

# al-Ihkâm

Jurnal Hukum dan Pranata Sosial

**Nur Quma Laila  
Irwan Abdullah**

*Questioning Fiqh Muamalah of Toleration:  
Religious Spatial Segregation in the  
Urban Area of Yogyakarta*

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the Perspective of Islamic and Indonesian  
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## PEDOMAN TRANSLITERASI

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



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



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## Customary Law of Dou Donggo Bima from the Perspective of Islamic and Indonesian Positive Law

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### **Abstract:**

The community (dou) of Donggo uses their local wisdom and customary law to deal with legal matters within its society. Both are believed as truth and fulfilling the sense of justice within the community that upheld peace values. Therefore, it has been preserved for a long time until today. Practically, customary law enforcement is implemented by a customary law institution called Lembaga Adat dan Syari'at Donggo/Donggo's Customs and Sharia Council (LASDO). This study is a normative legal study with statutory, comparative, and case approaches putting three legal decisions of LASDO as its material object. Data are collected through interviews and studies of the relevant documents consisting of primary ones; customary law, jurisprudence, and Islamic law references, and the secondary one; relevant research results, and the works of legal experts. The statutory and comparative analysis employed in this study led to the finding that the contemporary Donggo community still employs the customary laws, such as baja and flogging law in solving the criminal cases namely rape, theft, and adultery. The sanctions imposed by LASDO in these three cases are different from the punishments contained in the KUHP. While compared to Islamic law, there are similarities in spirit and type of punishment yet different in the sentence form.

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**Keywords:**

Dou Donggo Bima; Customary law; Indonesian positive law; Islamic law

**Abstrak:**

Masyarakat (dou) Donggo biasa menggunakan kearifan lokal dan hukum adat untuk menyelesaikan masalah hukum yang terjadi. Bagi mereka, keduanya merupakan sistem yang diyakini sebagai kebenaran dan memenuhi unsur keadilan yang mengutamakan nilai-nilai perdamaian. Karenanya, sistem hukum adat tersebut tetap bertahan hingga kini. Penegakan hukum adat yang demikian dijalankan oleh sebuah lembaga adat bernama Lembaga Adat dan Syariat Donggo (LASDO). Penelitian ini adalah penelitian hukum normatif dengan pendekatan perundang-undangan, komparatif dan kasus dengan mengkaji tiga putusan LASDO sebagai obyek material penelitian. Data dikumpulkan dengan wawancara dan studi dokumen, baik yang sifatnya primer berupa referensi hukum adat, yurisprudensi, hukum Islam, maupun yang sekunder, yakni hasil penelitian yang relevan dan karya-karya para ahli hukum. Analisis statutory dan comparative mengantarkan pada sebuah kesimpulan bahwa masyarakat adat Donggo kontemporer masih menerapkan hukum adat berupa baja dan cambuk dalam menyelesaikan masalah hukum pidana seperti pada kasus perkosaan, pencurian, dan perzinaan. Sanksi yang dijatuhkan oleh LASDO pada 3 kasus tersebut berbeda dengan hukuman yang terdapat dalam KUHP. Sementara jika dibandingkan dengan hukum Islam, terdapat kesamaan spirit dan jenis hukuman meski berbeda dalam bentuk hukuman yang diberlakukan.

**Kata Kunci:**

Dou Donggo Bima; Hukum adat; Hukum positif;  
Hukum Islam

**Introduction**

Bima is historically one of the kingdoms that have been established for a long time in the archipelago. In the archive of *Dana Mbojo* Custom Agency of Bima, it was established in the 14<sup>th</sup> century based on the agreement of the small kings (*ncuhis*) in Bima.<sup>1</sup> It had successfully developed a political and cultural/customary pattern due to its prosperity from trade.<sup>2</sup> In the archipelagos' history of the trade, Bima was acknowledged as a transit port in its eastern part. Several merchants from Malaka heading toward Maluku in the 15<sup>th</sup> century transited in Bima.<sup>3</sup> Embroidery fabrics, sandalwood, candle materials, and various forest products were easily available through this port. Its strategic location on the bank of the bay and surrounded by mountains in the East of Sumbawa Island and the Flores Sea in the North has made Bima bay looks like a gate. Behind this gate, there were a large port and the capital of Bima in Nusa Tenggara Barat. The kingdom stretches half of East Sumbawa and Manggarai in the west of Flores.<sup>4</sup>

Bima had had its own legal system and customary law/common law obeyed by all of its population since the era of *nakas* (pre-historic kings). It was under the ruling of *ncuhi* (local customary leaders) and based on the customs and local wisdom. The agreements and common practices during the *ncuhi* era are the basis for the common law/customary law. The previous common law was influenced by Hinduism and Buddhism although the fact that the Bima people believed in Animism (*Parafu, ma kakamba ma kakimbi*, or old belief of Bima people). This means that the social institutions,

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<sup>1</sup> Muhammad Mutawali, "Implementasi Hukum Islam Di Kesultanan Bima," *Schemata* 3, no. 2 (2014): 182.

<sup>2</sup> Henri Chamber Loir dan Siti Maryam R. Salahuddin, *Bo' Sangaji Kai: Catatan Kerajaan Bima* (Jakarta: Ecole Francaise d'Extreme-Orient, Yayasan Pustaka Obor, 2012).

<sup>3</sup> J. Noorduyn, "Makasar and The Islamization of Bima," *Bijdragen Tot de Taal-, Land- En Volkenkunde* Deel 143, no. 2/3de Afl (1987): 316.

<sup>4</sup> Muhammad Mutawali, *Islam Di Bima: Implementasi Hukum Islam Oleh Badan Hukum Syara` Kesultanan Bima (1947-1960)* (Mataram: Alamtara and IT Press, 2013).

including the legal way of the Bima people at that time, had animism characteristics in addition to the influence of Hinduism and Buddhism.<sup>5</sup>

Throughout history, the practice of customary law aims to ensure that all problems in society can find complete solutions. Customary law resolves them thoroughly and answers all existing aspects or those which may exist so that in the future, there will not be any unsolved similar problems.<sup>6</sup> Nowadays, it turns out that customary law can still solve legal issues among contemporary indigenous people. It furthermore serves as a balance to determine the goodness or badness, right or wrong, and appropriateness or inappropriateness of an action or event within the society.

The customary law is also the guideline for enforcing and ensuring the preservation of manners, ethics, decency, morals, and common values within the society.<sup>7</sup> Within the framework of the restorative justice approach, the value expected in the traditional community such as balance, harmony, and peace among the society is all enforced in the customary laws. Therefore, it makes very much sense to find several countries whose customary courts are preserved to settle disputes or legal problems, including criminal cases.<sup>8</sup>

Among others, this is true and obvious in the community (*dou*) of Donggo which resides on the mountain in the western part of Bima Regency of Nusa Tenggara Barat Province, Indonesia. To solve legal issues within the community, the Donggo community has a customary law institution called *Lembaga Adat dan Syari'at Donggo*/Donggo's Customs and Sharia Council (LASDO). LASDO as

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<sup>5</sup> Ridwan, "Perkembangan Dan Eksistensi Hukum Adat: Dari Sintesis, Transplantasi, Integrasi Hingga Konservasi," *Jurnal Jurisprudence* 6, no. 2 (2016): 109, <https://doi.org/https://doi.org/10.2391/jurisprudence.v6i2.3008>.

<sup>6</sup> Dahlia Farida Et.al, "Legal Protection for Disputing Parties Through the Aceh Customary Court," *Legal Protection for Disputing Parties Through the Aceh Customary Court* 5, no. 1 (2020): 32, <https://doi.org/https://doi.org/10.19105/al-ihkam.v15i1.2250>.

<sup>7</sup> A. Suriyaman Mustari Pide, *Hukum Adat, Dahulu, Kini Dan Akan Datang* (Jakarta: Prenada Media Kencana, 2017).

<sup>8</sup> Yusi Amdani, "Konsep Restorative Justice Dalam Penyelesaian Perkara Tindak Pidana Pencurian Oleh Anak Berbasis Hukum Islam Dan Adat Aceh," *Al-Adalah* XIII, no. 1 (2016): 73, <https://doi.org/https://doi.org/10.24042/adalah.v13i1.1130>.

a sort of customary court is authorized to solve civil and criminal problems. The principles used in solving the legal matters in Donggo community are peacefulness, fairness, and liberation to preserve the harmony among people and between people and nature. Meanwhile, the customary sanction for the perpetrator of criminal laws ranges from advice-giving, warning-giving, married by force, being paraded around the village (*baja*), *dua kali waru* (two-times compensation) sanction, fines, to flogging.<sup>9</sup>

*Baja* and the flogging law are respectively sanctioned as punishment for the perpetrator of theft and adultery. Implementation of *baja* law is flogged while being paraded all over the village following the customary meeting. This sentence is expected to create shame for the perpetrator and create a deterrent effect by teaching others that such a criminal act has a detrimental effect and the perpetrator is publicly humiliated.<sup>10</sup>

Relating to this, some studies on the customary law of Donggo had been conducted. One of which is Peter Just in his study<sup>11</sup> which described the customs, culture, and customary law of the Donggo community. He focused on the aspect of justice and morality among the *dou Donggo* that offers an innovative approach to understanding the way of the law and dispute resolution. Just argued that the implementation of any kind of legal system should be based on and understood within the context of the moral ontology of a community. He further revealed the arguments on legal ethnography and anthropology before describing the village constitution as a moral community ontology and the basis of their lives.

Likely, The Team of Customary Law Revitalization in Bima carried out research on customary law and institutions in Bima. The team described that their research is an initial step in the process of customary agencies' empowerment in Bima. This study reveals that

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<sup>9</sup> Interview with customary leader and the former chairman of LASDO Council, Abdul Karim, in his residence on the 6<sup>th</sup> of July 2019, and The Chairman of LASDO, Arifin J. Anat, SH., in his residence in O'o village of Donggo on the 9<sup>th</sup> of June 2018.

<sup>10</sup> Interview with the chairman of LASDO Council, Arifin J. Anat, SH., in his residence in O'o village of Donggo on the 9<sup>th</sup> of June 2018.

<sup>11</sup> Peter Just, *Dou Donggo Justice: Conflict and Morality in an Indonesian Society* (Lanham, Md: Rowman dan Little field, 2001).

people in Bima are still willing the implementation of Bima customary law, including the *baja* law, as an alternative one. It is also found that a large number of crimes were still happening within the society, and the customary law as living law is believed able to suppress its increasing number.<sup>12</sup>

Meanwhile, discussion related to the *baja* customary law within the context of corruption was the focus of Irfan and Israfil's study.<sup>13</sup> It reveals that *baja* law is critical to be implemented because of the increasing case of corruption in Bima. Thus, implementation of *baja* customary law can be an alternative punishment for corruptors through the Bima customary institution known as *Sara Tua Majelis*. Additionally, Honest Dody Molasy carried out research on Islamic and customary law in Donggo traditional community. Molasy described that the Donggo community simultaneously implements Islamic law and customary law through a customary agency established by the local community called Customary and Sharia Agency of Donggo (LASDO).<sup>14</sup>

This study comprehensively discusses the implementation of LASDO's legal decision to resolve three types of criminal cases and then views it from the perspective of Indonesian positive and Islamic law through a comparative scheme. This method of study differentiates this present study from the previous studies highlighted above.

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<sup>12</sup> BPMPP Kabupaten Bima Tim Revitalisasi Hukum Adat Bima (ForPuan, FKPT, Nasyiatul Aisyiah, CeDes, "Adat-Adat Bima Yang Tercecer, Dari Penelitian Tentang Revitalisasi Lembaga Adat Di Tengah Kegagalan Identitas Diri," *Center of Development Studies*, 2008.

<sup>13</sup> Muhammad Irfan and Israfil, "Baja Bima Customary Sanction an Alternative Policy of Corruption Actors in Bima Regency West Nusa Tenggara," *ULREV: Unram Law Review* 1, no. 1 (2017), <https://doi.org/DOI:https://doi.org/10.29303/ulrev.v1i1.10>.

<sup>14</sup> Honest Dody Molasy, "The Implementation of Islamic Law in Indonesia; What Should We Learn from Suku Donggo," in *Conference Proceedings 12th AICIS* (Surabaya, 2012).

### **Method**

This is a normative legal study that discusses relevant documents as its secondary data.<sup>15</sup> Permanent legal decisions issued by LASDO as the material objects of this research consist of 3 cases that have been decided by LASDO. They are the rape case in 2007, the theft case in 2015, and the adultery case in 2017. There were three approaches employed in this study; statutory, case, and comparative approaches.<sup>16</sup> The first approach is by reviewing relevant laws and regulations be it customary, national, and Islamic, while the second is through three criminal that cases occurred within the Donggo society, and the last is by comparing the laws of a legal system with others, namely customary with Indonesian positive, and Islamic law in Indonesia.<sup>17</sup> The data used in this study were primary and secondary data. Primary data were data obtained through interviews with some key persons, ranging from the former chairman of the LASDO, the current one, to the Head Police of Donggo Subdistrict. Meanwhile, secondary data were relevant literature to support the primary one.

The in-depth interview was chosen to obtain detailed data and meaningful information. More importantly, it was carried out because the decisions were verbally decided and rarely written down, including in the three cases discussed here. In the next stage, this study employed two methods of analysis, namely statutory and comparative analysis.<sup>18</sup> The former analyzes the regulations related to the discussed legal issues. Whereas, the later is comparing those decisions by LASDO with the perspectives of Indonesian positive and Islamic law.

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<sup>15</sup> Soerjono Soekanto and Sri Mamudji, *Penelitian Hukum Normatif* (Jakarta: Raja Grafindo Persada, 2015).

<sup>16</sup> Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Prenada Media Kencana, 2016).

<sup>17</sup> Muhammad Atho Mudzhar, "Kreativitas Mencari Judul Dan Pisau Analisis Dalam Studi Syari'ah Dan Hukum" (Jakarta, 2019).

<sup>18</sup> This analysis puts a legal system, such Indonesian law, in comparison to another legal system, with the legal system of another country, between one court to another, or comparing a rule of law in two different times. Muhammad Atho Mudzhar, "Kreativitas Mencari Judul dan Pisau Analisis dalam Studi Syari'ah dan Hukum".

## Discussion and Result

### LASDO Decisions in Criminal Cases

Among others, several criminal acts are sentenced using *dou* Donggo customary law punishments: *baja*, *dua kali waru*, and flogging. They are respectively used for the cases of rape, theft, and adultery as below:

#### 1. Rape Case

In December 2007, there was a rape case in Mpili Village. It was committed by Imar (a pseudonym) against a girl named Mawar (a pseudonym), who happened to be his niece. The victim's family cannot accept this as the rapist has raped the victim and destroyed her future. They reported the case to the customary council and the council decided to arrest the rapist. They then convened to determine the appropriate punishment.

The council considered that the rapist was fully aware of violating both Islamic and customary law of Donggo. His crime has destroyed the dignity and the future of an innocent girl. In fact, he happened to be his uncle. Following various considerations, the LASDO sentenced the rapist with flogging and *baja* all over the village. In addition to these punishments, he was also sanctioned with *dua kali waru* (two-time compensation). The compensation cost depended on material loss and immaterial loss of the victim's future. Rape is the most serious crime and will get the most severe punishment as well. Compensation is determined by the decision of the customary council with the victim's family considering that the victim has lost his future. The rapist is obliged to pay compensation in the form of money and livestock such as cows and buffalo. The rapist will typically pay compensation with all his assets otherwise he will be impoverished. It is considered equal to the suffering of the victim.<sup>19</sup>

#### 2. Theft Case

A buffalo theft case happened in 2015 and was committed by five thieves. They stole buffalos of a Donggo resident who, after the

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<sup>19</sup> Interview with the chairman of LASDO Council, Arifin J. Anat, SH., in his residence in O'o village of Donggo on the 6<sup>th</sup> of July 2019 and via phone on the 20 April 2020.

incident, suffered material loss. The owner reported the case to the customary law council so that its members in each village got to hand in hand to arrest the thieves. The council then held a meeting in *pesanggarahan adat* (customary assembly meeting place) to settle the case about the appropriate sentence. LASDO decided that the punishment for the thief was being paraded around and flogged. After the sentence was decided, the LASDO administrator carried out the execution, namely by getting the thieves paraded on the highway witnessed by the community who had stood along the road. When paraded around, they were also whipped by the executioner along the way while carrying the stolen goods namely the animal. They are also required to express remorse and apologize to the victim and the public for having committed a harmful crime.<sup>20</sup>

The customary council considered that the thieves were fully aware of doing their action and intentionally did it. Meanwhile, *dou* Donggo considers theft as one of the crimes that violate the established norms and rules of the community as well as disturbing the social order. It is, furthermore, indeed against the law that the perpetrators do deserve punishment.

Based on the result of the council meeting, they decided the points below on the case: *First*, thieves are convincingly proven to have stolen the buffalo. *Second*, the buffalo as the evidence of the stolen property proved the action of the theft. *Third*, thieves were sentenced with *baja* punishment (parading all over the village roads) while being flogged by the executioner.

The customary council did not sentence the thieves with a penalty because the thieves are economically poor and their motive for stealing is due to the economic needs. Moreover, they confessed that that was the first crime they committed.<sup>21</sup>

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<sup>20</sup> Interview with the chairman of LASDO Council, Arifin J. Anat, SH., in his residence in O'o village of Donggo on the 6<sup>th</sup> of July 2019.

<sup>21</sup> Interview with the chairman of LASDO Council, Arifin J. Anat, SH., in his residence in O'o village of Donggo on the 6<sup>th</sup> of July 2019.

### 3. Adultery Case

In 2017, Donggo people were shocked by a consensual adultery case between a married man and a married woman. The couple committed it under no pressure from anyone. The community, then, reported it to the council considering that adultery is a type of crime against the local customary law. Moreover, adultery among married couples is deemed a severe crime and incurs severe punishment. Following the community report, the council held a session to determine the punishment at the *Pesanggarahan*. The couple was then decided to have committed a serious offense of the customary law. Based on the decision of the customary council, the two adultery perpetrators were punished with caning and paraded around the village, and fined. The amount of the fine is determined by the decision of the customary council. This punishment was imposed so that the adulterers would be humiliated while creating a deterrent effect so that they would not do the act anymore. Likewise, people who witnessed it wished not to dare to do such a thing.

Within the Donggo community, there was a saying called *maja labo dahu* (shame and fear). It means an appeal to be shy to commit mistakes and fear to commit immoral actions. Adultery, meanwhile, is violating not only Islamic sharia law, but also customary rules. Therefore, the council decided that both criminals were sentenced to flogging while being paraded all around the village (*baja*) and paying the fines. The sentences are considered appropriate for criminals as the action breaks both religious and customary norms. The perpetrators were flogged while being paraded all around the village to be seen by the community.<sup>22</sup>

#### ***Dou* Donggo Customary Law in the Perspective of Indonesian Positive Law and Islamic Law**

Based on the information above, an analysis based on the perspective of Indonesian positive and Islamic laws on the cases is then carried out through a comparative scheme as follows:

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<sup>22</sup> Interview with the chairman of LASDO Council, Arifin J. Anat, SH., in his residence in O'o village of Donggo on the 6<sup>th</sup> of July 2019.

## **1. Rape Case**

### **a. The Perspective of Indonesian Positive Law**

The above-mentioned rape case is a disgraceful one for Donggo community because it so rarely happens. Moreover, the rapist is a relative of the victim as he happens to be her uncle. In this case, LASDO sentenced the criminal with the most severe sentence in their custom namely *baja*, flogging, and *dua kali waru* (paying all the indemnities both materials and non-materials to the victim). The last-mentioned one is different from another kind of fine, as *dua kali waru* is the most severe sanction that is traditionally applied in the Donggo community and is only sentenced to the doer of any serious crime like rape.

Within the perspective of Indonesian positive law or KUHP (*Kitab Undang-undang Hukum Pidana*), the rape in Donggo has fulfilled all the criteria of a criminal case. In the KUHP, rape is defined as an immoral action. Article 285 mentions that “anyone who, by using force or threat of force, forces a woman to have sexual intercourse with him out of marriage, shall, being guilty of rape, be punished by a maximum imprisonment of twelve years”. Because the rapists have typically and intentionally planned the rape, the word ‘force’ implies intentional criteria although the Article does not verbally mention it.

In addition to the sentence stipulated in article 285 of KUHP, the rapist can also be charged with Child Protection Act No. 35 of 2014 on Amendment of Child Protection Act No. 23 of 2002. To incur a deterrent effect for the rapist, he is possibly charged with PERPPU No. 1 of 2016 on Child Protection. This PERPPU aims at preventing a similar crime of sexual abuse toward a child by sentencing the rapist with the most severe sentence of the death penalty and announcing his identity, giving chemical castration, and installing an electronic detection device on the body to monitor his activities. Such sentences mentioned in this PERPPU are deemed suitable for the rapist as he has destroyed the chastity of an innocent girl and as such, has destroyed her future.<sup>23</sup>

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<sup>23</sup> Zainuddin, “Hukuman Bagi Pelaku Perkosaan Anak Di Bawah Umur,” *ISTIDAL: Jurnal Studi Hukum Islam* 4, no. 2 (2017): 133.

Implementation of the *baja*, *flogging*, and *dua kali waru* for the rapist has therefore some similarities with the sentences in PERPPU No. 1 of 2016 which gives the rapist the most severe sentence. This is different from the KUHP which only sentences the rapist with a maximum of 12 years imprisonment. According to Donggo community, this 12-year imprisonment may not be sufficient to provide justice and failed to make him wary of repeating his crime.

Within the perspective of the customary law of *dou* Donggo, rape is one of the most despicable and forbidden crimes. In addition to being a crime, it also violates the customary norms and rules of the community and thus, has disturbed peace and harmony. It is furthermore against the value of obedience, safety, sense of justice, and legal awareness of the community. Therefore, it makes very much sense for the rapist to be sentenced with the most severe sentence. Rape is not only disturbing the balance and harmony with the community but also detrimental to the victim and her family both physically and mentally as well as affecting the future of the victim.<sup>24</sup>

The rape case in Donggo community is a real legal problem because, in addition to violating the customary law, it has also violated the Islamic law. Moreover, the sentences are considered appropriate enough for the rapist as the victim was his underage niece. It is believed to have fulfilled the sense of justice for the community so that the case was not further filed with the police and the state's court.<sup>25</sup>

Additionally, when the rapists are being paraded around the village, they are required to recite the oath not to repeat their actions and apologize to the victim, her family, the elders, and the community.<sup>26</sup> The flogging, meanwhile, is a physical sentence aiming to give the rapist severe pain while suffering hard feeling as same as what the victim would face in her future. Whereas, the *dua*

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<sup>24</sup> Zainuddin.

<sup>25</sup> Interview with the chairman of LASDO Council, Arifin J. Anat, SH., in his residence in O'o village of Donggo on the 6<sup>th</sup> of July 2019

<sup>26</sup> Interview with the chairman of LASDO Council, Arifin J. Anat, SH., in his residence in O'o village of Donggo on the 6<sup>th</sup> of July 2019 and via phone on the 20 April 2020.

*kali waru* fines serve as a form of criminal's responsibility toward the victim for his crime which will impact the victim's life both physically and psychologically.

#### **b. The Perspective of Islamic Law**

Within the Islamic criminal law, rape is categorized as *jarimah hudud* (a crime for which the perpetrator is punished by *hudud* or punishment that has been determined by religious texts/the Qur'an or the hadith) as there is no specific *nash*/verse that specifically describes its sentence. However, considering that both are crimes against morality in the form of sexual intercourse, adultery can be used as a stepping stone to the crime of rape and be treated using the principal law for the rape case even though both are different. Adultery is based on consensual aspects, whereas rape is carried out by force and threats.<sup>27</sup> Rape contains an element of aggravation which is of a higher quality than adultery because it contains attempts at violence and coercion.<sup>28</sup>

The adultery sentence applicable in the rape case is the *hadd*, which is being flogged 100 times for the unmarried perpetrator (*ghairu muhsan*) and stunned for the married perpetrator (*muhsan*). In addition to *hadd* sentence, the rapist can also be sentenced with *ta'zir* (discretion of the judge).<sup>29</sup> This applies to the rapist but not to the victim which was forced to commit adultery. Moreover, she is typically powerless whether or not she has committed an offense. Therefore, the victim is not subject to any punishment according to the majority of scholars' interpretations in QS. al-Nûr: 33 and al-An'am: 119.<sup>30</sup>

In the case of rape that occurred in Donggo, the customary institution sentenced the perpetrators to *baja* punishment, flogging, and *dua kali waru* (compensation) sanctions. This multiple punishments are in line with Islamic law because apart from

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<sup>27</sup> Nurhayati, "Pelaksanaan Tindak Pidana Pemerkosaan: Studi Komparasi Antara Hukum Islam Dan Qanun Jinayat Di Aceh," *Al-Manahij* XII, no. 1 (2018): 22.

<sup>28</sup> Rahmat Abduh, "Tindak Pidana Perkosaan (Studi Komparatif Antara Hukum Pidana Dan Hukum Islam)," *Wahana Inovasi* 3, no. 1 (2014): 221.

<sup>29</sup> Syarif Hidayatullah, "Tindak Pidanan Kesusilaan Dalam Perspektif Hukum Pidana Islam," *Al-Mizan* 4, no. 1 (n.d.): 49.

<sup>30</sup> Hidayatullah.

violating customary norms and Islamic teachings, it has also harmed the victim both materially and mentally. Both *baja* accompanied by lashes according to Donggo customary law and flogging followed by stoning in the Islamic law are physical punishments that aim to provide a deterrent effect and shame for the perpetrators.

Substantially, they both have similarities just like *dua kali waru* sanctions in Donggo and the *ta'zir* in Islamic law. *Ta'zir* punishment is typically decided and determined by the judge using the authority to impose sanctions based on his/her discretion in formulating the law according to the type of case and the losses suffered by the victim, be it in the form of *diyat* (fines) or compensation. Sanctions of *dua kali waru* for the Donggo community, meanwhile, usually take a material form, such as money, buffalo, or guarantees for the living and future costs of the victim up to a time limit determined by the traditional institution.<sup>31</sup>

The comparison among the three is presented in the table 1 below:

**Table 1:**  
**Comparison of the Rape Case Resolution Process**  
**According to Customary Law, Islamic Law, Positive Law**

RATIO	CUSTOMARY LAW	ISLAMIC LAW	POSITIVE LAW
TYPE OF CASE	Rape	<i>Al-Wath'u bi Al-Ikrah</i>	Immorality, molestation, or rape
DECISION MAKER	Customary Institution (LASDO)	<i>Qadi</i>	Judge of court

<sup>31</sup> Interview with the chairman of LASDO Council, Arifin J. Anat, SH., in his residence in O'o village of Donggo on the 6<sup>th</sup> of July 2019

RATIO	CUSTOMARY LAW	ISLAMIC LAW	POSITIVE LAW
LEGAL FOUNDATION	Donggo Community Customary Law	Qs. Al-Nûr: 33 and al-An'am: 119. The former means: "And do not force your female slaves to commit prostitution, while they themselves desire chastity, because you seek worldly gain. And whoever compels them, then indeed Allah is Forgiving, Most Merciful (to them) after they were forced." The later reads: Whoever is in a state of necessity, while he does not want it and does not (also) transgress, then indeed your Lord is Forgiving, Most Merciful".	Article 285 of the Criminal Code reads: Whoever by force or threat of violence forces a woman to have sex with him outside of marriage, is threatened with a rape sentence with a maximum imprisonment of twelve years.
DECISIONS/ SANCTIONS	The toughest sanction applied by the Donggo customary law, namely the <i>baja</i> , flogged	<i>Hadd</i> of <i>zina</i> is being lashed 100 times and <i>ta'zir</i> punishment depends on the judge's	Maximum imprisonment of 12 years

RATIO	CUSTOMARY LAW	ISLAMIC LAW	POSITIVE LAW
	and fines ( <i>dua kali waru</i> ).	consideration in terms of the level of the crime. It can also be in the form of the death penalty, stoning, exile, and fines.	

The table 1 above is a comparison between Donggo customary law, Islamic law, and positive law in rape cases. It shows differences in the punishment forms for the perpetrators of the three laws. Donggo customary law punishes them with *baja*, flogging, and *dua kali waru* (fines) sanctions, Islamic law with *hadd zina* punishment, namely 100 lashes, and *ta'zir*, while the Indonesian Criminal Code sentenced 12 years in prison.

## 2. Theft Case

### a. The Perspective of Indonesian Positive Law

The objective and subjective elements of buffalo theft case by a group of theft in Donggo were sufficient to be tried in the court. The theft is against Article 363 of the Indonesian Penal Code (KUHP) which stated that the offender shall be punished with a maximum of seven years imprisonment.<sup>32</sup> However, LASDO decided that the criminals were punished with the customary law instead of the provision in KUHP. If the council applied the KUHP by sentencing them with a maximum of seven years imprisonment through the court, it will likely be time and money consuming as well as considered not providing a sense of justice for the victim.

The sentencing given by the LASDO for the thieves was rather in the form of *baja* (paraded around the village) and flogging aiming for making them ashamed while providing a deterrent effect so they will not repeat their crime anymore. In addition to *baja* sentence, the thieves were also ordered to return the stolen property. In the case that the stolen property is still available (alive,

<sup>32</sup> Redaksi Sinar Grafika, *KUHAP Dan KUHP* (Jakarta: Sinar Grafika, 2014).

in this context), they will be required to pay fines to the victim depending on the agreement between both. However, because the economic factor is one that needs consideration, LASDO which is required to be meticulous and thorough in sanctioning the thieves very much adjusts the fine to thief's economic ability.<sup>33</sup>

In the parade of the village punishment (*baja*), the thieves are flogged while apologizing and stating their regrets for committing the crime and promising not to repeat it anymore. Verbally, they say: *Wahai para warga masyarakat, saya telah melakukan kejahatan pencurian. Jangan mengikuti kejahatan yang telah saya lakukan. Karena itu, saya memohon maaf dan berjanji tidak akan mengulangi perbuatan itu lagi.* (Dear citizens, I have committed the crime of theft. Do not follow what I have done. Therefore, I ask for forgiveness and I promise not to repeat this crime).<sup>34</sup>

The sense of justice and willingness to settle various kinds of disputes by this sort of win-win solution are also evident within the practices of the customary councils all over Indonesia, such as *Adat Badamai* in Banjar, the *Bendesa Adat* in Bali, the *Kerapatan Suku*, *Kerapatan Kaum* and *Kerapatan Adat Nagari* in Minangkabau. In Aceh, for instance, they are known by the names of *di'et*, *sayam*, *suloh*, *peusujuk* and *peumet jaroe*. In this context, LASDO's customary decision through customary law of *baja* while apologizing and expressing their regrets and promises not to repeat their crime does the same. It very much reflects the restorative justice concept through deliberation and customary law. This is different from the litigation process in formal courts which are costly and time-consuming, as well as putting one party as the winner and another one as the loser.

#### **b. The Perspective of Islamic Law**

Settlement of the theft case within the perspective of Islamic Law is categorized as *hudud* where its punishment was already set by the holy scripture/*nash*. Within the Qur'an, it was described that the punishment for the theft is corporal punishment by cutting off

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<sup>33</sup> Interview with the chairman of LASDO Council, Arifin J. Anat, SH., in his residence in O'o village of Donggo on the 6<sup>th</sup> of July 2019.

<sup>34</sup> Interview with the chairman of LASDO Council, Arifin J. Anat, SH., in his residence in O'o village of Donggo on the 6<sup>th</sup> of July 2019.

his/her hand. However, different opinions among the ulema do exist regarding the interpretation of the verse (QS. Al-Maidah: 38). Regardless of this debate and different opinions, it is certain that the thief is punished with corporal punishment according to Islamic law, particularly in the Qur’anic text.

In a closer look, this corporal punishment in the Islamic law is the similar spirit with the Donggo customary law for the theft criminals. The hand-cutting punishment and *baja* psychologically have some similarities to incur shame, fear, and deterrent effects for the criminals not to repeat their actions. This corporal punishment is seemingly expected to create regrets and awareness that the crime they committed has caused loss for others and possibly damage the well-maintained social order.

The *baja* customary punishment decided by LASDO is rooted in the same aspiration as Islamic law. The chairman of LASDO council insisted that *baja* is the way the Donggo community implemented Islamic law. Implementing *baja* means implementing Islamic law regardless of the physical differences in how corporal punishment is executed. He further argued that *baja* is a part of the implementation of Islamic law combined with the customary law of the *dou* Donggo. This, according to him, is clearly reflected in the name of LASDO which means the Customary and Sharia Council of Donggo. He maintained that the law implemented for the criminals is the Donggo customary law, whereas the Islamic law serves as the social control and the engineer for the implementation of customary law.<sup>35</sup>

To sum up, a comparison between the three is clear in the table 2:

**Table 2:**  
**Comparison of the Theft Case Resolution Process**  
**According to Customary, Islamic, and Indonesian Positive Law**

RATIO	CUSTOMAR Y LAW	ISLAMIC LAW	POSITIVE LAW
TYPE OF CASE	Buffalo theft	<i>Al-Sariqah</i>	Livestock theft

<sup>35</sup> Interview with the chairman of LASDO Council, Arifin J. Anat, SH., in his residence in O’o village of Donggo on the 6<sup>th</sup> of July 2019.

<b>DECISION MAKER</b>	Customary Institution (LASDO)	<i>Qadi</i>	Court judge
<b>LEGAL FOUNDATION</b>	Donggo Community Customary Law	QS. Al-Maidah: 38 that explains that those who steal anything will be cut off at hands (as) in retribution for what they have done and as a punishment from Allah.	The act of theft violates articles 362-363 of KUHP. Article 362 of the Criminal Code reads: Whoever takes something, wholly or partly belonging to another person, with the intention of unlawfully possessing, is threatened with a maximum imprisonment of five years or a maximum fine of nine hundred rupiahs. Meanwhile, article 363 reads: (Thieves will be) threatened with a maximum imprisonment of seven years.
<b>DECISIONS/ SANCTIONS</b>	<i>Baja</i> and flogging	Punishment of cutting hands and <i>ta`zir</i>	Maximum imprisonment of 7 years

The table above is a comparison between Donggo customary law, Islamic law, and positive law in the case of theft. This table shows that there are differences in the punishments for the thieves from the three laws. Donggo customary law punishes them with *baja* and flog, Islamic law applies the punishment of cutting hands and *ta'zir*, while the Criminal Code sentenced a maximum of 7 years in prison.

### 3. Adultery Case

#### a. The Perspective of Indonesian Positive Law

The adultery case in Donggo between a married man and a married woman has fulfilled the criteria for adultery based on the Indonesian Penal Code. According to Article number 284 of KUHP, those who committed adultery are punished with 9 months imprisonment.<sup>36</sup> It defines adultery as a sexual relationship between a man and a woman who are not bound in a legal marriage, each or one of the two is not in a legal marriage or is not in a state of married or married to another person. In other words, adultery is punished solely because of the moral obligation to be faithful to the husband or wife. This is quite problematic because sexual relations between a widower and a widow or between two singles are excluded from the article above.<sup>37</sup>

Basically, any sexual relationship between a man and a woman out of legal marriage is considered adultery. The Donggo community in this case believes that harmonious and prosperous life will only be achieved by following the customary law. The relationship between a man and a woman, meanwhile, is believed to should only be held within a sacred marriage and through cultural wedding rituals. Consequently, any sexual relationship out of it is an offensive action against the cultural and customary values as well as religious norms. The adulterers would be punished with a severe punishment of *baja*, flogging, and fines. These punishments are believed adequate for an offense against this customary rule.

In settlement of the adultery case, the Donggo customary council administered a severe sanction where the criminals were paraded around the village (*baja*) while being flogged and being required to pay the fines. According to the customary law of the *dou* Donggo, adultery is a despicable act that violates the agreed customary law. The doers have violated and disturbed the long-established norms of the custom society. Therefore, the decision reached by the council to punish them with the most severe

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<sup>36</sup> Grafika, *KUHAP Dan KUHP*.

<sup>37</sup> Jimly Asshiddiqie, *Pembaharuan Hukum Pidana Indonesia* (Bandung: Angkasa, 1996).

punishment was considered appropriate. The consideration of the council was taken from the legal norms and the legal philosophy believed by the community. All kinds of actions against the legal norms shall be punished with the applied laws in order to restore balance to the social order.<sup>38</sup>

#### **b. The Perspective of Islamic Law**

In Islamic criminal law, adultery is forbidden sexual intercourse carried out by two people or more the non-married couple. This definition is not only limited to married persons, but also to any sexual intercourse between man and woman who are not bounded by marriage. Islamic law considers each sexual intercourse between non-legally married couple as forbidden and therefore, the doers should be punished regardless of their marital status. Anyone convincingly proven to have committed adultery will be punished by *hadd* (singular form of *hudud*) of adultery. Islam forbids all types of adultery and all actions leading to adultery.<sup>39</sup>

The Qur'an clearly explains the sanctions that will be imposed on the perpetrators of adultery at An-Nur verse 2 as follows:

الرَّانِيَةُ وَالرَّانِي فَاجْلِدُوا كُلَّ وَاحِدٍ مِّنْهُمَا مِائَةَ جَلْدَةٍ

Meaning: The woman who commits adultery and the man who commits adultery, then lash each one of them a hundred times.

Jimly Asshiddiqie is of the opinion that the provisions contained in the verse above are general in nature, namely that all forms of adultery are punishable by a penalty of 100 lashes. However, according to various hadiths regarding adultery, the adultery referred to in the verse above is adultery for unmarried (*ghairu muhsan*) doers. Meanwhile, for married ones (*muhsan*), apart

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<sup>38</sup> Interview with the chairman of LASDO Council, Arifin J. Anat, SH., in his residence in O'o village of Donggo on the 6<sup>th</sup> of July 2019

<sup>39</sup> Asadulloh Al-Faruk, *Hukum Pidana Dalam Sistem Hukum Islam* (Bogor: Ghalia Indonesia, 2009).

from being punished with flogging, they are also stunned which is one of the operational forms of the death penalty.<sup>40</sup>

The flogging punishment implemented in *dou* Donggo has some similarities with the *jild* (flog) in Islamic criminal law. Flogging in Arabic is *jald* which is derived from the word *jalada* and means to hit the skin or to hit with the whip made from animal skin. The flogging sentence inflicts severe pain in the skin although its real intention is more to incur shame and prevent others from committing the same mistake than inflicting the pain.<sup>41</sup> The *jild* does the same to the flogging punishment applied by Donggo people. Both have the same type of punishment, namely a physical one.

Likely, flogging and *baja* sentences aim at shaming and creating a deterrent effect for the criminals. When the doers were paraded around the village, it was expected that they feel ashamed and become deterred from repeating the same crime. Meanwhile, those who witness the *baja* sentencing and the flogging are expected to be frightened to commit the same crime.

Philosophically, this is in line with the *Majo Labo Dahu* (ashamed and afraid) values of the Donggo community and Bima people in general. It indicates that anyone who went against God's and Prophet's orders should feel ashamed and afraid of God, ashamed toward others, and ashamed toward himself/herself. When anyone violates this *Majo Labo Dahu* philosophy, it means that they violate both religion and custom values right away. For a long, this value has caused Bima people always obey their religion and customs.<sup>42</sup>

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<sup>40</sup> Wahbah Zuhayli, *Al-Fiqh Al-Islami Wa Adillatuh* (Dimashqa: Dar al-Fikr al-'Ilmiyah, 1997).

<sup>41</sup> Rusjdi Ali Muhammad, *Revitalisasi Syari'at Islam Di Aceh: Problem, Solusi Dan Implementasi* (Jakarta: LOGOS, 2003).

<sup>42</sup> M. Hilir Ismail, "Maja Labo Dahu Sebagai Falsafah Hidup Pada Masa Kini" (Bima, 2001).

Comparison among the three is clear in the table 3 below:

**Table 3:**  
**Comparison of the Adultery Case Resolution Process**  
**According to Customary, Islamic, and Indonesian Positive Law**

RATIO	CUSTOMAR Y LAW	ISLAMIC LAW	POSITIVE LAW
TYPE OF CASE	Adultery	<i>Zina</i>	Immoral offense
DECISION MAKER	Customary Institution (LASDO)	<i>Qadi</i>	Judge of court
LEGAL FOUNDATION	Donggo Community Customary Law	QS. Al-Nur : 2 which means that woman who commits adultery and the man who commits adultery are subjected to lashes each one of them a hundred times	The adulterer has violated Article 284 of the Criminal Code which reads: 1) Threatened with a maximum imprisonment of nine months. a. A married man who commits <i>gendak</i> ( <i>zina</i> , adultery), even though it is known that Article 27 BW <sup>43</sup> applies to him b. A married woman who commits <i>gendak</i> ( <i>zina</i> , adultery), even though it is known that Article 27 BW applies to her

<sup>43</sup> Article 27 BW says that a man can only marry a woman, and a woman can only marry a woman at the same time. Those who are subject to this article, both men and women, are not allowed to have sex with anyone other than their own wife or husband.

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		2)
		<ul style="list-style-type: none"> <li>a. A man who participates in the act, even though he knows that the guilty party is married</li> <li>b. An unmarried woman who participates in the act, even though it is known to her that the guilty party is married and Article 27 BW applies to her.</li> </ul>
<i>Baja and flogging</i>	In Islam, non-married adulterers are subject to 100 lashes while married ones are for stoning.	A 9-month prison sentence. The crime of adultery is imposed on the perpetrator who is already married or having a partner. Apart from the category, it is not mentioned as adultery, but intercourse or damage of the honor.

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The table above is a comparison of Donggo customary law, Islamic law, and positive law in adultery cases. It shows that there are differences in the penalties for the adulterers from the three laws. Donggo customary law punishes adulterers with *baja* and flog, Islamic law imposes lashes of 100 times for unmarried offenders and stoning for those who are married, while the Criminal Code is sentenced to 9 months in prison.

In connection with LASDO's decisions in resolving criminal cases by applying the customary law, the police responded positively. The Head Police of Donggo Subdistrict, Mr. IPDA Sukardin, SH., said:

“The police do not interfere or intervene in the implementation of the Donggo customary law as long as the custom is carried out because of the community's compliance and obedience to their customary law and there are no complaints from the community. The police only monitor and supervise the implementation of customary law or sanctions so as not to cause any new problems. Criminal cases in Donggo are very rare and this is probably the impact of the implementation of customary law.<sup>44</sup>

### **Conclusion**

This study revealed that Donggo Customary and Sharia Council (LASDO) implemented the customary law in a form of *baja*, *dua kali waru*, flogging, and fines for resolving the criminal cases ranging from rape, theft, to adultery. Regarding sanctions and sentences applied by LASDO, there are differences in sentences applied by Indonesian positive law. Meanwhile, from the perspective of Islamic law, the criminal cases handled by LASDO, in general, are regulated within the Islamic law and the sanctions have some similar substances to those of Islamic law's punishment although come in different forms.

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<sup>44</sup> Personal interview with the Head Police of Donggo Subdistrict, Mr. IPDA Sukardin, SH. at the Donggo Police Station on October 27, 2020.

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## Questioning Fiqh Muamalah of Toleration: Religious Spatial Segregation in the Urban Area of Yogyakarta

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### Abstract:

Yogyakarta, despite being declared as the city of tolerance, shows religious discrimination manifested in religious spatial segregation. Discrimination is contrary to divine norms that protect the rights of each party in mu'amalah. The objective of this study is to explain that religious spatial segregation reflects intolerance in the urban community of Yogyakarta. This study relies on data collection through a qualitative approach which includes observation, interviews, and literature review with descriptive analysis considering fiqh muamalah principles on the interfaith relationships. The results suggest that religious spatial segregation may lead to the emergence of intolerant and discriminative acts in the forms of; (1) the presence of housing associated with a certain religious identity as a manifestation of identity labeling in social recruitment (exclusivism); (2) the practice of land trading (property right) only with people from the same faith; and (3) segregation in social acceptance (social exclusion) as seen in boarding houses with a certain religious label. This study concludes that religious spatial segregation has shallowed the relations between community groups and thus raising the potential of discriminative and intolerant acts

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in the urban area of Yogyakarta. This study suggests that there is a need for a policy to regulate space as a common one, hence spatial exclusivism for a certain religion can be eliminated.

**Keywords:**

Spatial Segregation; Intolerance; Religious Conflicts;  
Interreligious Relations; Fiqh Muamalah

**Abstrak:**

Yogyakarta yang dideklarasikan sebagai the city of tolerance justru memperlihatkan diskriminasi yang mewujud dalam segregasi ruang berbasis agama. Diskriminasi sendiri bertentangan dengan norma-norma yang melindungi hak setiap individu seperti dalam konsep muamalah. Studi ini bertujuan menjelaskan adanya segregasi ruang berbasis agama yang merefleksikan adanya intoleransi pada masyarakat urban Yogyakarta. Studi ini bersandar pada pengumpulan data dengan pendekatan kualitatif melalui observasi, wawancara dan studi literatur dengan analisis deskriptif terhadap prinsip fiqh muamalah hubungan antarumat beragama. Hasil penelitian menunjukkan bahwa segregasi ruang berbasis agama yang merujuk pada lahirnya aksi-aksi diskriminasi intoleransi mewujud dalam 3 hal yakni; (1) adanya perumahan dengan identitas agama tertentu sebagai wujud dari pelabelan identitas dalam rekrutmen sosial (eksklusifisme); (2) adanya praktik jual beli tanah (property right) hanya pada orang dengan keyakinan yang sama; dan (3) adanya segregasi dalam penerimaan sosial (social exclusion) yang nampak pada rumah indekos dengan label agama tertentu. Tulisan ini menyimpulkan bahwa segregasi ruang berbasis agama telah menyebabkan pendangkalan relasi antar kelompok masyarakat sehingga berpotensi melahirkan aksi-aksi diskriminasi dan intoleransi di wilayah urban Yogyakarta. Studi ini menyarankan perlunya kebijakan yang mengatur ruang sebagai ruang bersama agar tidak terjadi eksklusifisme atas kepemilikan ruang pada agama tertentu.

**Kata Kunci:**

Segregasi Ruang; Intoleransi; Konflik Keagamaan;  
Hubungan Antar Agama; Fiqh Muamalah

## Introduction

Spatial segregation tends to show religious discrimination in urban areas, as seen in Yogyakarta. Yogyakarta government declared the city as *the city of tolerance* in the Regional Long Term Development Plan (*Rencana Pembangunan Jangka Panjang Daerah* or RPJPD) of 2004-2005, which movement reflects the growing common belief by picturing Yogyakarta as a city with high religious tolerance, both within and between religions.<sup>1</sup> This branding, however, seems to be merely a slogan. The slogan “city of tolerance” bestowed to Yogyakarta is in fact a myth and not manifested in the reality of its citizens’ lives. Research by Setara Institute, a non-governmental organization (NGO) that advocates democracy, political freedom, and human rights, indicates that the Special Region of Yogyakarta is included in the top 10 provinces with the highest cases of violation of freedom of religion/belief in Indonesia<sup>2</sup>. In 2019, Yogyakarta was even recorded as one of the most intolerance places with 37 cases of intolerance.<sup>3</sup>

Studies on social segregation have hitherto the propensity to focus on three aspects. First, social segregation is seen from a resource control perspective.<sup>4</sup> Segregation reflects social discrepancy, indicating how disparity changes, such as in the debate about urban poverty.<sup>5</sup> Second, social segregation is caused by cultural differences.<sup>6</sup>

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<sup>1</sup> Diatyka Widya Permata Yasih, “Tradisi, Ekonomi-Politik, Dan Toleransi Yogyakarta,” *Masyarakat: Jurnal Sosiologi*, 2010, <https://doi.org/10.7454/mjs.v15i2.4866>: 37-38

<sup>2</sup> Irwan Syambudi. Intoleransi di Yogyakarta Meningkat 5 Tahun Terakhir, Kata Setara, 2019, <https://tirto.id/intoleransi-di-yogyakarta-meningkat-5-tahun-terakhir-kata-setara-emig>

<sup>3</sup> Devina Halim, “Setara: Dalam 5 Tahun Terakhir Terjadi Peningkatan Intoleransi Di Yogyakarta,” *Kompas.com*, 2019, <https://nasional.kompas.com/read/2019/11/24/19300051/setara--dalam-5-tahun-terakhir-terjadi-peningkatan-intoleransi-di-yogyakarta>.

<sup>4</sup>Jing Yao et al., “Spatial Segregation Measures: A Methodological Review,” \ 1. 00, No. (2019), <https://doi.org/10.1111/tesg.12305>; Maria Izabel dos Santos et al., “Urban Income Segregation and Homicides: An Analysis Using Brazilian Cities Selected by the Salurbal Project,” *SSM - Population Health*, 2021, <https://doi.org/10.1016/j.ssmph.2021.100819>.

<sup>5</sup> Jing Yao et al., “Spatial Segregation Measures: A Methodological Review,” *Tijdschrift Voor Economische En Sociale Geografie* 110, no. 3 (2019): 235–50, <https://doi.org/10.1111/tesg.12305>

This is often apparent from residential segregation attributed to structural, ethnicity, and religious racism, which leads to the social distancing between community groups and damages the principle of social inclusion or social solidarity as the primary dimension of citizenship.<sup>7</sup> Third, social segregation is often seen as a political boundary.<sup>8</sup> The separation of one group from another on the basis of the social and religious parameters happens due to the implementation of space as political boundaries. Segregation is not only a separation of cultural space but also political category as a group identity declaration. Of the three mentioned patterns of study, there is a shortcoming where segregation as a political boundary is seen only as an identity boundary, and not as a means to strengthen self-identity.

This paper responds to the shortcoming of the existing studies by examining religious-based spatial segregation not only as an identity boundary but also as a means to strengthen self-identity. Religious-based spatial segregation that is used to fortify self-identity reflects the existence of structural intolerance in the urban citizens of Yogyakarta. Accordingly, this paper will demonstrate that Yogyakarta as “the city of tolerance” is a setting for various forms of religious-based spatial segregation. Those forms can be seen through first, housing areas labeled with a specific religion; second, the practice of buying and selling land only to believers of the same religion; and

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<sup>6</sup> Emeline Bezin and Fabien Moizeau, “Cultural Dynamics, Social Mobility and Urban Segregation,” *Journal of Urban Economics*, 2017, <https://doi.org/10.1016/j.jue.2017.02.004>; Jennifer Scott et al., “Structural Racism in the Built Environment: Segregation and the Overconcentration of Alcohol Outlets,” *Health and Place*, 2020, <https://doi.org/10.1016/j.healthplace.2020.102385>; Tanja Buch, Moritz Meister, and Annekatrin Niebuhr, “Ethnic Diversity and Segregation in German Cities,” *Cities*, 2021, <https://doi.org/10.1016/j.cities.2021.103221>.

<sup>7</sup> Scott et al., “Structural Racism in the Built Environment: Segregation and the Overconcentration of Alcohol Outlets.” *Health & place*, 64, 102385, <https://doi.org/10.1016/j.healthplace.2020.102385>: 1

<sup>8</sup> Sarah Mekdjian, “Urban Artivism and Migrations. Disrupting Spatial and Political Segregation of Migrants in European Cities,” *Cities*, 2018, <https://doi.org/10.1016/j.cities.2017.05.008>; Roni Jayawinangun and David Rizar Nugroho, “Segmentasi Pemilih Pemula Berdasarkan Akses Berita Politik Melalui Media Sosial Di Kabupaten Bogor,” *Jurnal Komunikasi Pembangunan*, 2019, <https://doi.org/10.46937/17201926845>.

third, the establishment of boarding houses labeled with a certain religion.

This paper is based on the argument that Yogyakarta, which claimed as a city of diversity and plurality with a high level of tolerance, in fact, is a set of place with much intolerant discrimination. The claim “the city of tolerance” bestowed to Yogyakarta is not directly proportional to the tolerance of its citizens, as numerous spaces in Yogyakarta are still segregated based on religion. Religious spatial segregation between the majority and minority religious groups has the potential to rise intolerant discrimination. Those acts emerge due to the existence of a homogeneous and monocultural environment which leads to the shallowing interaction between groups, hence declining their relations. This lack of interaction is also likely to create stereotypes—with negative labeling—between religious groups which might provoke religious conflicts.

The conflict taking place in the society can be viewed as a threat to the idea of tolerance as part of the practice of *mu'amalah* (relation among humankind). Tolerance is a form of *ukhuwah* (brotherhood) that gives meaning to an attitude that reflects a sense of brotherhood, harmony, unity, and solidarity that is carried out by a person toward other people or groups in interaction.<sup>9</sup> In Islam, a Muslim is recommended to do *mu'amalah* or interact well and not do wrong to other groups of different beliefs.<sup>10</sup> To achieve this, harmony can only be established by practicing mutual understanding among the members of society on one hand and by keeping social cohesion in everyday interaction on the other hand. Performing mutual understanding and keeping social cohesion constitute the manifestation of *fiqh mu'amalah* in the society, particularly for interfaith relationships.

## Method

The locus of this research is the urban area of Yogyakarta, which is acclaimed as *the city of tolerance* that reflects the popular opinion

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<sup>9</sup> Muntahibun Nafis, “Pesantren Dan Toleransi Beragama,” *Ta'allum: Jurnal Pendidikan Islam*, 2014, <https://doi.org/10.21274/taalum.2014.2.2.163-178>.

<sup>10</sup> Salma Mursyid, “Konsep Toleransi (Al-Samahah) Antar Umat Beragama Perspektif Islam,” *Aqlam: Journal of Islam and Plurality*, 1(2) 2, no. 1 (2018): 35–51.

that Yogyakarta has a high tolerance for relations within and between religious beliefs. This is interesting because, in reality, there are still numerous acts of religious intolerance in the area. Besides, the prevailing religious-based spatial segmentation indicates a structured intolerance attitude among the citizens. This study uses a qualitative approach with data collection through observation, interviews, and literature reviews. The observation examines how religious-based spatial segregation occurred in the urban area of Yogyakarta. In this observation, a list of various housings and boarding houses associated with religion was made. In-depth interviews were carried out with 4 subjects who have been directly or indirectly involved in some activities that set apart religious-based spaces, such as those involved in land trading and owners of boarding houses that are associated with a specific faith. Meanwhile, the literature study involves reading various kinds of literature relevant to the research topic, especially those discussing religious spatial segregation and its correlation with intolerant acts in Yogyakarta. The literature is from journal articles, thesis, and dissertations exploring the topic of acts of intolerance. The collected literature was then read and reduced by summarizing and selecting important information and omitting less significant information for answering research questions. The collected data were then categorized based on planned categories. The results were then reduced and analyzed using the descriptive analysis technique.

## Discussion and Result

### Segregation and the Potentials of Intoleration between Religious Believers

Relations between humans and the opposite sex, economic activities, and matters relating to politics and the state are almost all framed in the discourse of *halal-haram* (lawful and unlawful) in other fiqh aspects.<sup>11</sup> Relations between religious believers are parts of human social relations or so-called *mu'amalah* in terms of *fiqh*. In Indonesia, there are ups and downs in interfaith relations, especially between Muslims and non-Muslims as the majority-minority.

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<sup>11</sup> Ahmad Hakam, "Perkembangan Islam Mainstream Dan Peran Signifikan Agensi Sosial Di Indonesia," *Jurnal Online Studi Al-Qur'an*, 2015, <https://doi.org/10.21009/jsq.011.1.07>.

Interfaith relations in Indonesia occur in a complex manner wrapped in harmony, tension, misperception, and conflict. This is in accordance with Samsu's opinion that social interaction between Muslims and non-Muslims is not always harmonious due to the religion-related conflicts that still occur.<sup>12</sup> Religious conflict is a complicated and complex form of conflict. This type of conflict occurs due to various factors, such as the interpretation of one single truth as well as domination and hegemony over other believers which rise to a sense of injustice and inequality that further fortifies group sentiment.<sup>13</sup> Furthermore, religious conflicts also occur because minority group finds it hard to express their belief.<sup>14</sup>

Furthermore, such conflict can also be provoked by the presence of spatial segregation based on religions. Spatial segregation manifests various economic, social, and cultural conditions as an interconnected mechanism. In the social sphere, segregation is the act of grouping and or zoning space based on ethnicity, nation, religion, profession, or other aspects.<sup>15</sup> On the other hand, from a sociological perspective, segregation is interpreted as the absence of interaction between social groups.<sup>16</sup> Segregation on certain bases of social structure is commonly highlighted as the source of housing differentiation which causes the increase of social discord in the community.<sup>17</sup>

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<sup>12</sup> Samsu, "Interaksi Sosial Muslim Kepada Nonmuslim," *Al Munzir* 8, no. 2 (2015): 247-58.

<sup>13</sup> Siti Raudhatul Jannah, "Kegalauan Identitas: Dilema Hubungan Muslimin Dan Hindu Di Bali," *Ulumuna*, 2017, <https://doi.org/10.20414/ujis.v16i2.186>: 446.

<sup>14</sup> Achmad Faidi, Achmad Fauzi, and Dimas Danar Septiadi, "Significance of Legal Culture Enforcement on Tolerance among Madurese Society through Inclusive Curriculum at IAIN Madura," *Al-Ihkam: Jurnal Hukum Dan Pranata Sosial*, 16 (1), 2021: 50-67, 2021:51, <https://doi.org/10.19105/al-lhkam.v16i1.4302>

<sup>15</sup> Syamsul Alam Paturusi, "Segregasi Ruang Sosial Antara Pendatang Dengan Penduduk Asli Pada Permukiman Perkotaan Di Denpasar," *Jurnal Kajian Bali* 6, no. 2 (2016): 62.

<sup>16</sup> Amalia Wulangsari, "Tipologi Segregasi Permukiman Berdasarkan Faktor Dan Pola Permukiman Di Solo Baru, Sukoharjo," *Jurnal Pembangunan Wilayah & Kota*, 2014, <https://doi.org/10.14710/pwk.v10i4.8166>: 392

<sup>17</sup> Gemal Sigit P, Sugiono Soetomo, and Joesran Alie S, "Ruang Netral Di Kota Ambon ( Segregasi Dan Integrasi Ruang Kota )," in *CoUSD, Conference on Urban Studies and Development*, 2015:32, <http://proceeding.cousd.org>

Inter-religious people are required to be tolerant and respectful of existing beliefs.<sup>18</sup> Religious spatial segregation has caused tension that results from the poor quality of interfaith communication.<sup>19</sup> This lacking quality develops into the stereotype of one group to other groups of different religions, thus triggering interreligious conflicts followed by various attempts to attack and kill each other as well as to burn the houses of worship and other important places for the believers.<sup>20</sup> Conflicts can trigger opposing attitudes between the two parties, where each party sees the other as a rival or hindrance who will impede them from achieving their purpose and fulfilling their needs.<sup>21</sup> This is what develops a large number of intolerant actions.

Intolerance is a form of unwillingness and refusal to give the rights of other people or groups who differ in terms of faith, ideology, social status, or ethnicity.<sup>22</sup> Intolerance is specifically defined by Prastowo as attitude, perspective, and behavior that do not approve of any differences of other people, groups, and communities; thus, any form of differences is seen as something wrong, forbidden, and deserves to be opposed, fought against, and annihilated.<sup>23</sup> In various cases, acts of intolerance often exploit collective identity to justify their acts.<sup>24</sup> Besides, acts of intolerance in religious life are directly or indirectly connected to conservatism, a religious attitude that emphasizes the importance of tradition and past values.<sup>25</sup>

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<sup>18</sup> Fahrudin Ali Sabri, "Membangun Fiqh Toleransi: Refleksi Fatwa-Fatwa Terhadap 'Aliran Sesat' Di Indonesia," *AL-IHKAM: Jurnal Hukum & Pranata Sosial*, 2018, <https://doi.org/10.19105/al-lhkam.v13i1.1612:163>

<sup>19</sup> Asep S. Muhtadi, "Komunikasi Lintas Agama: Mencari Solusi Konflik Agama," *Conference Proceeding ICONIMAD 2019*, 2019:276.

<sup>20</sup> Firdaus M Yunus, "Konflik Agama Di Indonesia Problem Dan Solusi Pemecahannya," *Substantia*, 2014: 227

<sup>21</sup> Andri Wahyudi, "Konflik, Konsep Teori Dan Permasalahan," *Jurnal Publiciana*, 2015:1.

<sup>22</sup> Ahmad Sholikin, "Intoleransi, Radikalisme Dan Terorise Di Lamongan," *Jurnal Polinter: Kajian Politik Dan Hubungan Internasional*, 2018:15

<sup>23</sup> Agus Subagyo, "Implementasi Pancasila Dalam Menangkal Intoleransi, Radikalisme Dan Terorisme," *Jurnal Rontal Keilmuan PKn*, 2020:14.

<sup>24</sup> Elma Haryani, "Intoleransi Dan Resistensi Masyarakat Terhadap Kemajemukan: Studi Kasus Kerukunan Beragama Di Kota Bogor, Jawa Barat," *Harmoni*, 2019, <https://doi.org/10.32488/harmoni.v18i2.405:2>

<sup>25</sup> Luthfi Assyaukanie, "Akar-Akar Legal Intoleransi Dan Diskriminasi Di Indonesia," *Maarif*, 2018, <https://doi.org/10.47651/mrf.v13i2.20:28>

Qowaid divided signs of intolerance into two factors, namely internal factor, which originates from the religious understanding that is based on religious teaching interpretation, and external factor, which highlights that intolerance can be triggered by a variety of deprivation variables (negative feelings, being ignored, stressed over the experienced reality).<sup>26</sup> In religious life, acts of intolerance are manifested in various forms, such as disapproving the activities of a certain religion, difficulties obtaining permits for building worship houses, easily judging people of other beliefs as the infidels, and justifying the killing of other religions' believers.<sup>27</sup> Therefore, in terms of religious life, religion can be a media of integration as well as a media that arises disintegration among society members.<sup>28</sup> The emerging disintegration induces religious conflicts that often occur in social reality, where such a condition is often started with excessive fanaticism which leads to fundamentalism.<sup>29</sup>

### **Spatial Segregation and Social Recruitment: Religious-based Housing and Building**

Urban areas will continue to experience growth and development that lead to the formation of a model. Each model has a different city growth but the same zone. Zones within urban areas are divided into six areas, namely suburban areas, high-class settlements, middle-class settlements, transition zones, industrial areas, and center of activity areas. These zones then give rise to spatial segregation based on social differentiation. In the context of cultural space, segregation is a process of cultural separation that occurs in one group of people or society that maintains its culture and does not

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<sup>26</sup> Qowaid Qowaid, "Gejala Intoleransi Beragama Di Kalangan Peserta Didik Dan Upaya Penanggulangannya Melalui Pendidikan Agama Islam Di Sekolah," *Dialog*, 2013, <https://doi.org/10.47655/dialog.v36i1.82:71>

<sup>27</sup> Subagyo, "Implementasi Pancasila Dalam Menangkal Intoleransi, Radikalisme Dan Terorisme." *Jurnal Rontal Keilmuan PKN*, 2020:14

<sup>28</sup> Dwi Wahyuni, "Agama Sebagai Media Dan Media Sebagai Agama," *Jurnal Ilmu Agama: Mengkaji Doktrin, Pemikiran, Dan Fenomena Agama*, 2017, <https://doi.org/10.19109/jia.v18i2.2368>.

<sup>29</sup> Imam Hanafi, "Agama Dalam Bayang-Bayang Fanatisme; Sebuah Upaya Mengelola Konflik Agama," *Toleransi: Media Ilmiah Komunikasi Umat Beragama*, 2018, <https://doi.org/10.24014/trs.v10i1.5720:48>

adopt a more dominant culture.<sup>30</sup> Such cases also happened in the urban area of Yogyakarta, where spatial segregation occurs not only due to certain social or economic levels, but also religion. This religious-based spatial segregation is apparent from the establishment of various housing that associate themselves with certain religions in the last few years. Some examples of such housing are Muslim housing areas and Christian housing areas. These housings are actual empirical phenomena that increase every year. This is as shown by the data from the Development Planning Agency at Sub-National Level or *Bappeda* (2021) which indicate that there has been an increase in the number of real estate in Yogyakarta, from 5,216 units in 2017 to 8,275 units in 2019. The data reveals the tendency of using housing names that are associated with certain religious terms such as Darussalam, Madani, and Bethesda.

Discourses concerning religious-based spatial segregation show the maps of society dynamism that give insight into patterns of characters and differentiators between one community to another.<sup>31</sup> Religious-based spatial segregation can be seen not only in housing with specific labels but also in buildings with a specific religious label. An example of this is the growing number of *sharia* or *syariah* hotels/lodging in the urban area of Yogyakarta. This type of building implements *sharia* concept/principle for its services which is in accordance with Islamic teaching. Based on observation result, the *sharia* principle can be seen in the Standard Operation Procedure (SOP) of accepting visitors which forbid the visitors from bringing people of the opposite sex out of relatives and family to stay in the same room. This regulation is stated clearly on the website of the *syariah* housing in the figure 1 bellow.

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<sup>30</sup> Filasias Tiar Martin, Nana Novita Pratiwi, and Vetti Puryanti, "Sekadau Hilir Kabupaten Sekadau," *Jurnal Mahasiswa Teknik Sipil Universitas Tanjungpura*, 6(2), 2017:1

<sup>31</sup> Paturusi, "Segregasi Ruang Sosial Antara Pendatang Dengan Penduduk Asli Pada Permukiman Perkotaan Di Denpasar." *Jurnal Kajian Bali (Journal of Bali Studies)*, 6(2), 2016: 67

Figure 1. Regulations of Syariah Housing



#### Kebijakan properti

##### Kebijakan mengenai anak dan tempat tidur tambahan

Ketersediaan tempat tidur tambahan tergantung kamar yang Anda pilih. Silakan cek kapasitas kamar untuk informasi lebih lanjut.

Usia minimum tamu: 17 tahun.

##### Lainnya

- Properti ini tidak menerima pesanan dari pasangan yang belum menikah. Semua pasangan yang menginap di kamar yang sama harus menunjukkan bukti nikah yang sah saat check-in sesuai hukum yang berlaku. Jika tidak, properti berhak menolak pesanan atau meminta tamu memesan satu kamar lagi.
- Jika Anda memesan lebih dari 5 kamar, kebijakan dan aturan lainnya mungkin berlaku.

Source: Agoda Pondok Garini Syariah, 2022

Besides, *sharia* hotel/lodging only provides food, reading materials (magazine, tabloid, book), and architecture that suit Islamic teaching guidelines. Similarly, its financial management also uses *sharia* accounting and builds partnerships with *sharia* banks. Based on the collected data, there are at least 26 housing/hotels in the urban area of Yogyakarta that associate themselves with religion. The list of these housing is presented in Table 1;

**Table 1.**  
**Housing/Building with Religious Labels**

No .	Name of Housing/Building	Housing/Hotel	Affiliation	Address
1.	Darussalam 3 Muslim Housing	Housing	Islam	Candi Gebang Street, the fourth alley, Jetis, Wedomartani, Ngemplak Subdistrict, Sleman Regency, Special Region of Yogyakarta 55584
2.	Djogja Village Muslim Housing	Housing	Islam	Plosokuning IV Street, Ploso Kuning IV, Minomartani, Ngaglik Subdistrict, Sleman Regency, Special Region of Yogyakarta 55581
3.	Pesona Salsabila Muslim Housing	Housing	Islam	KM 9 Yogyakarta - Wates Street, Tonalan, pereng, dawé, Sleman Regency, Special Region of Yogyakarta 55752
4.	Permata Muslim Ambarukmo Housing	Housing	Islam	Karangbendo Kulon Street, Jaranan, Banguntapan, Banguntapan Subdistrict, Bantul, Special Region of Yogyakarta 55198

5.	Mutiara Pendowoharjo Muslim House	Housing	Islam	Cepit, Pendowoharjo, Sewon Subdistrict, Bantul, Special Region of Yogyakarta 55186
6.	Ndalem Nurriyat Syariah	Hotel	Islam	9 Shinta Street, Palagan Tentara Pelajar Km. 7,8 Karang Mloko, Sariharjo, Ngaglik, Sleman Regency, Yogyakarta, Indonesia
7.	Terakota Muslim Melati Housing	Housing	Islam	Jongke Kidul, Sendangadi, Mlati Subdistrict, Sleman Regency, Special Region of Yogyakarta 55285
8.	Terakota (Muslim) Potorono Villa	Housing	Islam	Potorono, Banguntapan Subdistrict, Bantul, Special Region of Yogyakarta 55196
9.	Jogja Syariah Housing	Housing	Islam	Lereng Wisata Street, Metes, Argomulyo, Sedayu Subdistrict, Bantul, Special Region of Yogyakarta 55752
10.	Jogja Muslim	Housing	Islam	Kutu Dukuh,

	House			Sinduadi, Mlati Subdistrict, Sleman Regency, Special Region of Yogyakarta 55284
11.	Sakinah House of Muslim	Housing	Islam	Gendeng, Bangunjiwo, Kasihan Subdistrict, Bantul, Special Region of Yogyakarta 55184
12.	CD Bethesda Housing	Housing	Christianity	Kencuran, Sukoharjo, 55581, Tanjungsari, Sukoharjo, Kec. Ngaglik, Kabupaten Sleman, Daerah Istimewa Yogyakarta 55581
13.	Syariah Hotel	Hotel	Islam	50 Dagen Street, Sosromenduran, Gedong Tengen, City of Yogyakarta, Special Region of Yogyakarta 55271
14.	Limaran Syariah 3 Hotel	Hotel	Islam	33 Taman Siswa Street, Wirogunan, Mergangsan Subdistrict, City of Yogyakarta, Special Region of Yogyakarta 55285
15.	Madani Syariah	Hotel	Islam	1A Cantel Baru II

	Hotel			Street, Muja Muju, Umbulharjo Subdistrict, City of Yogyakarta, Special Region of Yogyakarta 55165
16.	Adilla Syariah Hotel	Hotel	Islam	15 Nogorojo Street, Ambarukmo, Caturtunggal, Depok Subdistrict, Bantul, Special Region of Yogyakarta 55198
17.	Namira Syariah Hotel	Hotel	Islam	KM 4,5 Magelang Street, Sinduadi, Kutu Asem, Sendangadi, Mlati Subdistrict, Sleman Regency, Special Region of Yogyakarta 55284
18.	Gapura Sitimulya Estate Muslim Housing	Housing	Islam	Wonosari Street, KM 10,5 Karang Anom Street, Karang Anom, Sitimulyo, Piyungan Subdistrict, Bantul, Special Region of Yogyakarta 55792
19.	Atmajaya Krajan Jogja Housing	Housing	Christianity	Krajan Ngori Condongcatur Jogja Street Condong Catur,

				Sleman, Yogyakarta 55283
20.	Puri Syariah Hotel	Hotel	Islam	KM 6,7 No. 272 Wonosari Street, Wirono, Baturetno, Banguntapan Subdistrict, Bantul, Special Region of Yogyakarta
21.	Royal Homy Syariah	Hotel	Islam	Kledokan I Street, Ngentak, Caturtunggal, Depok Subdistrict, Sleman Regency, Special Region of Yogyakarta
22.	Sofyan Inn Unisi Hotel	Hotel	Islam	42 Pasar Kembang Street, Malioboro Street, Yogyakarta, Yogyakarta Province, Indonesia, 55721
24.	Arrayan Malioboro Syariah	Hotel	Islam	13 Bhayangkara Street, Malioboro Street, Yogyakarta, Yogyakarta Province, Indonesia, 55261
25.	Madani Syariah Jogja Hotel	Hotel	Islam	1A Cantel Baru Street, Umbulharjo Subdistrict,

				Umbulharjo, Yogyakarta, Yogyakarta Province, Indonesia, 55165
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Source: data processed by author, 2022

From the data above, it can be seen that housing and hotels/lodges with religious labels are scattered in the urban area of Yogyakarta, which includes the Sleman and Bantul areas. In addition, most of these buildings are affiliated with Islam.

The religious spatial segregation that appears from the labeling of housing and hotels/inns with a certain religious identity in the urban area of Yogyakarta is a manifestation of exclusivism in social recruitment. A housing with a certain religious identity prohibits residents of different religions from living in the housing. This reflects the tendency to create an exclusive and homogeneous space. This exclusive attitude will eventually create a discriminatory relationship.<sup>32</sup> Religious spatial segregation affects the patterns of interaction and social relations in a society because it has resulted in the shallowing of relations between community groups; thus, it has the potential to provoke any acts of intolerance.<sup>33</sup> In addition, such segregation may result in not only the formation and strengthening of religious identity but also the formation of a *gated community* in which space is represented as a symbol of power and moves dynamically according to what is constructed by the community.<sup>34</sup>

Religious-based spatial segregation rises segregative space in perception between groups which causes lasting tension in the community. This segregative space is implemented in the forms of mutual suspicion, distrust, and stigmatization. This will create a social

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<sup>32</sup> Ahmad Zamakhsari, "Teologi Agama-Agama Tipologi Tripolar; Eksklusivisme, Inklusivisme Dan Kajian Pluralisme," *Tsaqofah* 18, no. 1 (2020): 35, <https://doi.org/10.32678/tsaqofah.v18i1.3180>.

<sup>33</sup> Kamil Alfi Arifin, "Perumahan Muslim Dan Politik Ruang Di Yogyakarta," *Jurnal Pemikiran Sosiologi*, 2017, <https://doi.org/10.22146/jps.v4i1.23627>; Yelly Elanda, "Komodifikasi Agama Pada Perumahan Syariah Di Surabaya," *Jurnal Al-Hikmah*, 2019, <https://doi.org/10.35719/alhikmah.v17i1.3>.

<sup>34</sup> Elanda, "Komodifikasi Agama Pada Perumahan Syariah Di Surabaya." *Jurnal Al-Hikmah*, 2019:41

distance between community groups that causes stigmatization between community groups that is difficult to refute. The emerging social distance is likely to trigger social tension which then creates various frictions of conflict between community groups and leads to community disintegration.<sup>35</sup> This happens in the case of the Ambon conflict, where segregation of living spaces separated based on religion (Islam and Christianity) yielded a strong need for a neutral space that can be used together.

The presence of religious spatial segregation in Yogyakarta which appears in the forms of housing and student dormitories has decreased the social interaction amongst groups in society. This tendency stimulates prejudice between one social group and the others. This is evidenced by the existence of certain racial sentiments that surround various conflicts in Yogyakarta, such as the racial conflict experienced by Papuan students in Yogyakarta.<sup>36</sup> In response to the situation, a neutral space can bridge the segregated spaces by offering the feeling of caring and respect for each other, especially at the level of interfaith tolerance.<sup>37</sup> Tolerance provides an opportunity for everyone to live their life, including doing worship according to their religions and beliefs in religious life.<sup>38</sup> Therefore, spatial segregation does not only reflect the existence of social classes but also tension in society.

### **Segregated Property Right: Selection of Land Trading**

Religious segregation in the urban area of Yogyakarta is not only visible from the separation of physical space, but also in community activities. The activity of buying and selling land in this

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<sup>35</sup> Ricky Santoso Muharam, "Membangun Toleransi Umat Beragama Di Indonesia Berdasarkan Konsep Deklarasi Kairo," *Jurnal HAM*, 2020, <https://doi.org/10.30641/ham.2020.11.269-283:280>

<sup>36</sup> Sindi Monica Putri, Weli Febrianto, and Yosephine Susanto, "Urgensi Yogyakarta Menjadi Kota Ramah HAM Sebagai Upaya Perlindungan Bagi Mahasiswa Papua Di Yogyakarta," *Jurist-Diction*, 2020, <https://doi.org/10.20473/jd.v3i1.17639>.

<sup>37</sup> Gemal Sigit P et al., "Ruang Netral Di Kota Ambon (Segregasi Dan Integrasi Ruang Kota)," *CoUSD Proceedings Urban Stud*, no. Semarang (2015):40

<sup>38</sup> Hanafi Hanafi, "Upaya Preventif Dalam Mengantisipasi Kekerasan Atas Nama Agama (Aliran Sesat)," *Al-Ihkam: Jurnal Hukum & Pranata Sosial*, 2015, <https://doi.org/10.19105/ihkam.v9i2.476:382-383>

area indicates the presence of religious segregation. It can be seen from the exclusion or limitation of buyer categories based on religious similarity with the seller. This resulted in the fact that only people of certain religions who are able to buy the land. This is in accordance with the statement made by HR (25) who has relevant experience related to the practice of land transactions that impose a category of buyers to have the same faith as the seller as follows;

“I have an experience related to the land transaction between believers of Islam. At that time, coincidentally, my parents wanted to find land to build a house and run a business for retirement in Bantul area. This seller was an acquaintance of my mom. She sold land plots and they were sold only for Islam believers or fellow Muslim and preferred close acquaintances as the prospective buyers” (Interview excerpt, 9 August 2021-translated)

HR’s (25) statement suggests that segregation of space (land) rights has occurred among Yogyakarta residents. The land sellers only choose fellow Muslims and close acquaintances for the land transactions.

The segregation that leads to discrimination seems to have become a normal thing among the people of Yogyakarta. The practice of buying and selling land only to believers of the same faith has also been experienced by NN (35) who bought land in Sonosewu area to build a house as described below;

“Yes, I have (experienced it). The seller was only willing to sell the land to fellow Muslim because his family wanted to divide their inheritance. Therefore, they wanted to find Muslim buyers so that both parties can sincerely agree to the contract just in case a negotiation is needed. They are a Moslem family from lower-middle economy-level so they want to divide the inheritance” (Interview excerpt, 9 August 2021-translated).

In the second case, because the seller wanted to divide the money from the land-purchase to the heirs, they wanted the transaction contract to be carried out in accordance with their religion's teaching. In fact, the reasons why some sellers are picky about finding prospective buyers for their land seem to be diverse. HR, for instance, added that sellers tend to limit the prospective buyer category for same-faith believers because such transaction is considered as an effort to help their same-faith brothers and sisters and thus their sustenance will not cease. Furthermore, they believe in a guarantee that the money they receive from the buyers is *halal* (earned lawfully according to Islamic teaching). This is as stated by HR (25) in the following excerpt;

“So, the seller in Bantul sold his/her land to fellow Islamic believers because thinking that it helps fellow Muslims so that the fortune will not be cut off because of the transaction. By choosing the same fellow, the path of fortune between buyer and seller is not cut off. Also, by selling plotted land to fellow Muslims, they get the guarantee that the money is *halal*. They doubt the *halal* status of money if they sell the land to non-Muslim” (Interview excerpt, 9 August 2021-translated)

Meanwhile, FM (28) also has the same experience regarding the sale and purchase of land where the seller only wants to sell the land to same-faith believers as conveyed in the following excerpt;

“I have an experience of land trading where the seller only wants to sell the land to fellow Muslims. He sold his land to me a couple times ago and mentioned the criteria of his prospective buyer directly. He realized that a lot of people from certain ethnicity have much money to buy land in Jogja easily. However, he was a bit reluctant to sell his land to them because he was actually happier to sell it to me because he believed that my religious practice is good. Maybe because he saw my beard, that's why he thought so” (Interview excerpt, 9 August 2021-translated)

FM's statement makes it clear that the seller's motive is different from the previous two cases, which is because of certain ethnicities. In fact, the particular ethnicity implies differences in religious affiliation with the seller. This is emphasized in further explanation by FM as follows;

“The reason on why he finally chose to sell his land to fellow Muslim is because of *ukhuwah* (brotherhood) reason. So, he preferred that land in Jogja is owned by people from the same religion” (Interview excerpt, 9 August 2021).

FM explanation indicates competition which leads to segregation among the people of Yogyakarta over land ownership.

In a closer look, the land-trade practice to same-faith people is caused by 2 reasons. Firstly, such practice is a result of religious fanaticism. The strengthening of the universalism movement has led to various changes in religious, social, economic, educational, legal, cultural, and political life.<sup>39</sup> Religion theologically affects the way of thinking, behaving, and acting of its followers, hence narrowly understanding religious teaching may result in narrowing the subsequent actions as well.<sup>40</sup> A narrow understanding of religious teachings restrains people in a relationship built on the similarity of religious identity.<sup>41</sup> A grouping based on similar religious identity forms in-group and out-group which often leads to prejudice expressed as negative labeling.<sup>42</sup> This extreme loyalty and categorization may inflict various aggressive behaviors in society<sup>43</sup> as

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<sup>39</sup> S Huda, “Fpi: Potret Gerakan Islam Radikal Di Indonesia,” *Jurnal Huda.Studi Agama*, 2019: 1

<sup>40</sup> YUSDANI, “Pengelolaan Konflik Umat Agama Di Indonesia,” *Millab*, 2013; Musa Rumberu and Hasse J, “Radikalisme Agama Legitimasi Tafsir Kekerasan Di Ruang Publik,” *Al-Ulum*, 2017, <https://doi.org/10.30603/au.v16i2.37>.

<sup>41</sup> Yosep Yoga Pranata and Gendon Barus, “Peningkatan Karakter Bersahabat Melalui Layanan Bimbingan Klasikal Dengan Pendekatan Experiential Learning,” *Solution, Journal of Counseling and Personal Development*, 2019:3

<sup>42</sup> Moh Rosyid, “Peredam Konflik Agama: Studi Analisis Penyelesaian Di Tolikara Papua 2015,” *Afkaruna: Indonesian Interdisciplinary Journal of Islamic Studies*, 2017, <https://doi.org/10.18196/aiijis.2017.0067.48-81:52>

<sup>43</sup> Kalis Stevanus, “Memaknai Kisah Orang Samaria Yang Murah Hati Menurut Lukas 10:25-37 Sebagai Upaya Pencegahan Konflik,” *BIA': Jurnal Teologi Dan Pendidikan Kristen Kontekstual*, 2020, <https://doi.org/10.34307/b.v3i1.99:2>

a form of religious fanaticism which arises from rejection of the diversity of other groups<sup>44</sup> and indirectly creates a harsh image of religion due to the occurring segregation that makes it look exclusive and rigid. Therefore, a narrow fanaticism is not limited to faith matters but also combined with any efforts to create a mainstream group on the basis of religious similarity.<sup>45</sup> It induces discriminatory attitudes that lead to acts of intolerance, violence, and prolonged conflict against different groups.<sup>46</sup>

Secondly, the practice of trading land with people of the same faith is caused by competition between the majority and the minority. Segregation occurs due to the increasing competition between the majority and minority triggered by the existing disparity.<sup>47</sup> Majority-minority competition does not only refer to competition between religious groups but also ethnicities. Prejudice containing suspicions born from individual and group subjectivity is characterized by a sense of superiority from the majority group who views the minority group as inferior.<sup>48</sup> This competition has led to various attempts from each group to obtain what they want, often detrimental to other groups. The superior attitude in the majority-minority relationship has caused discrimination. This also explains that space is able to guide people's mindset and actions. Space is used for the purposes of control and domination, where its character is closely related to the issue of power rather than neutral.<sup>49</sup>

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<sup>44</sup> Yusdani, "Pengelolaan Konflik Umat Agama Di Indonesia." Saadah Cipta Mandiri, Jakarta: 622

<sup>45</sup> Moh Rosyid, "Mewujudkan Pendidikan Toleransi Antar-Umat Beragama Di Kudus: Belajar Dari Konflik Tolikara Papua 1 Syawal 1436 H / 2015 M," *Quality*, 2015:52

<sup>46</sup> Hanafi, "Agama Dalam Bayang-Bayang Fanatisme; Sebuah Upaya Mengelola Konflik Agama". *Toleransi: Media Komunikasi umat Beragama* 10(1), 2018:53

<sup>47</sup> Syarifuddin Latif, "Meretas Hubungan Mayoritas-Minoritas Dalam Perspektif Nilai Bugis," *Jurnal Al- Ulun* 12, no. 1 (2012): 97-116.

<sup>48</sup> Wawan Hernawan, "Prasangka Sosial Dalam Pluralitas Keberagamaan Di Kecamatan Cigugur Kabupaten Kuningan Jawa Barat," *Sosiohumaniora*, 2017, <https://doi.org/10.24198/sosiohumaniora.v19i1.9543:78>

<sup>49</sup> Arifin, "Perumahan Muslim Dan Politik Ruang Di Yogyakarta." *Jurnal Pemikiran Sosiologi* 4(1), 2017: 47

### **Segregation in Social Acceptance: Residential Rental (Boarding Houses)**

Religious spatial segregation is evident not only from spatial patterns or land ownership but also from residential rental (boarding houses) as a manifestation of segregation of social acceptance. Residential rental (boarding house) only accepts tenants with the same religion as indicated by certain religious labels implying exclusion towards certain other groups. This can be seen, for example, in boarding houses with certain religious identities which apply regulations based on religious teaching that differs from common boarding houses' regulations. In relation to this, AT (46), an owner of a female Muslim boarding house, mentioned as follows;

“The difference is in its regulations, namely its rules. In a female Muslim boarding house, male visitors outside the family members are not allowed to enter the room. They can only meet the tenant on the front terrace. Male relatives are also expected not to walk around the boarding house. Besides, they cannot bring alcoholic drinks, let alone illegal drugs” (Interview excerpt, 9 August 2021-translated)

AT's statement (46) indicates differences between female Muslim boarding houses and other female boarding houses in terms of ways to enter and exit the building as well as prohibition to bring or drink things forbidden by Islam, namely alcoholic drinks and illegal drugs.

This difference of regulation is further emphasized by HR (25), who also owns a female Muslim boarding house, as follows;

“The regulations of this boarding house don't allow males to get in the room. If they want to meet the tenant, they can meet outside, namely in a provided place to receive guests of the opposite sex. If the tenants buy a gallon (of water), the deliveryman usually just puts it at the front. As for brother or father, they can enter the room, usually in moving time” (Interview excerpt, 9 August 2021).

In addition to the way of entering and exiting the boarding house, regulation is also made on tenant acceptance procedure which is not only based on identification card showing the tenant's religious affiliation, but also on the tenant's appearance attributes, such as headscarf-wearing. This is due to environmental reasons (neighbor's demand) and the trust of the boarding house owner in the tenant who wears a headscarf that she will be well accepted by the neighbors. This is as expressed by HR (25) as follows;

"We are a bit picky about accepting tenants and therefore we ask them to show any proof of identity, at least an ID card. We require them to be Muslim. This is because of relevant neighbors' requests considering that here is an area of NU Islamist. Regular female boarding houses typically accept tenants from all religious affiliation be the Muslim, non-Muslim, or Muslim who doesn't wear a headscarf. Since here is a Muslim female boarding house, I prefer to accept Muslim tenants who wear the headscarf because it seems safer and the neighbors also find it good". (Interview excerpt, 9 August, 2021-translated)

Furthermore, another interview reveals insight into the reason why owners of boarding houses opt to use a religious label as expressed by HR (24) in the following excerpt;

"This is actually my parents' boarding house which is now managed by me. Why my parents ended up preferring to make a boarding house for Muslim women is because they have a prejudice against students from Eastern Indonesia. These students usually look for a boarding house a bit far from their campus, including nearby. And you know, they often bring their lifestyle to the boarding house they live in like drinking alcohol, getting drunk at night, and being noisy. So, we just play safe hereby accepting Muslim or Muslim women".

This is in line with the observation of different locations as shown in figure 2:

Figure 2. Moslem Female Boarding House



Source: Data processed by the author

Figure 2 above shows the community's way to avoid boarding house tenants coming from certain ethnicities who are considered to have an inappropriate lifestyle with the people of Yogyakarta. It is by establishing a rule, through the naming, that the boarding houses only accept tenants from certain religious affiliations. Based on HR's statement (24), it is clear that the reason beyond the owner's choice to name a Muslim female boarding house is because of sentiment against

members of a community group from Eastern Indonesia studying in Yogyakarta. People have a negative stigma that they tend to bring their lifestyle in Eastern Indonesia to Yogyakarta. Therefore, to avoid them, the owner labels their boarding house as a Muslim female one. In fact, this is mainly because the majority of students from Eastern Indonesia are non-Moslem thus indirectly rejected through the label. The owner's motive to avoid these students from renting their place is also conveyed by AT (46) as follows;

"I made a Muslim female boarding house because I'm afraid that the tenants are delinquents, especially if taking boys to the boarding house. If so, the boarding house will have a bad image in the surrounding environment. One of these delinquents is those from Eastern Indonesia. Besides, our area is near a mosque"

The data above indicate the existence of discrimination in terms of social acceptance. This is clearly seen in the religious spatial segregation of boarding houses with religious labels in the urban area of Yogyakarta which refuses people from a certain group from renting their places.

The emerging religious segregation in terms of social acceptance indicates that the country does not have yet a mechanism to bridge these differences. Religious freedom must be seriously considered by the state, especially in violent conflict in the name of religion, as the state has the function of monitoring and maintaining order in a heterogeneous society.<sup>50</sup> The absence of this effort from the country as a facilitator inflicts societal changes where people become more pragmatic, apathetic, and less caring for society.<sup>51</sup> This paper does not only fill the gap in studies concerning segregation but also criticizes the country's weak contribution as a facilitator in eliminating all forms of discrimination and creating a conducive condition for

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<sup>50</sup> Hanafi, "Upaya Preventif Dalam Mengantisipasi Kekerasan Atas Nama Agama (Aliran Sesat).":367

<sup>51</sup> Muhamad Rusdi, "Penanganan Intoleransi Oleh Pemerintah Daerah Istimewa Yogyakarta," *Widya Pranata Hukum: Jurnal Kajian Dan Penelitian Hukum*, 2021, <https://doi.org/10.37631/widyapranata.v3i1.266.137>

society.<sup>52</sup> The mushrooming religious spatial segregation in Yogyakarta rises the threat of emerging discriminative actions that lead to intolerance. What is happening in Yogyakarta shows that there are a number of issues that need to be resolved. Religious spatial segregation has reduced the space for cross-cultural dialogue and has diminished people's solidarity as a result of homogeneous and monocultural life.<sup>53</sup> Therefore, there needs an interaction that requires openness, a caring attitude, and balanced expressions of opinion between the different groups.

### Conclusion

Religious spatial segregation reflects the structured intolerance in the urban society of Yogyakarta. Intolerance is embedded in social relations and transactions which can be found in the selling of housing and land as well as renting of boarding houses for only the fellow believer. This tendency emphasizes that the understanding of space which has been seen only as static and physical has ignored the more flexible social discourses. The development of spatial segregation has caused shallowing relations between groups, thus raising the potential for intolerant actions. These actions occur due to the lack of interaction between different groups which results in a homogeneous and monocultural life. This paper is limited only to analyzing one area; thus, it does not provide a comprehensive insight into intolerances caused by religious spatial. Due to this limitation, this study suggests the need for further research to accommodate comparative aspects in terms of area and relies on more varied data, thus a more comprehensive understanding can be obtained.

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<sup>52</sup> Musa, "Optimalisasi Peran Pemerintah Dalam Pemberdayaan Masyarakat: Sebuah Tawaran Dalam Mengentaskan Kemiskinan," *Jurnal Dakwah Dan Pengembangan Sosial Kemanusiaan*, 2017.:120

<sup>53</sup> Muryana, "Kebebasan Ekspresi Keagamaan Di Jogja City Of Tolerance (Studi Kasus Toleransi Dan Intoleransi Di Balik Plank 'Terima Kost Putra Muslim/Putri Muslimah')."

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## **The Role of Women Workers in Surabaya, East Java, Indonesia, in Meeting Families' Needs During the Covid-19 Pandemic: a Maqāṣid Sharīah Perspective**

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### **Abstract:**

This research studied the role of women workers in Surabaya in meeting the family's needs during the Covid-19 pandemic. As field research, it employed a qualitative approach. The data was collected through interviews with 12 women workers and observation at the respondents' workplaces from November 2021 to April 2022. This research concluded that women workers have a significant role in meeting the family's needs during the Covid-19 Pandemic. Their role comes in three

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categories: First, they work to help husbands in meeting primary needs because the husband's salary cannot cover the whole bill. Second, they work to meet the family's secondary needs because the husband's salary is only sufficient for the family's primary needs. Third, they work to meet primary and secondary needs because no one provides so. In the perspective of maqāṣid shariah, their role are according to the principle of maintaining property (ḥifẓ al-māl). The first role is according to the principle of ḥifẓ al-māl in the category maṣlaḥah ḍarūriyyāt. The second role accords to the principle of ḥifẓ al-māl in maṣlaḥah ḥajjiyyāt and the third role is according to the principle of ḥifẓ al-māl in maṣlaḥah ḍarūriyyāt and maṣlaḥah ḥajjiyyāt.

**Keywords:**

Women Workers; Surabaya; Family's Needs; Covid-19;  
Maqāṣid Shari'ah

**Abstrak:**

Penelitian ini mengkaji peran pekerja perempuan di Surabaya dalam memenuhi kebutuhan keluarga pada masa pandemi Covid-19. Penelitian lapangan ini menggunakan pendekatan kualitatif. Pengumpulan data dilakukan melalui wawancara dengan 12 pekerja perempuan dan observasi di tempat kerja para informan pada November 2021 - April 2022. Penelitian ini menyimpulkan bahwa pekerja perempuan memiliki peran penting dalam memenuhi kebutuhan keluarga, khususnya pada masa pandemi Covid-19. Peran mereka terdiri dari 3 kategori: Pertama, mereka bekerja untuk membantu suami memenuhi kebutuhan primer keluarga karena pemasukan suami tidak mampu memenuhi seluruh kebutuhan primer. Kedua, mereka bekerja untuk memenuhi kebutuhan sekunder keluarga karena pemasukan suami hanya mencukupi kebutuhan primer. Ketiga, mereka bekerja untuk memenuhi kebutuhan primer dan sekunder karena tidak ada yang menafkahi mereka. Dalam perspektif maqāṣid shariah, peran pekerja perempuan Surabaya dalam memenuhi kebutuhan keluarga pada masa pandemi Covid-19 tersebut telah sesuai dengan prinsip menjaga harta (ḥifẓ al-māl). Peran pertama senada dengan prinsip ḥifẓ al-māl dalam kategori maṣlaḥah ḍarūriyyāt, peran kedua senada dengan prinsip ḥifẓ al-māl

dalam maṣlahah ḥajjiyyāt dan peran ketiga senada dengan prinsip ḥifz al-māl maṣlahah ḍarūriyyāt dan maṣlahah ḥajjiyyāt.

**Kata Kunci:**

Pekerja Perempuan; Surabaya; Kebutuhan Keluarga; Covid-19; Maqāṣid Shariāh

**Introduction**

The Covid-19 Pandemic affects all aspects of life in the world, such as health and the economy as well as social and family life.<sup>1</sup> Indonesia is one of the countries that has been affected by Covid-19.<sup>2</sup> To break the spread of Covid-19, the government issued policies such as large-scale social restrictions (PSBB; *Pembatasan Sosial Berskala Besar*) and implementation of micro community activities (PPKM; *Pemberlakuan Pembatasan Kegiatan Masyarakat*).<sup>3</sup> Surabaya city is

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<sup>1</sup> Heather Prime, Mark Wade, and Dillon T. Browne, "Risk and Resilience in Family Well-Being during the Covid-19 Pandemic," *American Psychologist* 75, no. 5 (2020): 631-43, <https://doi.org/http://dx.doi.org/10.1037/amp0000660>; World Health Organization (WHO), "Advice on the Use of Masks in the Community, during Home Care, and in Health Care Settings in the Context of COVID-19," WHO, no. April (2020): 1-2, [https://www.who.int/publications/i/item/advice-on-the-use-of-masks-in-the-community-during-home-care-and-in-healthcare-settings-in-the-context-of-the-novel-coronavirus-\(2019-ncov\)-outbreak](https://www.who.int/publications/i/item/advice-on-the-use-of-masks-in-the-community-during-home-care-and-in-healthcare-settings-in-the-context-of-the-novel-coronavirus-(2019-ncov)-outbreak); Azam Raoofi et al., "COVID-19 Pandemic and Comparative Health Policy Learning in Iran," *Archives of Iranian Medicine* 23, no. 4 (2020): 220-34, <https://doi.org/10.34172/aim.2020.02>; Mohamed Buheji et al., "The Extent of COVID-19 Pandemic Socio-Economic Impact on Global Poverty. A Global Integrative Multidisciplinary Review," *American Journal of Economics* 10, no. 4 (2020): 213-24, <https://doi.org/10.5923/j.economics.20201004.02>; Putu Sekarwangi Saraswati and I Nengah Susrama, "Peran Perempuan Dalam Keluarga Untuk Melindungi Serta Pemenuhan Hak Anak Di Masa Pandemi COVID-19," *Prosiding Webinar Nasional Universitas Mahasaraswati 2020* (Denpasar Bali, January 2020), <https://e-journal.unmas.ac.id/index.php/prosidingwebinarwanita/article/view/1251>.

<sup>2</sup> Presiden Republik Indonesia, "Keputusan Presiden Republik Indonesia Nomor 12 Tahun 2020 Tentang Penetapan Bencana Non Alam Penyebaran Corona Virus Disease 2019 (Covid\_19) Sebagai Bencana Nasional" (2020).

<sup>3</sup> Presiden Republik Indonesia, "Peraturan Pemerintah Nomor 21 Tahun 2020 Tentang Pembatasan Sosial Berskala Besar Dalam Rangka Percepatan Penanganan Coronavirus Disease 2019/COVID-19" (2020); Shofiatul Jannah and Mohammad Afifulloh, "Islamic Legal Analysis of Obligation for Swab Tests as a Requirement for Marriage in the Era of Covid-19 Pandemic in Indonesia," *Al-Ihkam: Jurnal Hukum Dan*

among the cities that implemented PSBB and PPKM.<sup>4</sup> It inevitably affected the lives of its citizens, individually, in family, and in social life.<sup>5</sup> One of the impacts felt by the community with the presence of Covid-19 is the termination of employment (layoffs).<sup>6</sup> Based on data from the Central Statistics Agency (BPS: *Badan Pusat Statistik*), in November 2021, there are 21.32 million Indonesians (10.32 percent of the working-age population) affected by COVID-19.<sup>7</sup> Meanwhile in East Java, as of August 2021, as many as 1.28 million people are unemployed.<sup>8</sup>

Consequently, it inevitably affected the fulfillment of families' economic needs. The difficulty of the family's financial situation made women have to work for a living because their husbands' income cannot meet the family's needs or because they initially live in a low

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*Pranata Sosial* 16, no. 2 (2021): 450, <https://doi.org/http://doi.org/10.19105/al-lhkam.v16i2.5329>.

<sup>4</sup> The Mayor of Surabaya, "Surabaya Mayor Regulation Number 19 of 2020 on the Amendment of the Surabaya Mayor Regulation Number 16 of 2020 on Large-Scale Social Restriction Guidelines in Mitigating Corona Virus Disease 2019 (COVID-19) in Surabaya" 19 (2020): 14, <https://peraturan.bpk.go.id/Home/Details/141969/perwali-kota-surabaya-no-19-tahun-2020>. Purwanto Purwanto et al., "Spatiotemporal Analysis of COVID-19 Spread with Emerging Hotspot Analysis and Space-Time Cube Models in East Java, Indonesia," *ISPRS International Journal of Geo-Information* 10, no. 3 (2021): 7, <https://doi.org/10.3390/ijgi10030133>.

<sup>5</sup> I. Hidayati et al., "Small-Scale Fishing Families and Their Daily Multiple-Stressor on Climate Change and COVID-19: Preliminary Findings," *IOP Conference Series: Earth and Environmental Science* 739, no. 1 (2021): 1, <https://doi.org/10.1088/1755-1315/739/1/012047>.

<sup>6</sup> Hario Megatsari et al., "The Community Psychosocial Burden during the COVID-19 Pandemic in Indonesia," *Heliyon* 6, no. 10 (2020): e05136, <https://doi.org/10.1016/j.heliyon.2020.e05136>; Imas Novita Juaningsih, "Analisis Kebijakan PHK Bagi Para Pekerja Pada Masa Pandemi Covid-19 Di Indonesia," *Buletin Hukum Dan Keadilan* 4, no. 1 (2020): 189-96, <https://doi.org/10.15408/adalah.v4i1.15764>.

<sup>7</sup> Ryo, "BPS: Agustus 2021, Angkatan Kerja Indonesia 140,15 Juta Orang," *Jatim Newsroom*, November 5, 2021, 1, <https://kominfo.jatimprov.go.id/read/umum/bps-agustus-2021-angkatan-kerja-indonesia-140-15-juta-orang>.

<sup>8</sup> Mus and Nur, "Tingkat Pengangguran Terbuka Di Jatim Tembus 1,28 Juta Orang," <https://Radarsurabaya.jawapos.Com/>, November 9, 2021, <https://radarsurabaya.jawapos.com/surabaya/09/11/2021/tingkat-pengangguran-terbuka-di-jatim-tembus-128-juta-orang/>.

economic family.<sup>9</sup> Women are urged to increase their family income by working in various sectors, such as domestic helpers, traders, laborers, educators, etc.<sup>10</sup>

At the same time, women essentially have an important position in the family.<sup>11</sup> Therefore, those who work in the public sector face two demands: being homemakers and breadwinners.<sup>12</sup> Their common problems are related to pressures ranging from family problems such as weak family support, family feuds, and working milieu problems like long working hours, long distances,<sup>13</sup> and excessive workload.<sup>14</sup> Sometimes, women also experience discrimination in the workplace.<sup>15</sup>

During the Covid-19 pandemic, the number of female workers increased compared to males. In August 2019, the male worker was 83.25% while the female worker was 51.81%. Two years later, in August 2021, the male worker decreased to 82.27%, while the female worker increased to 53.34%.<sup>16</sup> This shows that the number of female

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<sup>9</sup> Agustinar & Dessy Asnita, Fika Andriana, "Istri Bergaji: Analisis Peran Wanita Bekerja Dalam Meningkatkan Ekonomi Keluarga," *Al-Qadha: Jurnal Hukum Islam Dan Perundang-Undangan* 8, no. 1 (2021): 24, <https://doi.org/10.32505/qadha.v8i1.2800>.

<sup>10</sup> Desak Putu, Eka Nilakusmawati, and Made Susilawati, "Studi Faktor-Faktor Yang Mempengaruhi Wanita Bekerja Di Kota Denpasar," *Piramida* 8, no. 1 (2012): 26-31, <https://ojs.unud.ac.id/index.php/piramida/article/view/6986>.

<sup>11</sup> Tri Niswati Utami et al., "Reproductive Health of Women Workers in Villages, Cities in Islamic Perspective," *Health Notions* 4, no. 4 (2020): 126, <https://doi.org/10.33846/hn40404>.

<sup>12</sup> Aditya Yuli Sulistyawan and Eka Padmahantara Antonius, "Socio-Legal Perspective of Gender Justice in Covid-19 Handling Policy in Indonesia," *International Journal of Criminology and Sociology* 9 (2020): 1301-5, <https://doi.org/10.6000/1929-4409.2020.09.149>.

<sup>13</sup> Melanie L. Straiton, Heloise Marie L. Ledesma, and Tam T. Donnelly, "A Qualitative Study of Filipina Immigrants' Stress, Distress and Coping: The Impact of Their Multiple, Transnational Roles as Women," *BMC Women's Health* 17, no. 1 (2017): 1-11, <https://doi.org/10.1186/s12905-017-0429-4>.

<sup>14</sup> Aristya Rahmaharyati, Budhi Wibhawa and Nunung Nurwati, "Peran Ganda Buruh Perempuan Sektor Industri Dalam Keluarga," *Prosiding Penelitian Dan Pengabdian Kepada Masyarakat* 4, no. 2 (2017): 230-34, <https://doi.org/10.24198/jppm.v4i2.14290>.

<sup>15</sup> "Girls' Education in Ingeria" (British: British Council, 2014), 35.

<sup>16</sup> WS, "Astaga, Terbongkar Selama Masa Pandemi Covid -19, Tenaga Kerja Perempuan Meningkatkan Terkuak Di Webinar Perempuan Andal Era Digital,"

workers has increased, while male workers have decreased. In addition, the Central Statistics Agency (BPS: *Badan Pusat Statistik*) noted that in 2021, as many as 64.5 percent of the total MSMEs (Micro, Small, and Medium enterprise) are managed by women.<sup>17</sup> It shows that women have an important role in economic growth in Indonesia, especially in the MSME sector.

Research on women workers in Surabaya from the perspective of *maqāṣid shariah* is essential. Islam allows women to work in order to meet economic needs. However, some Muslim-majority countries do not give women any great opportunities to work. In contrast, in non-Muslim countries, women get an excellent opportunity to work.<sup>18</sup> Muslim women in the UK, for instance, have a wide opportunity to have a career. They must be creative and active in developing their careers and education.<sup>19</sup> Women workers in Pakistan, on the contrary, experienced forced labor, debt bondage, wage discrimination, and double burdens. In addition, women employees have no control over financial and decision-making resources.<sup>20</sup> The same case happens in Bedouin traditions in Jordan which still restrict women's work through patriarchal interpretations of Islamic teaching.<sup>21</sup> However,

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*Kabarwarta.Id*, April 20, 2022, 1, <https://kabarwarta.id/detailpost/astaga-terbongkar-selama-masa-pandemi-covid-19-tenaga-kerja-perempuan-meningkat-terkuak-di-webinar-perempuan-andal-era-digital>.

<sup>17</sup> Humas Kementerian Koperasi dan UKM, "Menteri Teten: Jumlah Kewirausahaan Perempuan Perlu Ditingkatkan," *Kemenkopukm*, December 23, 2021, <https://kemenkopukm.go.id/read/menteri-teten-jumlah-kewirausahaan-perempuan-perlu-ditingkatkan>.

<sup>18</sup> Knut Eric Joslin and Frode Martin Nordvik, "Does Religion Curtail Women During Booms? Evidence from Resource Discoveries," *Journal of Economic Behavior and Organization* 187 (2021): 205–24, <https://doi.org/10.1016/j.jebo.2021.04.026>.

<sup>19</sup> Saskia Warren, "#YourAverageMuslim: Ruptural Geopolitics of British Muslim Women's Media and Fashion," *Political Geography* 69, no. December 2018 (2019): 118–27, <https://doi.org/10.1016/j.polgeo.2018.12.009>.

<sup>20</sup> Iram Rubab, "Women's Labor Rights in Islam: Plight of Female Bonded Laborers in Brickkiln Industry of Kasur Women Labor Rights in Islam: Plight of Female Bonded Laborers in Brick-Kiln Industry of Kasur," *Jihat-Ul-Islam* 14, no. 1 (2020): 103, [www.jihat-ul-islam.com.pk](http://www.jihat-ul-islam.com.pk).

<sup>21</sup> Tamer Koburtay, Jawad Syed, and Radi Haloub, "Implications of Religion, Culture, and Legislation for Gender Equality at Work: Qualitative Insights from Jordan," *Journal of Business Ethics* 164, no. 3 (2020): 421–36, <https://doi.org/10.1007/s10551-018-4036-6>.

several Muslim countries provide great opportunities for women to have careers, such as Indonesia.

Based on this, this research discusses the role of women workers in meeting the needs of families from the perspective of Islamic law in general and *maqāṣid shariah* in specific. It aimed to answer how women workers in Surabaya played a role in meeting their family's needs during the Covid-19 pandemic, as well as their right fulfillment as workers and how the Islamic law and *maqāṣid shariah* perceive their role.

### Method

This field research employed a qualitative research method. It took place in Surabaya, East Java, Indonesia, considering that the city is one of those most affected cities in Indonesia by the Covid-19. The data consists of primary (twelve women workers in Surabaya) and secondary (the Qur'an, Sunnah, relevant books, and journal articles).

Data collection is carried out through observation and interviews. Observations were made at the workplace of 12 women workers from November 2021-April 2022. It was conducted to find out the conditions of the workplace and how they work.

The interview as a way to obtain data by the direct answers to pondered questions was also made with 12 respondents of women workers in Surabaya. They work from various sectors: Four are lecturers, one office employee, one administrator in an Islamic financial institution, one factory employee, one parking attendant, two security guards, and two cleaning services as shown in table 1 below:

Table 1. Respondent Profession

Number	Profession	Sum of Respondent
1	Lecturer	4
2	Office employee	1
3	Administrator	1
4	Factory employee	1
5	Parking attendant	1
6	Security guards	2
7	Cleaning services	2

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<b>Total</b>	<b>12</b>
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Table 1 shows that informants come from 7 different professions. After obtaining valid and complete data, we analyzed the data using descriptive qualitative analysis. It described the role of women workers in meeting their families' needs and then analyzed it from the *Maqāsid Shariah* perspective.

## Discussion and Result

### The Economic Role, Employee Right Fulfillment, and Pandemic Impact on Twelve Surabaya Women Workers

The worker is defined as anyone who works for others on wages or rewards in other forms than what they do/make.<sup>22</sup> The term worker is juridically discovered in The Law No. 25 of 1997 on employment.<sup>23</sup> Indonesian government issues laws and regulations to protect workers and put them in a noble position according to human dignity.<sup>24</sup>

Workers and their families are very dependent on the wages they receive to meet the needs of clothing, food, housing, and other necessities. The legal basis of wages is Article 27, paragraph (2) of the 1945 Constitution which mentions that workers can meet the needs of their lives and their families reasonably from the amount of income they earned.<sup>25</sup>

Respondents of this research consist of twelve women workers who work in Surabaya. Eight respondents have worked before the pandemic while four others have just begun working after the coming of the pandemic. This initial scheme showed how the pandemic affected women's role in working place. Specifically, they play an important role in meeting family needs, especially during the Covid-19 pandemic.

The cause which led them to decide for going to work is because they work as the backbone of the family, work to help the

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<sup>22</sup> Abdul Rahmad Budiono, *Hukum Perburuhan* (Jakarta: PT. Indeks, 2009).

<sup>23</sup> Lalu Husni, *Pengantar Hukum Ketenagakerjaan Indonesia*, Cet-2 (Jakarta: PT. Raja Grafindo Persada, 2001), 22.

<sup>24</sup> Asyhadie Zaeni, *Hukum Kerja: Hubung Ketenagakerjaan Bidang Hubungan Kerja*, Cet-1 (Jakarta: PT. Raja Grafindo Persada, 2007), 20.

<sup>25</sup> Baqir Syarif Al-Qarasyi, *Keringat Buruh, Peran Pekerja Dalam Islam*, Alih Bahasa Oleh Ali Yahya, Cet-1 (Jakarta: Al-Huda, 2007), 179.

husband or to develop their knowledge. The woman's role as the backbone of the family mostly occurs because she serves as a single parent or because she is unmarried but has to earn living for her parents and younger siblings.

Arini (35 years) and LF (54 years), for instance, both are single parents. Arini has been working since 2015 in the transportation department as a parking attendant at Wonokromo Surabaya traditional market. She is the backbone of the family and the primary source of the family's finances because she divorced her husband six years ago.<sup>26</sup>

LF, meanwhile, has been working as a public servant since 1994. Her husband has long passed away in 2014, so she is currently a single parent to her three sons. She said that working is her own way to actualize herself and develop her college knowledge. Since her husband died, LF has been working mainly to pay the bills.<sup>27</sup>

In addition to Arini and LF, there is ZI (29 years old) who also plays a role as the backbone of the family. She is still a girl and unmarried, but she works to meet her personal needs as well as those of her parents and her younger siblings.<sup>28</sup>

Based on the three respondents above, it is known that one of the factors for women to work is because no one gives them a living so they become the backbone of the family. In this case, they work to meet the needs of the family both primary and secondary.

Another reason for women to work is to help the husband meet the needs of the family because the husband's salary can't cover the whole need and pay all the bills.

Hanik (45 years), for example, has worked as a labor for a company for 25 years. Hanik has two children; one is still studying in junior high school, another is a college student. She works to help her husband to meet the family's needs. Her husband's salary is allocated to meet daily needs and pay installments, while Hanik's salary is for the children's tuition and college fees.<sup>29</sup>

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<sup>26</sup> Arini, "Parking Attendant in Wonokromo Traditional Market," *Interview*, November .

<sup>27</sup> LF, "A Public Servant," *Interview*, April 7, 2022.

<sup>28</sup> ZI, "A Lecturer of a Public University," *Interview*, April 14, 2022.

<sup>29</sup> Hanik, "A Labor of a Company," *Interview*, November 2, 2021.

Sum (40 years), meanwhile, has been working as a cleaning service staff at the company since 2010 while her husband earns living from selling iced coconut. She has two children, 22 and 6 years old. Sum also works to help her husband cover family needs because his income only covers basic daily needs. Meanwhile, they still need to pay tuition, electricity bill, and other necessities.<sup>30</sup>

Lis (44 years), also a cleaning service staff in a company, has worked since 2015. She is a wife and a mother with four children aged 21, 18, 14, and 10. Lis works to help her husband—who sells chicken at the market—cover the family's needs. According to her, her husband's salary is typically spent for paying daily bills, while hers is for fee tuition, electricity bill, boarding rental costs, and other necessities.<sup>31</sup>

Another one is Nisa (27 years) who has worked as a security guard at a private company since 2022. Before that, she worked somewhere else. Her husband, meanwhile, works at a private company in Bojonegoro. They have a 4-year-old girl living in Bojonegoro with her father. Nisa mentioned that she decides to work in order to help her husband pay the family's bills because the pandemic affected their family's economic situation. At that time, the company reduced the husband's salary due to the impact of the pandemic. Her husband's salary is used for daily basic needs, while her salary is to pay other bills like her personal needs and for saving.<sup>32</sup>

Based on the above data of informants, it is known that they work to ease the burden of the husbands in meeting the needs of the family because the husband's salary is not sufficient for the whole needs they have to cover.

Another reason for women to work is to improve their knowledge and meet secondary needs. Alvi (35 years), has been working as an administrator in an Islamic financial institution since 2010. Using her ability and skill, she can get a good job and make extra money while developing her capacity. Her husband's salary is

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<sup>30</sup> Sum, "A Cleaning Service Staff at the Company," *Interview*, April 4, 2022.

<sup>31</sup> Lis, "A Cleaning Service Staff at the Company," *Interview*, April 6, 2022.

<sup>32</sup> Nisa, "A Security Staff of a Company," *Interview*, April 5, 2022.

allocated for daily needs and children's tuition, while hers is for secondary families' needs.<sup>33</sup>

Mega (28 years), a lecturer in a public university, has been working since 2021 when Covid-19 hit Indonesia. She decided to work due to the situation of her husband who works in the private sector and experienced decreased income due to the pandemic. Moreover, she mentions that working enables her to apply as well as improve her both knowledge and skill. After she works, her husband's salary is allocated for paying for the needs of their parents, ranting house, water, and electricity bills. Meanwhile, Mega's salary is used for children's tuition.<sup>34</sup>

Another almost same situation happens to Nurul AN (46 years) who also works as a lecturer at a public university. She is a mother of 2 children who has worked since 2003. She works to support her husband who is self-employed. The husband's salary is typically used for indeterminate expenses; some time for electricity bills or children's snacks, while hers is for both basic personal and children's needs.<sup>35</sup>

Inung (32 years), another lecturer at a public university, has been working since 2015 and has two children. Her husband also works as a lecturer in Semarang. The husband's salary is allocated for electricity and water bills, children's tuition, and daily necessities. Meanwhile, Inung's income is for home installment and secondary daily needs.<sup>36</sup>

NY (22 years), a security staff of a company, has worked since 2020 at the beginning of the pandemic. She is married with no children. Her husband works as an insurance employee. NY admits that she works to cover her personal needs and her tuition. At the same time, her husband's salary meets the family's needs.<sup>37</sup>

Based on the information of the recently mentioned respondents above, it is known that women work to improve their

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<sup>33</sup> Alvi, "Administrator in the Islamic Financial Institution," *Interview*, April 10, 2022.

<sup>34</sup> Mega, "A Lecturer of a Public University," *Interview*, April 11, 2022.

<sup>35</sup> Nurul AN, "A Lecturer of a Public University," *Interview*, April 13, 2022.

<sup>36</sup> Inung, "A Lecturer of a Public University," *Interview*, April 12, 2022.

<sup>37</sup> NY, "A Security Staff of a Company," *Interview*, April 6, 2022.

knowledge and to meet secondary needs because the primary needs of the family have been fulfilled by the husband's salary.

Regarding their rights as workers, some workers receive their rights as workers such as salary rights, leave due to illness, and THR (*Tunjangan Hari Raya*; 'Tied allowance) while some others do not fully accept these rights.

As for salary, 10 respondents stated that they received their salaries according to the UMR (*Upah Minimum Regional*; Regional Minimum Wages), especially lecturers and office workers, while two others got salaries below the UMR.

They also receive a salary every month except Arini who was paid every two months. However, Arini also receives basic compensation from the transportation agency and excess parking money deposits.<sup>38</sup> Likewise, Hanik also gets overtime pay when working extra time.<sup>39</sup>

Salaries below the UMR are received by Sum and Lis who work as cleaning service staff. Their monthly salary amounts 2,300,000 IDR which is still below the UMR of Surabaya which reaches 4,300,479 IDR in 2022. In fact, they both work from Monday to Saturday from 06.00 PM to 17.00 AM.

Regarding the leave rights, 10 respondents stated that they received leave as workers, either because of illness, childbirth, or the death of a family member. Different cases were experienced by Lis and Sum where they, fortunately, do not get leave rights because of illness, Eid holidays, etc. Late coming or absence for any reason, including getting sick, will make their salary reduced by 75,000 IDR. Likewise, if they do not come in Saturday and Monday work, their monthly salary will be reduced while paying a 50,000 IDR fine.<sup>40</sup>

Meanwhile, except Arini, all respondents mentioned that they received THR. Arini did not get it because of different policies as the impact on regents, deputy regents, and the House member succession.<sup>41</sup> As for Lis and Sum, before the pandemic, **they usually received the THR as much as one-time salary.** However, during the

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<sup>38</sup> Arini, "Parking Attendant in Wonokromo Traditional Market."

<sup>39</sup> Hanik, "A Labor of a Company."

<sup>40</sup> Sum, "A Cleaning Service Staff at the Company."

<sup>41</sup> Arini, "Parking Attendant in Wonokromo Traditional Market."

Eid during the pandemic in 2020-2021, they only received 350,000 IDR as the THR.<sup>42</sup>

As the effect of the Covid-19 pandemic, respondents also mentioned the influence on their work. 3 respondents (Hanik, Sum, and Lis) were rested temporarily from their jobs. Hanik, for instance, got fired because the pandemic affected the factory's production. After that, she once sold street foods because it coincided with the fasting month of Ramadhan. Hanik remained grateful although her new income was not as much as the salary in the factory she worked in before.<sup>43</sup> Likewise, Sum was once laid off for three months at the time of the pandemic. During this time, she worked in a factory at the night shift.<sup>44</sup> As for Lis, she only relied on her husband's salary.<sup>45</sup>

Another respondent stated that the Covid-19 pandemic did not affect their income, because the office continued to pay their salaries as usual. It was NY who said that the pandemic has not severely affected her family's economy because her wages already cover her needs and she does not yet raise any children.<sup>46</sup>

However, the Covid-19 pandemic has an impact on their work due to the WFO (Work from Office) and WFH (Work from Home) systems. As LF says, the current pandemic affected her career due to the WFH system where she typically completed the work target later than she used to do before the pandemic.<sup>47</sup>

As lecturers, some respondents must adapt their work to the online learning system. ZI, for example, argued that the Covid-19 pandemic affected her work system because she had to adjust the existing conditions such as switching to online media in delivering a lecture.<sup>48</sup>

However, a respondent even mentioned that the coming of the pandemic has a positive impact on her home life as follows:

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<sup>42</sup> Sum, "A Cleaning Service Staff at the Company."

<sup>43</sup> Hanik, "A Labor of a Company."

<sup>44</sup> Sum, "A Cleaning Service Staff at the Company."

<sup>45</sup> Lis, "A Cleaning Service Staff at the Company."

<sup>46</sup> NY, "A Security Staff of a Company."

<sup>47</sup> LF, "A Public Servant."

<sup>48</sup> ZI, "A Lecturer of a Public University."

“Thank God. This indirectly provides much time for rest and gives much more space for the family more than ever to increase household harmony.”<sup>49</sup>

As working women, respondents typically play a dual role as workers and housewives. They should be able to divide time between family and work. They have to take care of the family and prepare food for the family before going to work as some of the following respondents said.

Hanik admits that she does not forget her duties as a mother and a wife despite her work. She works from 6 a.m. and is already at home at 2 p.m. Before leaving for work, Hanik had to prepare food for her family. Sometimes, she arrives late due to housework.<sup>50</sup>

Sum and Lis are likewise. They said that they must be good at managing time for family and work. Before going to work in the morning, for instance, they have to finish cooking. It is quite lucky for Sum because her house is close to working place so she usually returns home to do household work during the rest hours.<sup>51</sup>

Different things are experienced by LF and Inung. There was no problem for LF to arrange her household affairs and work because she hires an assistant to work in her house.<sup>52</sup> Likewise with Inung, during work, she entrusts her two toddler children to daycare.<sup>53</sup>

Based on the presentation of the data above, it can be seen that respondents have different reasons for working. Their rights fulfillment and obligations are also different according to where they work. Also, although the impact of the Covid-19 pandemic is different for each other, they have an important role in meeting the needs of the family during the pandemic. Another similarity is their obligation to be responsible for work and household jobs.

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<sup>49</sup> Alvi, “Administrator in the Islamic Financial Institution.”

<sup>50</sup> Hanik, “A Labor of a Company.”

<sup>51</sup> Sum, “A Cleaning Service Staff at the Company”; Lis, “A Cleaning Service Staff at the Company.”

<sup>52</sup> LF, “A Public Servant.”

<sup>53</sup> Inung, “A Lecturer of a Public University.”

### Surabaya Women Workers and Humanly Need in the Islamic Law Perspective and *Maqāṣid Shariah*

Islam puts a big concern and cares about workers. Many texts of the Holy Qur'an and Hadith mention the issues of workers either directly or indirectly. For example, QS. Al-Baqarah: 286 is deemed as a foothold for workers to get the right to rest. The Qur'an also tells a lot about the job that the prophets once carried to earn living.<sup>54</sup> Accordingly, many hadiths also discuss the virtues of work, workers' rights, and the prohibition of begging.

A worker, for instance, is entitled to a variety of rights that the employers need to fulfill, such as being paid with reasonable wage,<sup>55</sup> be given proper jobs that do not exceed their physical ability,<sup>56</sup> be treated kindly and courteously; be given proper medical help if sick,<sup>57</sup> and be paid appropriate compensation for accidents that occur in employment.

The women's position in the public sphere, including in the working place, can be traced from the history of women in the Prophet Muhammad's life. The infant Muhammad was taken care of by Halimah Sa'diyah, a working woman who was a nurse for him. His first wife, Khadijah, was a successful merchant. It indicates that

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<sup>54</sup> Dwi Runjani Juwita, "Pandangan Hukum Islam Terhadap Wanita Karir," *El-Wasathiyah: Jurnal Studi Agama* 6, no. 2 (2018): 183, <https://doi.org/https://doi.org/10.5281/zenodo.3523061>.

<sup>55</sup> The Prophet (PBUH) had stated: "Pay the worker his dues before his sweat has dried up", Ibn Majah, *Sunan Ibn Majah* (sunnah.com, n.d.), <https://sunnah.com/ibnmajah:2443>.

<sup>56</sup> Al-Baqarah (2), 286: Allāh does not charge a soul except [with that within] its capacity. It will have [the consequence of] what [good] it has gained, and it will bear [the result of] what [evil] it has earned. "Our Lord, do not impose blame upon us if we have forgotten or erred. Our Lord lay not upon us a burden like that which You laid upon those before us. Our Lord, and burden us not with that which we have no ability to bear. And pardon us; forgive us; have mercy upon us. You are our protector, so give us victory over the disbelieving people." <https://quran.com/2/286?translations=22,17,84,101,21,20,19,18,95,85>

<sup>57</sup> The Prophet (PBUH) had stated: "The burdens that you lighten from your helper will be a reward for you in the scales of your good deeds" (Ibn Hibban). <https://azislam.com/how-to-treat-maid-in-islam>

Islam encourages its people to work to make ends meet without prohibiting women from working.<sup>58</sup>

Furthermore, Islamic law examines the law based on the Qur'an and Hadith<sup>59</sup> texts allow women to work.<sup>60</sup> Women are even allowed to work in various fields of business as long as it is lawful (*halal*) and giving a positive impact on themselves and their families. Among other, Allah says in the Qur'an Surah An-Nisa' (4) verse 32 as follow:

“And (do) not covet what (has) bestowed Allah [with it] some of you over others. For men (is) a share of what they earned, and for women (is) a share of what they earned. And ask Allah of His bounty. Indeed, Allah is of everything All-Knower.”<sup>61</sup>

This verse shows that the positions of men and women are the same. Women's and men's rights are also the same.<sup>62</sup> In other words, at the context of a family, men have rights and obligations toward women and vice versa; women have rights and responsibilities toward men.

Islamic law obliges Muslim to work to meet the family's needs.<sup>63</sup> These needs consist of primary, secondary, and tertiary

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<sup>58</sup> Syaidun Syaidun, “Tinjauan Hukum Islam Terhadap Nafkah Keluarga Dari Istri Yang Bekerja,” *Al-Mabsut: Jurnal Studi Islam Dan Sosial* 13, no. 1 (2019): 93, <http://www.ejournal.iaingawi.ac.id/index.php/almabsut/article/view/339>.

<sup>59</sup> Jamal Abd. Naser, “Equalitas Gender (Konsep Dan Aktualisasinya Dalam Islam Serta Implikasinya Atas Rumusan Hukum Islam),” *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 2, no. 2 (2007): 34, <https://doi.org/10.19105/al-lhkam.v7i2.332>.

<sup>60</sup> Rubab, “Women's Labor Rights in Islam: Plight of Female Bonded Laborers in Brickkiln Industry of Kasur Women Labor Rights in Islam: Plight of Female Bonded Laborers in Brick-Kiln Industry of Kasur.”

<sup>61</sup> <https://www.islamawakened.com/quran/4/32/>

<sup>62</sup> Naser, “Equalitas Gender (Konsep Dan Aktualisasinya Dalam Islam Serta Implikasinya Atas Rumusan Hukum Islam).”

<sup>63</sup> Ibnu Rozali, “Konsep Memberi Nafkah Bagi Keluarga Dalam Islam,” *Jurnal Intelektualita: Keislaman, Sosial Dan Sains* 6, no. 2 (2017): 189–202, <https://doi.org/10.19109/intelektualita.v6i2.1605>; Ahmad Rajafi, “Reinterpretasi Makna Nafkah Dalam Bingkai Islam Nusantara,” *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 13, no. 1 (2018): 97–120, <https://doi.org/10.19105/al-ihkam.v13i1.1187>.

ones.<sup>64</sup> The first type consists of essential necessities that humans must acquire to survive such as food, drink, clothing, and shelter. Secondary needs are complementary as long as the primary needs have been met, such as jewelry, infrastructure, and equipment to support any immediate needs.<sup>65</sup> Meanwhile, tertiary needs arise when primary and secondary requirements are covered. This need consists of any goods and services classified as luxury such as cars, airplanes, plush homes, etc.<sup>66</sup>

The mentioned classification of humanly need is also known as the concept of *maqāṣid shariah* in the Islamic Law. *Maqāṣid shariah* itself means the purpose beyond Islamic sharia enforcement. In formulating Islamic law, the most basic principle is to give birth to any benefit (*maṣlahah*) while avoiding harm (*mafsadah*).<sup>67</sup> In this case, *maṣlahah* in *maqāṣid shariah* is divided into three categories: *dharurīyyāt*, *ḥājīyyāt*, and *taḥsīniyyāt*.<sup>68</sup>

*Maṣlahah dharurīyyāt* is *maṣlahah* to maintain the primary (essential) needs of human life, which include maintaining religion (*ḥifẓ al-dīn*), maintaining soul (*ḥifẓ al-nafs*), maintaining descendants (*ḥifẓ al-nasab*), maintaining reason (*ḥifẓ al-'aql*) and maintaining

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<sup>64</sup> Sri Wigati, "Perilaku Konsumen Dalam Prespektif Ekonomi Islam," *Maliyah: Jurnal Hukum Bisnis Islam* 01, no. 01 (2011): 22-39, <https://doi.org/https://doi.org/10.15642/maliyah.2011.1.1.%25p>.

<sup>65</sup> Rozali, "Konsep Memberi Nafkah Bagi Keluarga Dalam Islam."

<sup>66</sup> Dessy Fitri Pratiwi, Hadiyanto A. Rachim, and Rudi Saprudin Darwis, "Keberfungsian Sosial Buruh Perempuan Pada Sektor Industri Dalam Keluarga," *Prosiding Penelitian Dan Pengabdian Kepada Masyarakat* 2, no. 2 (2015): 284-94, <https://doi.org/10.24198/jppm.v2i2.13539>.

<sup>67</sup> Zakaria Syaifei, "Tracing Maqasid Al-Shari'ah in the Fatwas of Indonesian Council of Ulama (MUI)," *Journal of Indonesian Islam* 11, no. 01 (2017): 105, <https://doi.org/10.15642/JIIS.2017.11.1.99-124>.

<sup>68</sup> Ahmad Imam Mawardi, "The Urgency of Maqasid Al-Shariah Reconsideration in Islamic Law Establishment for Muslim Minorities in Western Countries," *International Journal of Innovation, Creativity and Change* 12, no. 9 (2020): 393, <https://www.ijicc.net/index.php/volume-12-2020/175-vol-12-iss-9>.

property (*ḥifẓ al-māl*).<sup>69</sup> Those five principles are known as *al-Uṣūl al-Khamsah* implying that if these can't be fulfilled, they will cause damage in this world and the hereafter.<sup>70</sup>

In the subsequent development, there is the concept of maintaining cosmic (*ḥifẓ al-'ālam*), maintaining environment (*ḥifẓ al-bī'ah*),<sup>71</sup> maintaining health while resisting disease (*ḥifẓ al-shiḥḥah wa daf' al-maradh*),<sup>72</sup> maintaining human humanity (*ḥifẓ insāniyyah al-insān*), and maintaining the rules of society (*ḥifẓ nidhām al-ummah*).<sup>73</sup> The aforementioned principles are conveyed by contemporary scholars as a development of the five main principles.

*Maṣlaḥah ḥājīyyāt* is *maṣlaḥah* to maintain the secondary needs that can prevent people from difficulties. The non-fulfillment of this *ḥājīyyāt* does not cause any threat to the essence of the five main elements and will only cause light difficulties. *Maṣlaḥah taḥsīniyyāt*, meanwhile, is to maintain the tertiary needs that support the increase of one's prestige in society or increase dignity before Allah in accordance with their respective obedience.<sup>74</sup>

The concept of *maṣlaḥah* for women workers is closely related to the principle of *ḥifẓ al-māl* in *maqāṣid shariah*. The economic effects of

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<sup>69</sup> Abdurrohman Kasdi et al., "Fiqh Minority for Papuan Muslims in the Perspective of Maqāṣid Al-Shari'ah," *International Journal of Islamic Thought* 20 (2021): 3, <https://doi.org/10.24035/ijit.20.2021.205>.

<sup>70</sup> Nur Lailatul Musyafaah, Athifatul Wafirah, and Sagita Destia Ramadhan, "Moderation of Fatwa: Worship During the Covid 19 Pandemic in Maqāṣid Shariah Perspective," *Proceedings of the International Conference on Engineering, Technology and Social Science (ICONETOS 2020)* 529, no. Iconetos 2020 (2021): 75, <https://doi.org/10.2991/assehr.k.210421.012>.

<sup>71</sup> Mukti Tabrani, "Maqāshid Revitalization in Global Era: Istidlāl Study from Text to Context," *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 13, no. 2 (2018): 310, <https://doi.org/10.19105/al-ihkam.v13i2.1814>.

<sup>72</sup> Nurdeng Deuraseh, "New Essential Values of Daruriyyah (Necessities) of the Objectives of Islamic Law (Maqāṣid Al-Shari'ah)," *Hadhari* 4, no. 2 (2012): 113, <https://doi.org/http://dx.doi.org/10.29300/madania.v25i1.4326>.

<sup>73</sup> Nur Lailatul Musyafa'ah, "Analisis Program Kampung Keluarga Berencana Perspektif Maqāṣid Al-Syari'ah (Studi Di Kampung Logam Ngingas Waru Sidoarjo Jawa Timur)," *Al-Manahij: Jurnal Kajian Hukum Islam* 8, no. 2 (2019): 259-79, <https://doi.org/https://doi.org/10.24090/mnh.v13i2.3132>.

<sup>74</sup> Abd. Rasyid As'ad, "Konsep Maqashid Al-Syari'ah Dalam Perkawinan," <https://Badilag.Mahkamahagung.Go.Id/>, April 14, 2013, 3-4, <https://badilag.mahkamahagung.go.id/artikel/publikasi/artikel/konsep-maqahid-al-syariah-dalam-perkawinan-oleh-drs-h-abd-rasyid-asad-mh-231>.

the pandemic on economies and the financial situation of all countries worldwide are well known. Working during a pandemic is a part of the principle of keeping the property to keep the survival and protection of the existence of human beings.<sup>75</sup> The way to produce this property is by working and inheriting, so one cannot eat other people's property in a vanity way. In QS. Al-Baqarah (2): 188, Allah forbids people from eating the results of usury as also mentioned in QS (2): 275-276.<sup>76</sup>

Regarding women workers who played a role during the Covid-19 Pandemic, eight respondents (67%) had been working before the pandemic and four others (33%) started to work after the coming of the pandemic. They started working because the Covid-19 pandemic affected their family's economies, mainly because the husband's income has been reduced. After all, the pandemic has affected the company's income. After the work to help the husband, then the family economy becomes more stable.

For the first eight women workers--who have worked before the hit of the pandemic—, the pandemic only affected their work system. Three of them were discharged for three months due to a reduction in staff which inevitably affected the fulfillment of their family needs. At this moment, two of them began working other jobs to meet their families' needs (Sum worked in another factory and Hanik sold street food). The other five respondents, meanwhile, mentioned that the pandemic did not affect their family's economy because their salary was stable. It only affected their work performance as they were required to turn from WFO (Work from Office) system into Work from Home (WFH) ones.

Beyond a variety of reasons and situations of each respondent, it becomes obvious that their role is significant in fulfilling the family

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<sup>75</sup> Ramzi Bendebka, Amar Fettane, and Ibrahim Shogar, "Preventive Medicine and Maqasid Al-Shari'ah: The Case of Covid-19," *Revelation and Science* 10, no. 01 (2020): 1-12, <https://journals.iium.edu.my/revival/index.php/revival/article/view/259>.

<sup>76</sup> Nur Lailatul Musyafa'ah, "Maqashid, Muslim Devotion and Ramadhan Tradition in Pandemic Times," *Jurisprudensi: Jurnal Ilmu Syariah, Perundangan-Undangan, Dan Ekonomi Islam* 13, no. 2 (2021): 157, <https://doi.org/10.32505/jurisprudensi.v13i2.2362>.

economy,<sup>77</sup> especially during the pandemic. They generally come to work for a living because of increasingly urgent life needs and the families' economic situation. When husbands' salaries cannot meet the whole family's needs like what Hanik, Lis, Mega, and Sum experienced, they go to work for helping their husbands paying uncovered bills, such as children's tuition, house rent, and electricity service. This finding strengthens Putu and Sari's research result that one of the factors that cause women to work is insufficient husband's income to meet the whole needs of the family.<sup>78</sup>

In this case, their work is in line with the spirit implied at the QS. Al-Baqarah (2): 233 literally explains that a father must provide a living for the child and the mother serves to breastfeed him/her. However, this verse also applies to a woman if she works and can earn a living or when the husband cannot cover the whole need because of being unemployed, having an insufficient salary, or other reasons.<sup>79</sup>

For the other three workers, their roles in supporting the family economy become more essential particularly when they serve as the backbone of the family, just like LF and Arini, who are single parents to their children. Likewise, ZI, although unmarried, has to provide an allowance for her parents and younger siblings. They have to work to meet their family's needs, both primary and secondary because no one provides them with any living. In this condition, working is even obligatory because of being a requirement for survival. As Husein Muhammad explained, working for women becomes mandatory because of their obligation to bear the cost of

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<sup>77</sup> Ahmad Thobroni, "Pendidikan Keluarga Dalam Perspektif Hukum Islam (Studi Kasus Wanita Karir)," *Al-Fikri: Jurnal Studi Dan Penelitian Pendidikan Islam* 2, no. 1 (2019): 61, <https://doi.org/10.30659/jspi.v2i1.4016>.

<sup>78</sup> Putu, Nilakusmawati, and Susilawati, "Studi Faktor-Faktor Yang Mempengaruhi Wanita Bekerja Di Kota Denpasar," 26; Eka Kartika Sari and Biko Nabih Fikri Zufar, "Perempuan Pencari Nafkah Selama Pandemi Covid-19," *Al-Mada: Jurnal Agama, Sosial, Dan Budaya* 4, no. 1 (2021): 21, <https://doi.org/10.31538/almada.v4i1.1106>.

<sup>79</sup> Faqihuddin Abdul Kodir, *Qira'ah Mubadalah Tafsir Progresif Untuk Keadilan Gender Dalam Islam* (Yogyakarta: IRCiSoD, 2019), 375.

living for themselves and their family members when no one is responsible for that.<sup>80</sup>

Some other cases show that several respondents decide to work to meet the family's secondary needs because the husband's salaries are allocated for the primary one, such as Nurul AN, NY, Nisa, Inung, and Alvi. They typically work as a form of self-actualization, capacity building, and knowledge improvement. This is also in line with the Islamic spirit and law.<sup>81</sup> Islam allows women to work or perform some activities, as Khadijah, the Prophet's wife, did, during her lifetime.<sup>82</sup> The law related to the plausibility of women to work is *mubah* (allowed).<sup>83</sup> Muhammad Sayyid al-Thanthawi stated that Islamic sharia does not prohibit women from working as merchants, teachers, doctors, or other professions.<sup>84</sup> Islam even encourages Muslims, men, and women to seek sustenance as described in verse QS. Al-Jumu'ah: 10.<sup>85</sup>

In a broader scope, working to gain a living is related to *maqāṣid shariah* under the *maṣlahah* of maintaining property (*ḥifẓ al-māl*). It is because work is an act related to finding the *halal* income as recommended in Islam. Therefore, women who work in various *halal* professions have been under the principle of maintaining property.

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<sup>80</sup> This is based on the history of Jabir bin Abdullah who told that his aunt had divorced her husband. One day, he intended to pick the dates, but someone rebuked him and forbade him to leave the house. His aunt complained to the Prophet, and the Prophet said: "Pick the date fruit, maybe you want to give alms or do good." Husein Muhammad, *Fiqh Perempuan* (Yogyakarta: LKiS, 2001), 173.

<sup>81</sup> Muh.TrikalSurahman, "Tinjauan Hukum Islam Dan Hukum Ketenagakerjaan Nomor 13 Tahun 2003 Terhadap Perlindungan Pekerja Perempuan Pada Malam Hari," *Kaffa: Jurnal Fakultas Keislaman* 2, no. 1 (2021): 30, <http://journal.citradharma.org/index.php/kaffa/article/view/47>.

<sup>82</sup> Afif Muamar, "Wanita Karir Dalam Perspektif Psikologis Dan Sosiologis Keluarga Serta Hukum Islam," *Equalita: Jurnal Pusat Studi Gender Dan Anak* 1, no. 1 (2019): 32, <https://doi.org/10.24235/equalita.v1i1.5153>.

<sup>83</sup> May Lyndha Marlina Lestari, "Wanita Karir Dan Perannya Sebagai Ibu Dalam Perspektif Hukum Islam," *JIIIP - Jurnal Ilmiah Ilmu Pendidikan* 5, no. 2 (2022): 633, <https://doi.org/10.54371/jiip.v5i2.468>.

<sup>84</sup> Muhammad Sayyid Al-Thanthawi, "Hurriyyah Qabla Al-Zawaj Wa Ba'dahu," in *Al-Mar'ah Fi Al-Islam* (Kairo: Akhbar al-Yaum, 1991), 67.

<sup>85</sup> According to Faqihuddin, although the verse is for men, like other verses, it is also valid for women. Kodir, *Qira'ah Mubadalah Tafsir Progresif Untuk Keadilan Gender Dalam Islam*, 372.

They work to get wealth in an attempt to survive.<sup>86</sup> Therefore, as a consequence, thieves are punished for violating the principle of keeping property (*ḥifz al-māl*).<sup>87</sup>

Information from respondents thus generally maps the classification of women workers' motives for work in relation to meeting the family's needs: *First*, working to meet primary needs because husbands' salaries cannot provide a primary living. *Second*, working to meet secondary needs because husbands only provide a primary living. *Third*, working to meet the primary and secondary needs because the husbands are not available. Regarding the classification of *maṣlahah* type, the first group belongs to the category of *maṣlahah ḍarūriyyāt*, the second to the category of *maṣlahah ḥajiyāt*, and the third group is for *maṣlahah ḍarūriyyāt* and *ḥajiyāt*.

The statement of women workers in the first group (especially Hanik, Lis, Mega, and Sum) shows that the reason for becoming a worker is to meet their immediate needs (*ḍarūriyyāt*). *Ḍarūriyyāt* needs that must be met or primary needs. This need consists of religion, soul, reason, descendants, and property. Of these five things, they worked closely related to guarding the right of property. If one of these five essential elements is lost, it will cause damage to their current life and in the hereafter. Immediate needs or first needs are ones that must be met primarily so that humans can maintain good survival. Included in the primary needs are clothing, food, and shelter.<sup>88</sup>

Meanwhile, respondents in the second group (Nurul AN, NY, Nisa, Inung, and Alvi) are willing to help the husband meet his family's needs. They tend to feel less satisfied with the husband's income because they want to fulfill secondary needs (*ḥajiyāt*). The need for *ḥajiyāt* is the need that accompanies the primary need. It is a secondary need that facilitates life and eliminates human difficulties.

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<sup>86</sup> Bendebka, Fettane, and Shogar, "Preventive Medicine and Maqasid Al-Shari'ah: The Case of Covid-19," 7.

<sup>87</sup> Musyafa'ah, "Analisis Program Kampung Keluarga Berencana Perspektif Maqasid Al-Syarī'ah (Studi Di Kampung Logam Ngingas Waru Sidoarjo Jawa Timur)," 262.

<sup>88</sup> Karim Adiwarmanto, "Sejarah Pemikiran Ekonomi Islam" (Jakarta: PT. Raja Grafindo Persada, 2004).

Secondary needs are additional or complementary needs whose mastery can be delayed.

Respondents in the third group, who are single and widows due to the husband's death or divorce, on the other hand, work to meet their family needs (primary and secondary needs) because no one is there or gaining them a living. This data can be well described below:

Table 2. Category of *maṣlahah* on the role of women workers in meeting the needs of the family

Types of Family Needs	Number of Respondents	Category of Humanly Needs	Factor
Primary	4	<i>maṣlahah ḍarūriyyāt</i>	The husband's salary is not enough to meet the needs of the family
Secondary	5	<i>maṣlahah ḥajiyyāt</i>	To develop knowledge and meet personal needs
Primary and Secondary	3	<i>maṣlahah ḍarūriyyāt</i> and <i>ḥajiyyāt</i>	They become the backbone of the family because no one finances or provides for them
Total	12		

### Conclusion

There found three roles of Surabaya women workers in meeting family needs during the Covid-19 Pandemic: *First*, to meet primary needs because husbands' salaries cannot provide a primary living. *Second*, to meet secondary needs because of husbands only provide a primary living. *Third*, to meet the primary and secondary family needs because the absence of husbands. In Islam, working becomes mandatory to meet the needs of primer (*ḍarūriyyāt*) and becomes *sunnah* to meet the secondary one (*ḥajiyyāt*). In the perspective of *maqāṣid shariah*, the role of the women workers has been

according to the principle of maintaining property (*ḥifẓ al-māl*). The first type is relevant to *maṣlaḥah ḍarūriyyāt*, the second for *maṣlaḥah ḥajiyiyāt*, while the third is to *maṣlaḥah ḍarūriyyāt* and *maṣlaḥah ḥajiyiyāt*.

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## **Anticipating Disaster: The 'Urf Perspective of Rebo Wekasan Ceremony in Kudus, Central Java**

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### **Abstract:**

Rebo Wekasan is a popular practice among Indonesian Muslims, including those who live in Kudus, Central Java. This article discusses the practice of Rebo Wekasan in Indonesia generally, Kudus in specific, and the rite of drinking water salamun, as well as the practice of Rebo Wekasan from the perspective of 'urf. The anthropological approach is used to understand the tradition of Rebo Wekasan while the observation took place in 2021. Additionally, we also collected relevant documents including pictures and newspaper articles of Rebo Wekasan from 2018 to 2019, and interviews with 8 resource persons ranging from takmir (caretaker of the mosque), ceremonial committee, village officials, and visitors. Rebo Wekasan rite in Kudus is done by performing sholat tolak bala (prayer for anticipating any calamities) and drinking salamun (blessing-infused) water. People who attend the ceremony believe it based on religious belief and classic text showing that the last Wednesday in Safar month is the day of disaster advent. They also believe in the Javanese value that water is a medium of spiritual cleansing. In the perspective of 'urf (custom), Rebo Wekasan is deemed to fulfill aspects of 'urf belonging to the category of 'urf shahih (good custom) because it contains noble values and is sourced from religious teaching.

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**Keywords:**

Kudus; *Rebo Wakasan*; 'Urf

**Abstrak:**

Rebo Wekasan adalah sebuah praktik yang populer di kalangan Muslim Indonesia, termasuk masyarakat Kudus, Jawa Tengah. Artikel ini membahas praktik Rebo Wekasan di Indonesia secara umum, di Kudus secara khusus termasuk ritual meminum air salamun, juga praktik Rebo Wekasan dalam perspektif 'urf. Pendekatan antropologis digunakan untuk memahami tradisi Rebo Wekasan dengan mengamati praktik tersebut pada 2021. Selain itu, kami juga mengumpulkan dokumentasi-dokumentasi yang relevan berupa gambar dan artikel surat kabar tentang pelaksanaan Rebo Wekasan pada 2018-2019 serta wawancara dengan 8 narasumber yang terdiri dari takmir, panitia penyelenggara, perangkat desa dan pengunjung. Rebo Wekasan di Kudus dilakukan dengan melakukan salat tolak bala dan meminum air salamun. Pengunjung percaya bahwa tradisi ini berdasar pada keyakinan agama dan teks klasik bahwa Rabu terakhir dalam Safar adalah hari datangnya bencana. Rebo Wekasan memiliki keterkaitan dengan penyebaran agama Islam di Kudus. Selain itu, praktik ini memiliki relasi dengan nilai-nilai budaya Jawa yang percaya bahwa air berfungsi sebagai media pembersihan diri. Dalam perspektif 'urf, Rebo Wekasan dianggap memenuhi aspek 'urf dalam kategori 'urf shahih karena mengandung nilai-nilai luhur dan bersumber dari ajaran agama.

**Kata Kunci:**

Kudus; *Rebo Wakasan*; 'Urf

**Introduction**

The pre-Islamic society in Mecca City believed that Safar was a misfortune month (*tasa'um*). This was latter countered by a hadith, narrated by Abu Hurairah, a Companion of the Prophet Muhammad, which mentioned the Prophet's saying reads: There is no

epidemic/infectious disease, prejudice, misfortune, and disaster in Safar month.<sup>1</sup>

However, today, the assumption of epidemic arrival in Safar month is still attached to some Muslims in Java, such as mentioned in *Serat Centini*.<sup>2</sup> This did not come without any precedence because some literature deliver the same information. In his book, al-Dairaby, for instance, referring to the warning of *ahl al-Kashfi* (gnostics), mentioned that God descends 350,000 disasters or accidents every year and most of them are on the last Wednesday of Safar. Therefore, he mentioned that the last Wednesday of Safar is the most precarious day of the year. He also suggested an attempt to avoid disaster by performing four *rekaat* (streak) prayers. In the first *rekaat*, after the *Fatiha*, *Surah* al-Kautsar is recited 17 times. It does the same for *Surah* al-Ikhlâs in the second *rekaat* and both al-Falaq and al-Nas in the third and fourth *rekaat*. The prayer is concluded with the special *du'a* of *Asyura*.<sup>3</sup>

Likely, in order to prevent disaster, some Muslims regularly perform a religious rituals on the fourth Wednesday of Safar month, which is typically called *Rebo Wekasan* (The Final Wednesday). *Rebo* in Javanese means Wednesday while *Wekasan* means the last. There are various names of *Rebo Wekasan* in Indonesia such as *Rabu Pungkasan* (Yogyakarta), *Rebo Kasan* (Sunda), *Makmegang* (South Aceh), *Arba Mustamir* (South Borneo) or *Rabu Capuk* (Riau). They are all initiated by the assumption that the fourth Wednesday of Safar is full of calamities or fateful days. Therefore, the culturalization of *Rebo Wekasan* tradition and its ritualization are due to the perception as the effort to reject the catastrophe/*tolak balak* (to anticipate calamity) by praying to God.

Regardless of assumptions and the reality about the fourth Wednesday of Safar month, the positive side of religious ritual according to O' Dea is to instill high awareness to strengthen the

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<sup>1</sup> Al Imam al-Hafidz Abi 'Abdillah Ibn Isma'il al Bukhori, *Shahih Al-Bukhori* (Damaskus dan Beirut: Dar Ibn Katsir, 2002), 249.

<sup>2</sup> Karel A. Steenbrink, *Beberapa Aspek Tentang Islam Di Indonesia Abad Ke-19* (Jakarta: Bulan Bintang, 1984), 202.

<sup>3</sup> Ahmad al-Dairaby, *Mujarabat Al-Dairaby al-Kabir* (Egypt: Maktabah al-Tijariyah al-Kubro, n.d.), 75.

community with moral efforts.<sup>4</sup> The existence of *Rebo Wekasan* is a form of accommodative Islamic indigenization approach. According to Simuh, indigenization is a result of understanding Islam contextually, flexibly, respectively, and appreciatively towards local culture so that Islamic teaching is indigenized.<sup>5</sup> Rite, meanwhile, is a way of a group of religious people marked by the various elements and components, i.e., time, place, tools, and people who conduct the ceremony. However, an appropriate ritual is by referring to complete religious postulates. In Islam, a tradition which does not refer to the Qur'an dan al-hadis is responded with pro-contra by the public, i.e., regarded as *bid'ah* (an activity which is not written *innash*), *takhayul*/superstition (activity based on thinking creativity), *khurafat* (a belief which is not based on sharia), or *syirik* (acknowledging there is another power besides God).

*Rebo Wekasan* tradition is deemed not to be found in any text of the Qur'an dan the Hadith. The practice is based on what is written by Syeh Abdul Hamid Quds<sup>6</sup> in his book entitled *Kanz an-Najah wa al-Surur fi al-'Ad'iyah al-Ma'thurah allati Tashrah al-Sudur*.<sup>7</sup> Farida mentioned that this book contains prayers of certain days and months in one year, such as the beginning of Hijriyah year, the first ten days of Muharram, worship deeds in the month of Sura, Safar, Rabiul Awwal, Rajab, Sya'ban, Ramadan, the last ten days of Ramadan, on the day of Idul Fitri and Idul Qurban, on the day of Arafah, and the end of the Islamic year. The prayers refer to some authentic and authoritative (*mu'tabar*) books written by *shalih* (pious) people.

In Kudus city, on the last Wednesday of Safar, people come to the Mosque al-Makmur of Mejobo Kudus in order to receive *salamun water* (blessing infused water). It is believed to maintain the fine condition of the consumer annually as taken from an old well just

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<sup>4</sup> Thomas F O'Dea, *Sosiologi Agama Suatu Pengenalan Awal*, Terjemah Yasogama (Jakarta: RajaGrafindo Persada, 1995), 7.

<sup>5</sup> Simuh, *Interaksi Islam Dalam Budaya Jawa Dalam Muhammadiyah Dalam Kritik* (Surakarta: Muhammadiyah University Press, 2002), 149.

<sup>6</sup> 'Abdul al-Hamid ibn Muhammad 'Ali Quddus ibn 'Abdul al-Qadir al-Khatib ibn 'Abdullah ibn Mujir Quddus was born and passed away in Makkah 1278 H/1861 AD, passed away in 1915 AD/1334 H in the age of 58 years, buried in Ma'la.

<sup>7</sup> Abdul Hamid, *Kanz Al-Najah Wa al-Surur Fi al-Ad'iyah al-Ma'thurah Allati Tashrah al-Sudur* (Lebanon: Dar al-Hawi, 2009), 34-35.

beside the mosque. Local people strongly believe that the last Wednesday of Safar is the day of calamities so a lot of employees, such as construction workers, ask for a day's leave to avoid any fatal incident during that day.

This article discusses the tradition of *Rebo Wekasan* in Kudus compared to those practiced in other areas, the rite of drinking *salamun water*, and the 'urf analysis of the tradition. There are three main issues addressed in this article: how is the practice of *Rebo Wekasan* in Indonesia and Kudus? And how is the tradition of *Rebo Wekasan* taken into account from the perspective of 'urf?

### **Method**

In order to understand the practice of *Rebo Wekasan* in Kudus, this article applies an anthropological perspective of the belief and then analyzes it from the perspective of *ushul fiqh*, mainly 'urf concept. The basic framework of anthropological research is descriptive—instead of normative—based on local practice (data from location) while finding out the relationship among domains and comparing inter-region. Anthropological research is meant to interpret religion by seeing the existing religious practices in social life. Religion as a belief cannot be studied because it is abstract but religion as an actualization, in form of social and cultural behavior, is otherwise.<sup>8</sup>

The data collection was proceeded amid the pandemic, making the *Rebo Wekasan* ritual not the same as in previous years. In this article, the practice of *Rebo Wekasan* in 2021 was observed. In order to have a deeper understanding of the practice, pictures, and newspaper articles of the practice of *Rebo Wekasan* in 2018-2019 are also collected. These documents provide a better understanding on how is the "normal" practice of *Rebo Wekasan* in Kudus before the pandemic. In addition to observation and documentation, several informants were interviewed. They are the caretaker of the mosque, the committee of *Rebo wekasan*, village officials, and visitors.

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<sup>8</sup> Pebri Yanasari, 'Pendekatan Antropologi Dalam Penelitian Agama Bagi Sosial Worker', *Empower: Jurnal Pengembangan Masyarakat Islam* 4, no. 2 (Desember 2019): 230.

## Discussion and Result

### *Rebo Wekasan* in Indonesian Muslim Societies

The practice of *Rebo Wekasan* is widely known among Javanese Muslims and has been researched from various perspectives and areas. Sa'adah, for instance, describes the practice of *Rebo Wekasan* in Gresik, where Muslims eat *ketupat* (sticky rice dumpling), and drink Safar water.<sup>9</sup> In Jember, people perform the prayer of *tolak bala* and drink blessing-infused water.<sup>10</sup> Instead of drinking blessing-infused water, people in Tegal gather in the river to have mass bathing. They also perform *tolak bala* prayer and do *ziarah kubur* (visiting ancestors' graves). Uniquely, there is also a shadow puppet show celebrating *Rebo Wekasan* in Tegal.<sup>11</sup> The significance of blessing-infused water in commemorating the last Wednesday of Safar is also mentioned in the research conducted among Muslim societies in Bandung<sup>12</sup>, Cilacap<sup>13</sup>, Pandeglang<sup>14</sup>, and Tondano<sup>15</sup>. In other places, water has not become an important aspect of *Rebo Wekasan*, such as in *Lebak*<sup>16</sup> and *Cirebon*.<sup>17</sup>

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<sup>9</sup> Nur Sa'adah, 'Makna Tradisi Rebo Wekaan Menurut Masyarakat Desa Suci, Manyar, Gresik Studi Teologi' (Skripsi, IAIN Surabaya, 2011).

<sup>10</sup> Umi Nuriyatur Rohmah, 'Penggunaan Ayat-Ayat al-Quran Dalam Ritual Rebo Wekasan Studi Living Quran Di Desa Sukoreno Kecamatan Kalisat Kabupaten Jember' (Skripsi, UIN Sunan Kalijaga Yogyakarta, 2014); Nazar Noordin Latif, Sutjipto, and Sumarjono, 'Tradisi Rebo Wekasan Pada Masyarakat Desa Gambiran, Kecamatan Kalisat, Kabupaten Jember Tahun 2000-2014', in *Artikel Ilmiah Mahasiswa Prodi Pendidikan Sejarah* (Jember: Jurusan IPS FKIP Universitas Jember, 2014).

<sup>11</sup> Ahmad Nurozi, 'Rebo Wekasan Dalam Ranah Sosial Keagamaan Di Kabupaten Tegal Jawa Tengah (Analisis Terhadap Rebo Wekasan Di Desa Sitanjung Lebaksiu', *An-Nuha* 3, no. 1 (July 2016): 7.

<sup>12</sup> Wawang Nurhayati, 'Makna Simbolik Dalam Tradisi Rebo Wekasan Studi Deskriptif Di Desa Laksana Kecamatan Ibun, Kabupaten Bandung, Jawa Barat' (Skripsi, UIN Sunan Gunung Djati Bandung, 2018).

<sup>13</sup> Mutingatul Khoeroh, 'Sejarah Dan Makna Tradisi Rebo Wekasan Di Desa Banjarsari, Kecamatan Nusawungu, Cilacap' (Skripsi, IAIN Purwokerto, 2019).

<sup>14</sup> Dede Nur Afiah, 'Ritual Perayaan Rebo Kasan Desa Girijaya Kecamatan Saketi Kabupaten Pandenglang Provinsi Banten' (Skripsi, UIN Syarif Hidayatullah Jakarta, 2018).

<sup>15</sup> Nurul H. Mutmainah, Yusno Abdullah Otto, and Hadirman, 'Tradisi Rebo Kasan Di Kampung Jawa Tondano Kabupaten Minahasa', *Jinnsa Journal Interdisipliner Sosiologi Agama* 2, no. 1 (2021).

<sup>16</sup> Weny Widyawati Bastaman and Fitria Dewi Fortuna, 'Posisi Penganan Ketupat Dalam Prosesi Upacara Tradisi Rebo Wekasan Di Desa Cikulur, Lebak, Banten Tahun 1980-2016', *Bihari: Pendidikan Sejarah Dan Ilmu Sejarah* 2, no. 1 (2019).

Among others, the tradition of *Rebo Wekasan* across Indonesia can exist because of some following factors: *First*, it has become a part of the custom that people keep doing time by time. *Second*, the belief is based on: (a) a hadith narrated by al-Baihaqi about the acceptance of prayer on Wednesday after the sunset,<sup>18</sup> (b) narration that activities starting on Wednesday will incur perfect results, including planting trees that will grow fruits,<sup>19</sup> (c) a hadith mentioned that Allah created light on Wednesday.<sup>20</sup> *Third*, it is in line with Islamic teaching about *du'a*/prayer, *salat*, and charity. *Fourth*, it becomes a means for strengthening interaction among people in this individualistic era.

*Rebo Wekasan*, furthermore, is also sourced from several other references. A hadith in the book titled *Kanz al-Najah wa al-Surur* implied that the practice closely relates to a view of Jahiliyah Arabic society which made an analogy on *Safar* month as a starving snake ready to prey on humans so that the month was regarded to contain many calamities.<sup>21</sup> However, the narration chain (transmission) of the hadith is mentioned as weak so Imam al-Sakhawi used a compromising method in understanding the hadiths related to the calamities in *Safar* month. He came to a conclusion that unluckiness can possibly happen anytime and the misfortune in *Safar* month only applies to those who believe it.<sup>22</sup>

Likely, Farida<sup>23</sup> found that the hadith about the downfall of calamities as many as 320.000 on the fourth Wednesday of *Safar* month had been criticized for two reasons. *First*, its content (*matn*) tends to be *mubham* (unclear) even *majhul* (closed/blocked) because it does not mention any more authoritative reference. *Second*, it is contradictory to another hadith narrated by Affan, Salim ibn Hayyan,

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<sup>17</sup> Siti Nurjannah, 'Living Hadis: Tradisi Rebo Wekasan Di Pondok Pesantren MQHS Al-Kamaliyah Babakan Ciwaringin Cirebon', *Diya Al-Afkar* 5, no. 1 (June 2017).

<sup>18</sup> Al-Baihaqi, *Shu'ab al-Ima* (Beirut, Lebanon: Dar al-Fikr, 2012), 3591.

<sup>19</sup> Ad-Dailami, *Sunan Ad-Dailami* (Aleppo: Maktabah Isa al-Bab al-Halabi, n.d.), 5479.

<sup>20</sup> al-Bukhori, *Shahih Al-Bukhori*, 4997.

<sup>21</sup> Abdul Hamid, *Kanz Al-Najah Wa al-Surur Fi al-Ad'iyyah al-Ma'thurah Allati Tashrah al-Sudur*, 108.

<sup>22</sup> Al-Sakhawi, *Al-Maqasid al-Hasanah* (Beirut: Dar al-Fikr, 2009), 943.

<sup>23</sup> Umma Farida, 'Rebo Wekasan Menurut Perspektif KH Abdul Hamid Dalam *Kanz Al-Najah Wa al-Surur*'.

Sa'id ibn Mina which narrated that Abu Hurairah stated that Prophet Muhammad said "no infectious diseases, no bad luck forecast, no pesky owls, and no bad luck in Safar month."<sup>24</sup>

On the other hand, *Rebo Wekasan* is one of the clearest proofs of acculturation between local custom and Islam in a way to pray to God for *tolak balak* (keeping away the catastrophe). It develops quite well among different areas in Indonesia along with the social dynamics in the respective tribes. However, the well-maintained typical thing is the frame and value of Islam beyond the tradition, such as praying in the Islamic way and making *kenduri* (giving charity in form of food, rice, and instant side dishes) or *selamatan* (thanksgiving). Table 1 shows various ritual practices conducted by Muslim in Indonesia on the last Wednesday of *Safar*.

Table 1  
Ritual Practice of *Rebo Wekasan* in Different Areas

Region	Ritual Practices
<b>Banjarsari Village, Nusawungu Sub-district, Cilacap Regency, Central Java</b> <sup>25</sup>	Conducting <i>mutlak</i> prayer ( <i>salat mutlak</i> ) of 4 <i>rekaat</i> , drinking water from the well which has been given <i>rajah</i> (special writing in <i>pegon</i> (letter) of Javanese believed to be the prayer), and giving charity.
<b>Sitanjung Village, Lebaksiu Sub-District, Tegal, Central Java</b> <sup>26</sup>	Conducting <i>sunnah</i> prayer, visiting one another, taking a bath of <i>Safar</i> in a river, and holding a <i>Wayang Kulit</i> (shadoq puppet) show.
<b>Kampung Sangkan, Laksana Village, Sub-</b>	Bringing <i>nasi tumpeng</i> (festival cone rice) to the village mosque; <i>rajah</i> or <i>jimat</i> (amulet)

<sup>24</sup> al Bukhori, *Shahih Al-Bukhori*, 476.

<sup>25</sup> Mutingatul Khoeroh, 'Sejarah Dan Makna Tradisi Rebo Wekasan Di Desa Banjarsari, Kecamatan Nusawungu, Cilacap'.

<sup>26</sup> Ahmad Nurozi, 'Rebo Wekasan Dalam Ranah Sosial Keagamaan Di Kabupaten Tegal Jawa Tengah (Analisis Terhadap Rebo Wekasan Di Desa Sitanjung Lebaksiu'.

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<b>district of Ibum, Bandung Regency, West Java</b> <sup>27</sup>	from the local religious leader with special prayers, and conducting <i>sunnah</i> prayer.
<b>Suci Village, Manyar Sub-district, Gresik Regency of East Java</b> <sup>28</sup>	Reciting the Holy Quran, <i>istighosah</i> (prayer together), reciting <i>selawat nabi</i> accompanied by <i>banjarin</i> (rebana/ Islamic tambourine), doing prayer, eating <i>nasi tumpeng</i> , and <i>ketupat</i> , and drinking special water.
<b>Gambiran Village, Kalisat Sub-district, Jember Regency, East Java</b> <sup>29</sup>	Conducting <i>shalat li daf'il bala'</i> (calamity repelling prayer), drinking water of <i>azimat</i> (amulet), and <i>sedekahan</i> (charity)
<b>Sukoreno Village, Kalisat Sub-district, Jember Regency, East Java</b> <sup>30</sup>	Drinking the amulet water, performing <i>shalat talak balak</i> (calamity repelling prayer) by reciting certain verses every <i>rakaat</i> (streak) of the prayer after reciting <i>Surah</i> al-Fatihah ( <i>Surah</i> al-Kautsar, al-Ikhlās, al-Falaq, and an-Nas).
<b>Girijaya Village, Saketi Sub-District, Pandeglang Regency, Province of Banten</b> <sup>31</sup>	Performing prayer, taking a bath of Safar, and climbing Mount Pulosari.
<b>Kampung Bahbul Pasir, Cikulir Village, Lebak Sub-district, Lebak</b>	Going to the village mosque or <i>musholla</i> , bringing <i>ketupat</i> as a medium for <i>tolak balak</i> (refusing calamities) performing <i>shalat Rebo</i>

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<sup>27</sup> Wawang Nurhayati, 'Makna Simbolik Dalam Tradisi Rebo Wekasan Studi Deskriptif Di Desa Laksana Kecamatan Ibum, Kabupaten Bandung, Jawa Barat'.

<sup>28</sup> Nur Sa'adah, 'Makna Tradisi Rebo Wekaan Menurut Masyarakat Desa Suci, Manyar, Gresik Studi Teologi'.

<sup>29</sup> Nazar Noordin Latif, Sutjipto, and Sumarjono, 'Tradisi Rebo Wekasan Pada Masyarakat Desa Gambiran, Kecamatan Kalisat, Kabupaten Jember Tahun 2000-2014'.

<sup>30</sup> Umi Nuriyatur Rohmah, 'Penggunaan Ayat-Ayat al-Quran Dalam Ritual Rebo Wekasan Studi Living Quran Di Desa Sukoreno Kecamatan Kalisat Kabupaten Jember'.

<sup>31</sup> Dede Nur Afiah, 'Ritual Perayaan Rebo Kasan Desa Girijaya Kecamatan Saketi Kabupaten Pandenglang Provinsi Banten'.

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<b>Regency, Province of Banten<sup>32</sup></b>	<i>Wekasan</i> (refusing calamities congregationally), holding <i>istighosah</i> (congregational prayer), <i>tahlil</i> , reciting al-Quran (surah Yasin), reciting <i>shalawat</i> , and making the prayer (du'a)
<b>Air Anyir Village, Merawang Sub-District, Bangka Regency, Province of Kepulauan Bangka Belitung<sup>33</sup></b>	Starting with <i>azan</i> (summon of prayer), dipping the <i>wafaq</i> ( <i>jimat</i> , <i>raja</i> , talisman) into the water and drinking it, performing congregational prayer, and removing the wrap of long <i>ketupat</i> (a symbol of throwing disease away) then eating them together in the mosque.
<b>Kampung Jawa Tondano (Jaton), Minahasa, Regency of North Sulawesi<sup>34</sup></b>	Reciting <i>dzikir</i> , <i>shalawat</i> , verses of Holy Qur'an, and making <i>rano dungo</i> (prayer water) in the vessel. Filling the vessel with water and paper with a prayer written on it by the <i>imam</i> (leader) of the Mosque. The water, which has been melted down with the ink/prayer with the prayer written on it, is shared to the villagers

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### **Rebo Wekasan and Banyu Salamun in Kudus, Central Java**

'*Wekasan*' in *Rebo Wekasan* is believed to derive from Arabic word 'hasan' which means 'baik (good)'. '*Kasan*', on the other hand, stands for Javanese '*pungkasan*' which means the last. The word '*kasan*' to the residents in Kudus does not relate to the name Hasan-Husein, a son of Ali, grandson of Prophet Muhammad.

Typically, *Rebo Wekasan* ceremony is held in a mosque. After *maghrib* (sunset) prayer, in many mosques and *musholla* in Kudus,

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<sup>32</sup> Weny Widyawati Bastaman and Fitria Dewi Fortuna, 'Posisi Penganan Ketupat Dalam Prosesi Upacara Tradisi Rebo Wekasan Di Desa Cikulur, Lebak, Banten Tahun 1980-2016'.

<sup>33</sup> Fallenia Faithan, 'Tradisi Upacara Tolak Bala Rebo Kasan: Sejarah, Makna, Dan Fungsi' (Skripsi, Universitas Sanata Dharma Yogyakarta, 2018).

<sup>34</sup> Nurul H. Mutmainah, Yusno Abdullah Otto, and Hadirman, 'Tradisi Rebo Kasan Di Kampung Jawa Tondano Kabupaten Minahasa'.

Muslims recite *zikir*, *shalawat*, and Holy Quran verses. In Jepang village, Kudus, for instance, the ceremony usually takes place in Al Makmur mosque. It is a historical mosque believed to be built by a *wali* (saint). The mosque is famous for its Hindu temple-shaped gate and an old well where *salamun* water is taken from. In other mosques, people bring their bottled water for *Rebo Wekasan*. Furthermore, *Rebo Wekasan* in Kudus becomes both religious and tourism agenda. There was a carnival as the opening of *Rebo Wekasan* ritual. People from Mejobo village and its surrounding come to receive a few amounts of *salamun* water which were already given *do'a keselamatan* (safety prayer) by religious leaders.

There is also a *kirab* (carnival parade) starting at Mejobo village hall to al Makmur Mosque. The participants parade the *gentong* (a soil pitcher to store water) and the *gunungan* (cone-shaped pile) which are made of fruit and traditional foods, including *lentog* (a large rice cake) and vegetables such as beans, eggplant, kale, corn, carrot, and chili. After the parade is done, people run after the *gunungan* and fought over all the things on it. In 2016, there were 8.000 plastic bags of *salamun* water distributed to people attending the event.

*Rebo Wekasan* is a tradition that has been done for generations by Mejobo residents, especially around Al Makmur mosque neighborhood. It is deemed not contrary to Islamic sharia because it has the basis in the *kitab kuning* (classical Islamic manuscript). People believe that the purpose of *Rebo Wekasan* tradition is to be aware of disasters and to get closer to God by praying. In addition, it has an economic impact on people around the mosque as they can introduce UMKM (*Usaha Mikro, Kecil, dan Menengah*; micro, small and medium enterprises) and home industry products at the exhibition as a series of *Rebo Wekasan* celebration. The local community also earns income from the management of visitors' motorcycle parking. Children enjoy the excitement of *Rebo Wekasan* procession because many foods and toy vendors are available.

During this pandemic, *Rebo Wekasan* is held by implementing the health protocols, which are keeping social distancing, physical distancing, and using masks all the time. Thus, people are suggested not to come to the mosque and as a consequence, the committee delivers the water to houses surrounding the mosque. It means that only people who live around the mosque are able to drink the water.

In Kudus, the ritual of *Rebo Wekasan* is typically done through 4 steps, i.e., (1) reciting *do'a*, (2) drinking *salamun* water (3) making *selamatan*, i.e., rice and side dish brought to the worship place to be shared to the attending people, (4) performing *salat sunah* of four *rokaat*<sup>35</sup> and reciting the special prayer.

Participants of *Rebo Wekasan* are having a diverse understanding concerning the event. Rohimah, a resident, routinely follows the tradition of *Rebo Wekasan* because she follows *dawuh* (teachings) of *kyai* (religious figure) who says that *Rebo Wekasan* is a good custom. *Rebo Wekasan* is believed to be one of the efforts to resuscitate oneself from any disaster (*tolak balak*) as the verses of the holy Quran are recited during the practice as well as the prayer of *tolak balak*. Rohimah said that she regularly attends *Rebo Wekasan* in order to get *salamun* water. She believes that by consuming *salamun* water, her family is safe from any disaster and is always healthy, even during the Covid-19 pandemic.<sup>36</sup>

Meanwhile, according to Suhban, one of the youths who serve on the organizing committee, *Rebo Wekasan* is a routine agenda of Al Makmur mosque that needs to be preserved. He believes that this tradition is in accordance with Islamic teachings because it contains congregated prayers and advice given by Islamic scholars/*kyai* so that citizens are wished to be safe from any illness and disaster. He added that the common prayer, typically called *doa tolak balak*, is a reminder of the existence of God who has the power to bring down disasters and provide salvation to humans.<sup>37</sup>

Similar to the other regions, some participants of *Rebo Wekasan* in Kudus perceive it more as an entertainment event instead of religious practice. Religious teachings that lie behind the ritual seem to be long forgotten.<sup>38</sup> Some participants even intended to watch the parade rather than join the *do'a* dan *sunnah* prayer. The parade itself has become an entertainment for them. They also like to jostle along the route of the parade. It looks quite contrast with a few *jamaah* who

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<sup>35</sup> Mohammad Dzofir, 'Agama Dan Tradisi Lokal Studi Atas Pemaknaan Tradisi Rebo Wekasan Di Desa Jepang, Mejobo, Kudus', *Jurnal Ijtimaia* 1, no. 1 (2017).

<sup>36</sup> Interview Rohimah, 2021

<sup>37</sup> Interview Subhan, 2021

<sup>38</sup> Karel A. Steenbrink, *Beberapa Aspek Tentang Islam Di Indonesia Abad Ke-19*, 187.

join *maghrib* prayer and recite *doa tolak balak*. It seems, furthermore, that some people come to the event merely to get the *salamun water*. Thus, *doa tolak balak* as the core of *Rebo Wekasan* has been replaced by *salamun water*.

The core ritual of *Rebo Wekasan* in Kudus is indeed *air salamun* (*salamun water*) taken and distributed during the event. It is believed to bring blessing when consumed. Because of its historical value and perception of blessing within, the well where the water is taken from is still maintained today so that it never drains even in the drought. This proves the existence of a mythological awareness of the objects amid controversial connotations as *klenik* (superstition) and *khurafat*. According to a *marbot* or *takmir* (mosque committee) of Al Makmur mosque, the source of water that was latter turned into *salamun water* is taken from a well which is believed to be a relic left by a disciple of Sunan Kudus. People believe that by consuming the water, they will always be healthy, be cured of diseases, and have their intelligence increased.<sup>39</sup> Notably, water has an essential meaning for Javanese Muslims as a medium of purification and cleaning up bad deeds.<sup>40</sup> Water, for instance, is often prescribed by traditional curer (*dhukun*) who puts a prayer or magical formula on it to cure illness.<sup>41</sup>

### Rebu Wekasan from the Perspective of 'Urf

The culturalized habit by society is typically called custom or '*urf*. Etymologically, the word '*urf* means an activity that is continuously done.<sup>42</sup> It also means good.<sup>43</sup> In the aspect of terminology, '*urf* means tradition which has been long culturalized in form of utterance or activities.<sup>44</sup> '*Urf* can also be interpreted as a

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<sup>39</sup> Interview with Fakhur Rohman Aziz, a caretaker (*marbot*) of al Makmur Mosque, November 13<sup>th</sup>, 2019

<sup>40</sup> P. B. R. Carey, *The Power of Prophecy: Prince Dipanagara and the End of an Old Order in Java, 1785-1855* (Leiden, The Netherlands: Brill, 2015), 579-80, <https://doi.org/10.1163/9789067183031>.

<sup>41</sup> ROBERT WESSING, 'Porous Boundaries: Addressing Calamities in East Java, Indonesia', *Bijdragen Tot de Taal-, Land- En Volkenkunde* 166, no. 1 (2010): 49-82.

<sup>42</sup> Teungku Muhammad Hasbi Ash Shiedieqy, *Pengantar Hukum Islam* (Semarang: Toha Putra Group, 1994), 226.

<sup>43</sup> Nasrun Haroen, *Ushul Fiqh I*, Cet. II (Jakarta: Wacana Ilmu, 1997), 137.

<sup>44</sup> Abdul Wahhab Khallaf, *Ilmu Ushul Fiqh*, Terjemah Moh Zuhri dan Ahmad Qarib (Semarang: Toha Putra Group, 1994), 13.

sustainable habit which becomes popular.<sup>45</sup> The word *adat* in Indonesian is derived from the Arabic word *adat* which means custom or habit. It is a synonymous of '*urf*. Both *adat* and '*urf* is the result of a long-standing convention which is adopted or adapted to circumstances and has been broadly followed.<sup>46</sup>

*Ushul fiqh* scholars study '*urf* to find ways to resolve legal issues in society considering that '*urf* is a routine and popular habit. In addition, '*urf* has a positive response from *fiqh* experts.<sup>47</sup> Ibn 'Ābidīn, for instance, argued that '*urf* could modify the result of *ijtihād* whether it is a general or a specific. He linked '*urf* to *ḍarūra* (emergency condition) concept by suggesting that once something is widely practiced, prohibiting it would lead to various problems.<sup>48</sup> Custom has always been important for the accommodation of legal rulings down to various local contexts.<sup>49</sup>

Imam Hanafi, meanwhile, uses '*urf* in arguing for the law (*hujjah*) when it is not stated in the Qur'an, al-hadith, *ijma'* (scholars' consensus), and *istihsan* (the assumption of the goodness of something).<sup>50</sup> Imam Malik even left *qiyas* (a method of formulating law based on analogy) if it was against '*urf*. Both Imam Shafi'i and Hanabilah scholars accept '*urf* if it does not conflict with the Qur'anic and hadith texts.<sup>51</sup> Accordingly, Jamal al-Din 'Atiyyah has suggested a new scheme for conventional *usul al-fiqh* in which he proposed to divide the sources of shari'a into five main headings. One of them is the existing conditions or status quo, in so far as it bears harmony

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<sup>45</sup> Wahbah az-Zuhaili, *Ushul Fiqh Al-Islam*, Cet. 2, vol. Juz 2 (Beirut: Dar al-Fikr, 1986), 828.

<sup>46</sup> Reuben Levy, *The Social Structure of Islam* (Cambridge: Cambridge University Press, 1957), 248.

<sup>47</sup> Mustafa Ibrahim al-Zilmu, *Dilalat Al-Nusyusy Wa Turuq Istimbath al-Ahkam Fi Daw Ushul al-Fiqh al-Islami*. (Baghdad: Matba'ah As'ad, 1983), 59.

<sup>48</sup> Ahmed Fekry Ibrahim, 'Customary Practices as Exigencies in Islamic Law: Between a Source of Law and a Legal Maxim', *Oriens* 46, no. 1-2 (1 January 2018): 222-61, <https://doi.org/10.1163/18778372-04601007>.

<sup>49</sup> Burhan al-Din Ibrahim Ibn Ali Ibn Abi al-Qasim Ibn Muhammad Ibn Farhun, *Tabsirat Al-Hukkam Fi al-Aqdiyah Wa Manahij al-Ahkam* (Cairo: Maktabah al Kulliyat al-Azhariyyah, 1986), 382-85.

<sup>50</sup> Teungku Muhammad Hasbi Ash Shiedieqy, *Pokok-Pokok Pegangan Imam Mazhab* (Semarang: Pustaka Rizki Putra, 1997), 174-75.

<sup>51</sup> Narul Rusli, *Konsep Ijtihad Al-Syaukani Relevansi Bagi Pembaruan Hukum Islam Di Indonesia* (Jakarta: Logos Wacana Ilmu, 1999), 34-35.

with other preceding sources, and this includes custom and presumption of continuity (*istishāb*.) The theory of *ijtihād*, for him, is in fact explicit on the requirement of familiarity with the custom of society and people in which the *mujtahid* lives.<sup>52</sup>

Based on the interpretation of al-Baqarah: 233, '*urf*' is commonly used as a legal basis (*hujjah*) so that Islamic scholars formulate a legal maxim reads *al-'adah muhakkamah* which means that habits can become one of the law sources. Its derivative legal maxim implies that any legal stipulation coming from '*urf*' is considered the same as other stipulations coming from textual provisions (*ats-tsabit bil 'urf ka tsabit bi an-Nash*).<sup>53</sup> Another basic for considering '*urf*' as a part of Islamic legal source is a sentence of Al-Hajj: 78 which reads; *wa ma ja'ala 'alaikum fiddiin man haraj*. Leaving the well-maintained habit is considered as *haraj* (difficulties).

Attributing the force of law to custom is inevitable in Islam owing to the nature of Islamic law. Islamic law deals with universal mankind as well as the norms of each ethnic group which differ from each other considerably. Moreover, because custom is intuitively rooted in people's lives and their utterances, taking their customs into account is inevitable.<sup>54</sup> In this specific context, '*urf*' is approved to be a part of Islamic law source because it represents public reason. Any activity is considered good if people or the public sense say it is good.<sup>55</sup>

Reinterpretation of '*urf*' is therefore important to strengthen and enrich Islamic law so that it can continue to play important role in the future. Strengthening '*urf*' may be conducted through improving the way of understanding and using the verses of the Holy Qur'an and hadith as the foundation of Islamic law. One should also affirm

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<sup>52</sup> Mohammad Hashim Kamali, 'Methodological Issues in Islamic Jurisprudence', *Arab Law Quarterly* 11, no. 1 (1996): 3-33, <https://doi.org/10.2307/3381731>.

<sup>53</sup> Sulfan Wandu, 'Eksistensi 'Urf Dan Adat Kebiasaan Sebagai Dalil Fiqh', *Samara: Jurnal Hukum Keluarga Dan Hukum Islam* 2, no. 1 (2018): 191-92.

<sup>54</sup> Luqman Zakariyah, 'Custom and Society in Islamic Criminal Law: A Critical Appraisal of the Maxim "al-'Ādah Muḥakkamah" (Custom Is Authoritative) and Its Sisters in Islamic Legal Procedures', *Arab Law Quarterly* 26, no. 1 (2012): 75-97, <https://doi.org/10.1163/157302512X612159>.

<sup>55</sup> M. Noor Harisudin, "'Urf Sebagai Sumber Hukum Islam (Fiqh) Nusantara', *Al-Fikr* 20, no. 1 (2016): 66-86.

the position of *fiqh* as the result of historical and cultural interpretation as well as negotiation between texts of Islamic teaching and local practices.<sup>56</sup>

'*Urf* itself can be classified into three types, i.e., '*urf shahih* (good habit), '*urf fasid* (bad habit), and '*urf* based on place or local '*urf* (local based habit). *Rebo Wekasan* tradition in Kudus is deemed to fulfill criteria of '*urf sahih* because it consists of good activities such as reciting 30 *juz* (chapter) of the Holy Qur'an, performing uncompulsory prayers, and reciting the specific prayer. The practices are also believed to be in accordance with the essence of prayers mentioned at QS. Ali Imran: 8 and Hud: 47. Local people also like to relate the practice to the notion that calamities can happen anytime as QS. al-Baqarah: 155-157 shows and therefore, they anticipate it by reciting specific prayers reciprocally, performing uncompulsory prayer, and giving charity.

In this talk, however, not every habit can be called '*urf*. There are some requirements to fulfill, namely: (1) reasonably logical and in line with common public opinion; (2) becomes a tradition with a wide scope, (3) has been traditionalized in a long term, (4) no excessive requirement, (5) not contradictory with *nash* or religious text.<sup>57</sup> Other considerations also matters, namely (1) not causing any *mafsadat* (damage), complication and not eliminating any positive value; (2) culturalized; (3) not applicable to any obligatory worship.<sup>58</sup> On a stricter criteria, a habit can be deemed as '*urf* as long as it covers the following; (1) it exists continuously, (2) it has become a long term preserved tradition, (3) it is well known by the residents, (4) it is not contradictory with any *shar'i* postulate.<sup>59</sup>

The practice of *Rebo Wekasan* in Kudus, in short words, is deemed not to violate any *sharia* teaching since the rituals and the whole procedure and steps within are conducted in accordance with

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<sup>56</sup> Ach Maimun, 'Memperkuat 'Urf Dalam Pengembangan Hukum Islam', *Al Ihkam: Jurnal Hukum & Pranata Sosial* 12, no. 1 (1 August 2017): 22-41, <https://doi.org/10.19105/al-ihkam.v12i1.1188>.

<sup>57</sup> Sabhi Mahmassani, *Filsafat Hukum Dalam Islam*, 262.

<sup>58</sup> A Djazuli and Nurot Aen, *Ushul Fiqh Metodologi Hukum Islam* (Jakarta: RajaGrafindo Persada, 2000), 187.

<sup>59</sup> Mustafa Ibrahim al-Zilmu, *Dilalat Al-Nusyusy Wa Turuq Istimbath al-Ahkam Fi Daw Ushul al-Fiqh al-Islami.*, 58.

*sharia* teaching. It ranges from praying, reciting the Holy Qur'an and specific prayers, to giving *shadaqah* (voluntary charity). Thus, it is qualified to be considered as '*urf shahih*' because it does not fall out of any Islamic teaching and therefore should not be classified as '*urf fasid*'.

More particularly, For Kudus people, *Rebo Wekasan* is categorized as '*urf sahih*' for several following reasons: 1) There is no specific argument and information on the meaning, history, procedures, and impact of *Rebo Wekasan* tradition found in either the Qur'an or Sunnah, 2) The whole aspects at the practice of *Rebo Wekasan* do not contradict to the Qur'anic teaching. Nor does it cause any difficulties and hardship. 3) The community knows about the meaning beyond every procedure and step of the tradition.

In another category, '*urf*' based on its scope consists of *al-'urf al-'am* (traditions in general) and *al-'urf al-khos* (traditions in certain areas). *Rebo Wekasan* in Kudus covers both *al-'urf 'am* and '*urf khos*'. It qualifies the former because it is routinely carried out in various regions as mentioned above. Meanwhile, it becomes a part of the latter because of some distinctive features, particularly using old well water to drink in order to avoid calamity or disease after being prayed for together). The well is believed as a relic of Sunan Kudus which lies in Wali Al-Makmur Mosque. The use of this old well water is unique and distinctive compared to that of other areas.

In the context of Indonesia, '*urf*' (local practices) becomes an important aspect of the forming of the Indonesian *madhhab* (school) of law. Local practices of the community refer to daily practice habits that are continuously practiced by the society. However, local norms are not always compatible with the ideal values of Islamic *sharia*.<sup>60</sup> Sometimes, there found resistance toward local traditions and cultures. Various tensions and conflicts between Islam versus *Kejawen* (Javanese culture) were unavoidable and even became a major feature of the development of Islam in Java, especially in the 19th century or the time of Dutch colonialism. In fact, outside the five pillars of Islam, Muslim also performs other costume rituals to express their identity.

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<sup>60</sup> Agus Moh Najib, 'Reestablishing Indonesian Madhhab: 'Urf and the Contribution of Intellectualism', *Al-Jami'ah: Journal of Islamic Studies* 58, no. 1 (1 July 2020): 171-208, <https://doi.org/10.14421/ajis.2020.581.171-208>.

Some custom rituals have unclear origins but are tolerated or well maintained all of these practices have Islamic values.<sup>61</sup>

At the next development, acculturation of Javanese belief and Islamic teaching occurred in dialogical patterns. Both built good communication in the form of socio-religious structures.<sup>62</sup> This is in accordance with Taufik Abdullah's opinion that acculturation of Javanese and Islamic culture in Java has taken a place in the form of dialogue.<sup>63</sup> It is well supported by the assumption that Islam is not anti-culture. Instead, it straightens out and directs any cultural practice to the right path according to humanity and piety values. Islam does encourage any culture and traditions beneficial for human life to exist continually and dynamically. Therefore, Islamic jurists propose the rule which gives chance to the living tradition to be one of the Islamic law sources in the process of formulating Islamic law and is called '*urf*'.<sup>64</sup>

In the case of *Rebo Wekasan*, the Imam of Al Makmur mosque claimed that the hadith mentioned in *Mujarobat* is a scriptural base to accept the practice *Rebo Wekasan*. However, he admitted that most Kudus people do not know about the origin or related information. They simply followed what their ancestors did in welcoming the last Wednesday of the Safar month. In fact, according to him, some local customs match precisely with *fiqh* while others only match the ethical or values emanating from Islam, and *Rebo Wekasan* is a part of the latter category.<sup>65</sup>

Moreover, Islam also gives space to non-ritual worship (*ghairu mahdhoh*) which provides much chance for the merging with any tradition as an effort to maintain as well strengthen the tradition while preserving religious values embedded within. Muslims can also take

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<sup>61</sup> A. G. Muhaimin, 'The Ritual Practice', in *The Islamic Traditions of Cirebon, Ibadat and Adat Among Javanese Muslims* (ANU Press, 2006), 115-58, <http://www.jstor.org/stable/j.ctt2jbkqk.11>.

<sup>62</sup> Umi Sumbulah, 'Islam Jawa Dan Akulturasi Budaya: Karakteristik, Variasi Dan Ketaatan Ekspresif', *El-HARAKAH (TERAKREDITASI)*, 1 December 2012, <https://doi.org/10.18860/el.v0i0.2191>.

<sup>63</sup> Taufik Abdullah, 'Islam Dan Pembentukan Tradisi Di Asia Tenggara', in *Tradisi Dan Kebangkitan Islam Di Asia Tenggara* (Jakarta: LP3ES, 1989), 58-99.

<sup>64</sup> Idris Mahmudi, 'Islam, Budaya Gotong Royong Dan Kearifan Lokal', *Jurnal Penelitian IPTEKS* 2, no. 2 (2017): 138-47.

<sup>65</sup> Interview with Abdul Aziz, imam of al Makmur mosque, October 6<sup>th</sup>, 2021

much benefit from preserving the local customs through the concept of 'urf at least from three aspects: (1) broader chance to have nativization (*pribumisasi*) on very rich culture which has been deeply rooted among society (2) wider opportunity to do 'negotiation' by embedding Islamic values into traditions that potentially contain elements of deviation and (3) bigger possibility to discard any traditions that are principally contrary to the Islamic teachings as a form of "Islamization". In short word, efforts to merge Islam with living local culture can avoid any conflicts between established religious teachings and deeply rooted traditions that are actually very unfavorable.<sup>66</sup>

### **Conclusion**

Like in some other areas in Indonesia, *Rebo Wekasan* is a local practice of Kudus people on the last Wednesday of *Safar* month. It is related to a belief that it is the day of calamities so people are supposed to pray in order to be safe from any casualties. One of the important aspects of *Rebo Wekasan* in Kudus is getting *air salamun* (water *salamun*) which is believed to help people stay healthy. The water is taken from the old well and given *du'a* (prayers) led by religious leaders. *Zikir* and *wirid* were chanted during the ritual of *Rebo Wekasan* as well as specific *du'a* called *tolak balak*. In the perspective of Islamic jurisprudence, *Rebo Wekasan* can be categorized as the good 'urf. Local people believe that this tradition is in line with shari'ah according to Islamic scholars in their classical Islamic books. It is also deemed fulfilling the requirements of 'urf *shahih* instead of 'urf *fasid* and the local 'urf.

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<sup>66</sup> Ach Maimun, 'Memperkuat 'Urf Dalam Pengembangan Hukum Islam'.

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## **Criticizing the Verdict of 18/JN/2016/MS.MBO of Mahkamah Syar'iyah Meulaboh Aceh on Sexual Abuse against Children from the Perspective of Restorative Justice**

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**Abstract:**

This article is based on a critical review of the judgment in the Indonesian Islamic Court, known publicly as Mahkamah Syar'iyah, case number 18/JN/2016/MS.MBO. The tribunal process in the Indonesian legal system should present clear evidence that convinces all involved parties, including for sexual abuse cases. Unfortunately, during the tribunal process of the case, the judges had neither asked the prosecutor to show the evidence nor asked how the case had happened. After asking a few simple questions, judges have made consideration and finally a judgment. Two main research questions will be answered in this article; how is restorative justice applied for law-breaking cases in Acehese view? Why has the punishment been imposed by the Mahkamah Syar'iyah in its legal considerations for the case? This article has used the black-letter law method and interview. The research results have indicated that the case seems weird and does not provide the due process of law principle. The tribunal procedure has not provided any sufficient evidence before the verdict had been decided. The connection between both evidence and judicial facts, in this case, is very blurred. The witness was simply based on the victim's evidence.

**Keywords:**

Sexual Abuse; Mahkamah Syar'iyah; Province of Aceh;  
Restorative Justice

**Abstrak:**

Penelitian ini berawal dari tinjauan kritis terhadap putusan Pengadilan Agama Indonesia—yang secara luas dikenal sebagai Mahkamah Syar'iyah—untuk kasus nomor 18/JN/2016/MS.MBO. Proses peradilan dalam sistem hukum Indonesia seharusnya menghadirkan bukti-bukti yang jelas untuk meyakinkan semua pihak yang terlibat, termasuk dalam kasus pelecehan seksual. Namun, dalam proses persidangan kasus ini, hakim tidak meminta jaksa untuk menunjukkan bukti atau menanyakan bagaimana kasus tersebut bisa terjadi. Setelah mengajukan beberapa pertanyaan sederhana, hakim membuat pertimbangan dan akhirnya memberikan putusan hukum. Ada dua permasalahan utama yang akan dijawab dalam artikel penelitian ini: Dalam pandangan masyarakat

Aceh, cara-cara seperti apa yang sebaiknya ditempuh agar keadilan restoratif dapat diwujudkan pada kasus pelanggaran hukum? Apa pertimbangan hukum di balik keputusan Mahkamah Syar'iyah menjatuhkan hukuman terhadap pelaku kasus tersebut? Artikel ini menggunakan metode black-letter law dan wawancara. Hasil penelitian ini menunjukkan bahwa kasus tersebut tidak wajar dan tidak sesuai dengan asas *due process of law*. Pengadilan tiba-tiba memberikan putusan hukum padahal bukti yang disajikan belum cukup. Kaitan antara bukti dan fakta peradilan dalam kasus ini juga sangat kabur karena hanya mengandalkan kesaksian korban.

**Kata Kunci:**

Pelecehan seksual; Mahkamah Syar'iyah; Provinsi Aceh;  
Keadilan Restoratif

**Introduction**

This article criticizes the tribunal process of sexual abuse against a child judged by the Indonesian Islamic Court in Meulaboh-Aceh, Indonesia.<sup>1</sup> The case occurred in Nagan Raya District. The victim was a ten-year-old girl named Anggi who has been sexually abused by Indra Sadewa. She is a close friend of Indra Sadewa's daughter and used to visit Sadewa's house. Thus, the victim's parents did not worry about his daughter's habit to play with Sadewa's daughter in his house.

During the tribunal process, it has been revealed that on the day of the incident, Anggi played hide and seek with Sadewa's daughter. Unfortunately, Anggi stepped over Sadewa whilst he slept on the floor. Feeling furious, Sadewa then grabbed Anggi's hands and shut her mouth while sexually abusing her by fingering her female genital. After having *visum et repertum*, the medical team proved that Anggi's female genital had been sexually abused by Sadewa so the judges have proved him guilty. Unfortunately, Anggi has not been treated like a victim who deserves to receive restorative justice including trauma healing.

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<sup>1</sup>Judgement of Mahkamah Syar'iyah Meulaboh Nomor 18/JN/2016/MS\_Mbo

Islamic law should, in theory, be able to address a variety of views of punishment and sanctions in diverse legal theories, including certain cases that involve children.<sup>2</sup> The punishment stipulated in those Islamic bylaws is supposed to be more humanistic and respectful of human rights so that it can become a lesson for the perpetrators, victims, and community. It is also supposed to provide an opportunity for repentance. More specifically, the main aim of punishing on the perpetrator of a crime against children is to protect for children as the asset of the future. As such, the legal consideration of the judges should lead to enhanced protection for children.

In fact, Aceh has been implementing bylaws called the *Qanun Aceh* Number 7 of 2013 on the *Hukum Acara Jinayat* (Islamic Procedural Criminal Law) and *Qanun Aceh* No. 6 the year 2014 on the *Hukum Jinayat* (Islamic Criminal Law). However, Islamic law, on the other hand, is considered unable to answer a variety of cases occurring in the Islamic Court, including those that happen in Aceh. Moreover, those Aceh's Islamic law has often been unfamiliar to Moslem itself. This condition has disabled Moslem to provide clear answers on the new type of cases, including sexual abuse against children.

Relating to children, Acehnese people of the past and nowadays have shown the notion of unpleasant treatments in different ways. For example, the traditional community of Aceh has perceptions that forcing children to learn the Al Qur'an in an early age is an absolute responsibility and the rights of parents. Although this perception recently has been classified as family violence, parents' perspective in fulfilling children's rights is still attached to that of community culture. In fact, protecting children is a natural and human process that every parent is obliged for.

In the context of law cases on children, the concept of restorative justice has now become a trend and popular term, especially among academics, law enforcers, and law practitioners. It is seen as a paradigm or approach to handling crime or criminal actions committed by both children and adults. As a paradigm or approach, restorative justice is expected to serve as one of the alternative ways of

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<sup>2</sup> Nasimah Hussin, "An Islamic Perspective on Preventing Sexual Abuse Against Children," *IJUM Law Journal* 29, no. 1 (2021): 153-76.

dealing with crime or criminal cases. The priority is to restore the harmony of relationships between perpetrators and victims or their families. In some ways, it seems relevant to use for the crime against children.

Several previous researches had discussed the topics above. As for *Mahkamah Syari'iyah* (known as Islamic Court), Rosmawardani, for instance, had conducted significant research questioning the jurisdiction of the district court and *Mahkamah Syari'iyah*. Her finding shows that the jurisdictions of the district court and *Mahkamah Syar'iyah* have still overlapped, including in the case for a child sexual abuse. This issue furthermore creates legal ambiguity in the implementation of Islamic criminal law in Aceh.<sup>3</sup>

Butt, furthermore, has also insisted on a battle of three Indonesian courts, consisting of the Constitutional Court, District Court, and Supreme Court, on the case of adultery and same-sex intercourse. Butt has strongly disagreed with the Supreme Court that was considered not annulling the *Qanun Jinayat* established in Aceh.<sup>4</sup> Additionally, using the historical approach, Mawardi explained how imperialism has influenced the establishment of Islamic law in Indonesia and Malaysia. He stated that the Dutch had inclined to develop a legal system in Indonesia, including Islamic law. Similarly, British imperialism has also obstructed the law system of Malaysia using the common law system. However, day by day, as law scholars have arisen from both Indonesia and Malaysia, the colonial laws have slightly been annulled and replaced by new laws, such as the enactment of the law of Marriage no. 1/1974, the law of the Religious Judiciary no. 7/1989, and *Kompilasi Hukum Islam di Indonesia* (Compilation of Islamic Law in Indonesia) among others.<sup>5</sup>

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<sup>3</sup> Rosmawardani Muhammad, "Analysis Of Absolute Competence Of District Courts And Syari'ah Courts," *Petita: Jurnal Kajian Ilmu Hukum Dan Syariah* 5, no. 2 (2020): 145-49.

<sup>4</sup> Simon Butt, "Religious Conservatism, Islamic Criminal Law And The Judiciary In Indonesia: A Tale of Three Courts," *The Journal of Legal Pluralism and Unofficial Law* 50, no. 3 (2018): 402-34.

<sup>5</sup> 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): 1-24.

Regarding restorative justice, there are earlier researches that can be considered relevant to this article. Marshall, for example, stated that restorative justice has been defined as one of the most important novelties in the administration of criminal justice to have ascended in the contemporary era. From small-scale tentative early stages in the early 1970s, restorative justice had since grown up into a worldwide social program for change, embracing a variety of broad and peace-making practices in a varied range of situations. Although the story behind the emergence of the modern restorative justice programs is still questioned, there is a good purpose not to reduce the involvement of religious faith in the origin, theory, and exercise of restorative justice. In fact, Marshall also insisted that without the effect of core Christian principles and beliefs, the central doctrines of restorative justice might not arise with such simplicity and conviction.<sup>6</sup> In Aceh with Moslem as the majority, the values of Islam take into account in applying restorative justice.

Gude and Papic also insisted that restorative justice as a national policy is sometimes diminished by literature considering legal culture is an essential process in law enforcement. They identified restorative justice backgrounds that are deemed as representative of civil and common law legal systems respectively and equivalence with a case study belonging to the previous system. They furthermore argued that restorative justice practices are formed by the legal traditions, political practices, and criminal justice character of the system where they grow. Also, they proposed a method to transfer restorative justice practices based on comparative criminology, restorative justice traditions, and legal culture. Those are believed to create a theoretical role in the field as well as have practical consequences at the level of public policy design.<sup>7</sup>

However, Gang criticized restorative justice while stating that restorative justice as an answer to sexual violence remains to be subject to important criticism. To measure the evidence, they sought to evaluate and synthesize evaluations of restorative justice programs

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<sup>6</sup> Christopher D. Marshall, "Restorative Justice," in *Religion Matters* (Springer, 2020).

<sup>7</sup> Alejandra Díaz Gude and Iván Navarro Papic, "Restorative Justice And Legal Culture," *Criminology & Criminal Justice* 20, no. 1 (2020): 57-75.

for sexual and family violence crimes by conducting a methodical review of peer-reviewed literature. This shortage of evidence leaves them powerless to classify how best to achieve the goals for which programs were recognized and poses difficulties for policymakers. Additionally, they decide whether it is appropriate to publicize restorative justice objectives for sexual and domestic abuse. At last, they recommended that evaluations of restorative justice programs that admit sexual and family violence cases be shown as a substance of urgency.<sup>8</sup>

Based on the above explanation and previous research, we claim this article to possess a clear novelty and originality as indicated by the main research problems that had not been discussed previously. Been conducted a case study research from the *Mahkamah Syar'iyah* Meulaboh Aceh, there found no previous research discussing sexual abuse cases in this court. Meanwhile, two main questions that this article aims to discuss are; firstly, how is restorative justice for law-breaking cases in Acehnese view? Secondly, why has the punishment imposed by the *Mahkamah Syar'iyah* in its legal considerations for the case?

### **Method**

This article has used the black-letter law method. In this method, the authors focused on Aceh's Islamic law verdict from *Mahkamah Syar'iyah* Meulaboh Nomor 18/JN/2016/MS\_Mbo using a socio-legal approach in the Aceh context. The reason for using the black-letter law method is because the main object of research is the judgment itself contrasted to other government official letters. The verdict here serves as the primary data to analyze and to know how well the judges understand the procedural law on criminal cases against children. However, to get supporting data, the authors also conducted interview with prominent persons having knowledge background of this case, such as judges of Islamic courts.

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<sup>8</sup>Daye Gang, et al. "A Call For Evaluation Of Restorative Justice Programs," *Trauma, Violence, & Abuse* 22, no. 1 (2021): 186-90.

## Discussion and Result

### Restorative Justice for Law Violation Case in Acehnese View

Restorative justice in Acehnese culture has been established since long time ago even before the Dutch colonialization.<sup>9</sup> Acehnese culture has its terminologies regarding to restorative justice consisting of *dhiet*, *sayam*, and *suloh*. The word *dhiet* has been used for murder cases when a murderer replaces a damaged soul or body with treasure. Meanwhile, the word *sayam* has been used for mistreatment, the form of compensation in the form of assets given to the victim or his family, and the word *suloh* has been used for reconciliation among those who has conflict.<sup>10</sup> From the perspective of the living law of local wisdom, the Aceh community finds it a shock to the social system whenever the law is violated or a crime takes place.<sup>11</sup> Therefore, whenever the social system encounters a community shock caused by a *jinayat* case, the *adat* (customary) ruler takes intervention to maintain the stability of society.<sup>12</sup> One of the ways is by organizing

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<sup>9</sup> Syahrizal Abbas, *Mediasi dalam Hukum Syariah, Hukum Adat, dan Hukum Nasional* (Jakarta: Kencana, 2011); Muhammad Sahlan et al., "The Roles of Ulama in the Process of Post-Conflict Reconciliation in Aceh," *Society* 7, no. 2 (2019): 251-67. See also Goss and Andrew, "Mobile Warriors and Cosmopolitan Intellectuals: The Legacy of the Dutch Counterinsurgency in Colonial Aceh," 2011.

<sup>10</sup>Muhammad Natsir, "Perlindungan Hukum Terhadap Korban Penganiayaan Melalui Diyat Dan Sayam Pada Peradilan Adat Aceh," *Arena Hukum* 12, no. 1 (2019): 91-112; Herlambang P. Wiratraman, et al. "Taking Policy Seriously: What Should Indonesian Government Do To Strengthen Aceh Truth And Reconciliation Commission?," *Petita: Jurnal Kajian Ilmu Hukum Dan Syariah* 5, no. 1 (2020): 14-30.

<sup>11</sup>T. Nazaruddin, et al. "Legal Political of Aceh Sustainable Spatial Reconstruction Based on Local Wisdom of Mukim Customary Legal Community," *JL Pol'y & Globalization* 56 (2016): 69..

<sup>12</sup>Arfriani Maifizar, et al. "A Study of Cultural Understanding of the Peusijek Rituals among Acehnese," *Journal of Talent Development and Excellence* 12, no. 3 (2020): 2999-3008; Bustamam Ali and Wahyu Wiyani I. Made Weni, "The Peusijuek Tradition as a Social Communication Media in the People of Aceh, Indonesia," *International Journal of Advances in Scientific Research and Engineering* 6, no. 6 (2020): 7-19; Ito Takeshi, *The World Of The Adat Aceh: A Historical Study Of The Sultanate Of Aceh*, 1984.

a *kenduri* (congregational feasting).<sup>13</sup> This practice of feeding others and eating together intends to restore social harmony from a disturbance.

The pattern of settlement of various criminal cases within Acehese society still reflects the process and practice that have been undertaken and experienced by people in the past. Since a long time ago, the most influential aspect of Aceh's societal system has been inspired by Islamic values and this has become the basic principle that serves as the ideological foundation and then develops the religious life order of the majority of Aceh people. Thus, it is natural that the basic principle of dispute resolution in Aceh always puts forward Islamic values.<sup>14</sup>

The principle of respecting, rehabilitating, and compensating the victims is regulated by Islamic tenets and this has become the customary practice of the Acehese people. The emergence of the concept of restorative justice is apparently not novel. It has indeed almost been foreign to the present-time society regardless of its past-time victory.<sup>15</sup>

However, Aceh's restorative justice values seem to not have been well implemented in the tribunal process in the case of sexual abuses at *Mahkamah Syar'iyah* Meulaboh No. 18/JN/2016/MS\_Mbo. The judges should have decided the case using Aceh's restorative justice to protect the rights of the child as the victim. However, the judges only focused to punish the perpetrator without considering the psychological and physical impact suffered by the victim. In fact, Aceh's restorative justice should have also been implemented in both private and criminal law cases as an Acehese society does not distinguish between criminal and private law domains. Both are

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<sup>13</sup>Nina Suryana, Sufandi Iswanto, and Heri Fajri, "The Development of Audio-Visual Learning Media Based on Kenduri Laot Tradition for Students at SMA Plus Athiyah Banda Aceh City to Increase Character Values," *Briliant: Jurnal Riset Dan Konseptual* 6, no. 2 (2021): 261-76.

<sup>14</sup>Shane Joshua Barter, "Ulama, The State, & War: Community Islamic Leaders In The Aceh Conflict," *Contemporary Islam* 5, no. 1 (2011): 19-36..

<sup>15</sup>Takeshi, *The World Of The Adat Aceh: A Historical Study Of The Sultanate Of Aceh*.

supposed to be processed by Aceh's restorative justice involving multi parties.

However, involving multi parties in modern legal system cases is deemed to possibly create a serious problem so it has not provided any mechanism of handling criminal law cases through implementing multi parties approach.<sup>16</sup> Meanwhile, in the restorative justice of Acehese society, the goal of seeking mediation between parties is to humanize the justice system while creating justice that can respond to the demand of victims, perpetrators, and the community. Although there found no legal basis concerning a special formulation of regulations governing restorative justice, according to the theory of legal discovery, law enforcers' duties also include finding the living law within the society.

In this case, when the existing law (retributive justice) is considered unable to resolve the problems that inflict the victim, the study of social legal studies requires the apparatus not to remain silent or do nothing. Instead, they are required to try to find a way how to change the law and reinterpret it in order to create justice. It is important, therefore, to also put a restorative justice perspective ahead in handling the cases of child crime as well as a crime against children such as sexual abuse. Restorative justice can be offered as the main approach to seek the resolution towards the fulfillment of a prosecution-oriented demand to achieve a resolution beneficial to all parties.

Practically, there emerge many cases of sexual harassment crimes against children. Victims who are sexually abused can experience very serious losses both physically and psychologically.<sup>17</sup> It could be the damage to genital organs such as tearing of the hymen,

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<sup>16</sup> Tody Sasmitha Jiwa Utama, "Between Adat Law and Living Law: An Illusion of Customary Law Incorporation into Indonesia Penal System," *Journal of Legal Pluralism and Unofficial Law* 53, no. 2 (2021): 269-89; Simon Butt, "Religious Conservatism, Islamic Criminal Law and the Judiciary in Indonesia: A Tale of Three Courts," *Journal of Legal Pluralism and Unofficial Law* 50, no. 3 (2018): 402-34.

<sup>17</sup> Dawn Crosswhite and Johnny S. Kim, "Child Sexual Abuse," in *Solution-Focused Brief Therapy with Clients Managing Trauma*, 2018, 177-88, <https://doi.org/10.1093/oso/9780190678784.003.0011>.

fainting, or even death. They are also likely infected by any sexually transmitted diseases and endure unwanted pregnancies as well as severe traumatism. It is also possible for them to experience post-incident psychological shocks followed by some physical reactions.<sup>18</sup> Unfortunately, these legal considerations had never been disentangled in the verdict of the *Mahkamah Syar'iyah* Meulaboh Number 18/JN/ 2016/MS\_Mbo.

Furthermore, the healing process for traumatism requires support from various parties. Multi-dimensional supports are needed mainly to raise the spirit of the victims and to help them able to accept what has happened. In fact, the criminal law has formulated the provisions for sexual harassment crime. Local legal policies about children have also existed in the community for a long time ago. The community also plays important role in children's surveillance outside homes, while parents supervise their children at home. The children's conduct receives proper observation both from the community and respective parents either at home or away from home.

Therefore, in the tribunal process, although judges find some obstacles in carrying out their duties and authority in dealing with sexual criminal action against children or other indecency cases, they are still required to examine the rights of the victimized child in formulating their decision. At least, they should consider other additional legal instruments, including restorative justice. Moreover, the Indonesian Supreme Court 2011 had produced some the landmark decisions that were subsequently transformed into the jurisprudence of the Supreme Court. One of them is Decision Number 1600 K/Pid/2009 containing the restorative justice considerations. This is also reinforced and highlighted in the decision of the Supreme Court of the Republic of Indonesia Number 096/KMA/ SK/VII/ 2011 on the Jurisprudence Release Team of the Supreme Court of the Republic of Indonesia regarding the Norms of Legal Formulation into Landmark Decision on July 1<sup>st</sup>, 2011. The decision turned out to be

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<sup>18</sup>Faradilla Fadlia and Ismar Ramadani, "The Qanun Jinayat Discriminates Against Women (Victims of Rape) in Aceh, Indonesia," *Journal of Southeast Asian Human Rights* 2, no. 2 (December 2018): 448, <https://doi.org/10.19184/jseahr.v2i2.8358>.

interesting because the judges have applied the concept of restorative justice to their verdicts before the provisions were formulated in the legislation and law. Therefore, the provision has certainly laid down the groundwork for the judges to use restorative justice.

However, again, the verdict of the *Mahkamah Syar'iyah* Meulaboh Number 18/JN/2016/MS\_Mbo has not led to seeking a settlement through restorative justice even though its provisions have already existed since the issuance of legislation on Judicial Power. *Mahkamah Syar'iyah* Meulaboh handled the case as usual and treated it as common case without searching the real background and detailed information regarding the case. They simply took the testimony of the victim and the witnesses--who unfortunately did not personally see or hear the incident --into their consideration. Seemingly, the judges were reluctant to apply Acehneses' restorative justice because they are not accustomed to using it.

In fact, a judge with a case with unexisted or less obvious provisions and sanctioning has a way of exploring them through legal discovery.<sup>19</sup> Such notion is also provided in Article 5 paragraph (1) of Law Number 48 the year 2009 regarding Judicial Power which reads: "Judges and Constitutional Court Judges are obliged to explore, follow and understand the values of law and the sense of justice living in the society." Thus, the judges can provide fair justice by digging into the case in detail, including seeking the resolution through restorative justice.

The opportunity to impose punishment through restorative justice is actually widely open. Moreover, restorative justice is well known in the traditional law system of Aceh so all criminal cases - let alone private cases--were usually settled through reconciliation and justice. Another way to reconcile the relationship between the perpetrator, victim, and family of both is through various peace-building ceremonials.<sup>20</sup> This ranges from putting an obligation on the perpetrator (the perpetrator's family) to doing something specific such

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<sup>19</sup>Mukti Arto, *Pembaharuan Hukum Islam Melalui Putusan Hakim* (Yogyakarta: Pustaka Pelajar, 2015).

<sup>20</sup> M. Ridha, *Peumat Jaroe: Proses Mediasi Menuju Harmoni Dalam Masyarakat Aceh* (Banda Aceh: Lhee Sagoe Press and CV. Meuseuraya, 2017).

as stating a plea of guilt, saying an apology, paying compensation or submitting a particular object, and financing a trauma healing.

### **Punishment Imposed by the Mahkamah Syar'iyah and its Legal Considerations**

The Mahkamah Syar'iyah Meulaboh decided on the first-level sentence of 30 (thirty) months imprisonment for the perpetrator according to Article 47, Aceh's *Qanun* Number 6 of 2014 on the *Jinayat* Law. The judges' legal considerations have come to a decision through the verdict of the Mahkamah Syar'iyah Meulaboh Number 18 JN/2016/MS-Mbo on October 18, 2016. The verdict, unfortunately, has not considered any rehabilitation and restitution for the victim, including trauma healing as a part of restorative justice.<sup>21</sup> The imprisonment has only repeated the pattern of punishment introduced by the Dutch colonial in Indonesia. In pre-colonial times, Muslim throughout the archipelagic regions did not recognize the sort of imprisonment sentence.<sup>22</sup> These archipelagicians understood religious teaching as a religiously-inspired common sense living in the community of that time. All crimes and law violations were prosecuted and legally handled through reconciliation. This shows how religion and tradition had been an integral part of society's behavior.<sup>23</sup>

The Aceh *Qanun* Number 6 the year 2014 on *Qanun of Jinayat*, meanwhile, is a law produced by the Government of Aceh as a special province of Indonesia.<sup>24</sup> Thus, it can be said that Aceh has involved

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<sup>21</sup> Zulfa Hanum, "Pengawasan Pelaksanaan 'Uqūbah Cambuk Di Kota Banda Aceh (Analisis Pasal 262 Ayat (2) Qanun Hukum Acara Jinayat Tentang Pelaksanaan 'Uqūbah Cambuk Tidak Boleh Dihadiri Oleh Anak-Anak Di Bawah Umur 18 Tahun)" (UIN Ar-Raniry Banda Aceh, 2017).

<sup>22</sup> Boma Wira Gumilar, Gunarto Gunarto, and Akhmad Khisni, "Reconstruction of Life Imprisonment in Prison System in Indonesia," *Jurnal Daulat Hukum* 2, no. 4 (2020): 499; Christina Maya Indah Susilowati, "Sentencing of Minor Offences in Indonesia: Policy, Practice, and Reform," *International Journal of Criminology and Sociology* 10 (2021): 778-83.

<sup>23</sup> A Hamid Sarong, *Mahkamah Syar'iyah Aceh: Lintasan Sejarah Dan Eksistensinya* (Banda Aceh: Global Institute, 2012).

<sup>24</sup> Amsori Amsori and Jailani Jailani, "Legislasi Qanun Jinayat Aceh Dalam Sistem Hukum Nasional," *Ar Raniry: International Journal of Islamic*

the state as the guardian in providing protection to its people through upholding the law of *fiqh* (Islamic jurisprudence).<sup>25</sup> It also means that *fiqh* law-directly or indirectly-has become a legal material in Indonesia. The mission to increase the number of Islamic legal content to be incorporated into the national law lies at the hands of the *fiqh* expert. With their serious efforts and relevant competencies, they have a wide chance to identify concepts of Islamic jurisprudence compatible with the legal basis to be incorporated into Indonesia's legal system.<sup>26</sup>

Cammack and Feener have stated that Aceh people have agreed to the imposition of caning punishment is a falsification to Islamic law that had been implemented since 2003.<sup>27</sup> So far, the punishment prescribed by national law is considered unable to reduce the rate of crime in society.<sup>28</sup> Therefore, to grant the judge some ease, the *Qanun* Aceh Number 6 of 2014 provides three forms of punishment; (1) caning; (2), imprisonment; (3), compensation or fine. All these three forms of punishment can be imposed on the judges' choice, chiefly compensation or fine for cases relating to restorative justice. Article 46 of the *Qanun* reads "Whomsoever intentionally

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*Studies* 4, no. 2 (2018): 221; Al Yasa' Abubakar M. Daud Yoesoef, "Qanun Sebagai Peraturan Pelaksanaan Otonomi Khusus Di Provinsi Nanggroe Aceh Darussalam," *Jurnal Legislasi Indonesia* 1, no. 3 (2004): 15-30.

<sup>25</sup>Afridawati, "History, Typology, and Implementation of Islamic Law in Indonesia: Combination of Sharia and Fiqh or the Result of Historical Evolution?," *Al-Risalah* 21, no. 1 (2021): 33-47; Abdul Syatar, "Transformation Of Fiqh In The Forms Of Hajj And Zakat Legislation,"; Zahlul Pasha Karim, "Relasi FPI Dengan Dayah Dalam Penegakan Syari'at Islam Di Aceh," *Jurnal Sosiologi Agama Indonesia* 1, no. 3 (2020): 228-37.

<sup>26</sup> Nyak Fadhlullah, "Metode Perumusan Qanun Jinayah Aceh : Kajian Terhadap Pasal 33 Tentang Zina," *In Right (Jurnal Agama Dan Hak Azazi Manusia)* 7, no. 1 (2017): 16-40.

<sup>27</sup> Cammack, M. E. and R. M Feener, "The Islamic Legal System in Indonesia," *Pacific Rim Law & Policy Journal* 21, no. 13 (2012); Nurrohman Syarif and Marzuki Wahid, "Politik Formalisasi Syari'at Islam Dan Fundamentalisme: Kasus Nanggroe Aceh Darussalam," *ISTIQRRA: Jurnal Penelitian Direktorat Perguruan Tinggi Agama Islam* 01, no. 01 (2018): 45-74.

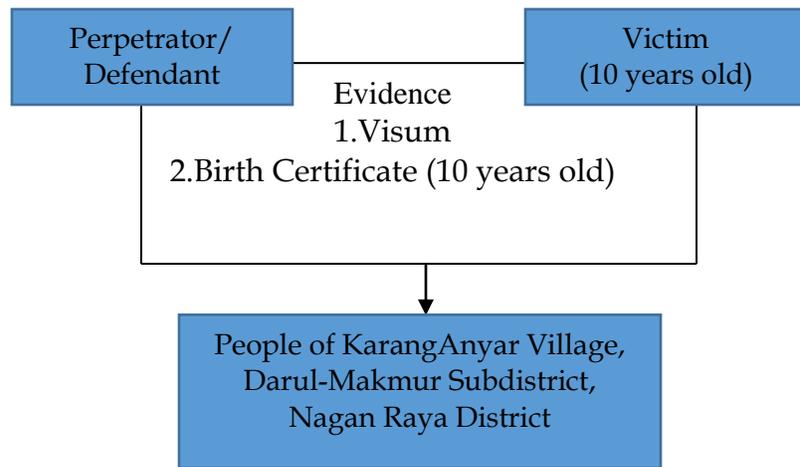
<sup>28</sup> Dinas Syariat Islam Aceh, *Kajian Syariat Islam Terhadap Tingkat Kriminalitas Pasca Penerapan Qanun Jinayat* (Banda Aceh: Dinas Syariat Islam Aceh, 2017).

performs a *jarimah* (forbidden activities) of sexual harassment is sanctionable with a maximum *uqubat ta'zir* (a punishment for those who break the law which is not mentioned in Al Qur'an/Hadits) of 45 (forty-five) time whipping or a maximum fine of 450 (four hundred and fifty) grams of pure gold, or a maximum imprisonment of 45 months. Meanwhile, Article 47 stipulates that "whomsoever deliberately performs a sexual harassment as meant in Article 46 against a child is threatened with a maximum *ta'zir* of 90 (ninety) times of caning or a maximum fine of 900 (nine hundred) grams of pure gold or maximum imprisonment of 90 (ninety) months. It is understandable, therefore, to find the punishment doubled when the victim comes from children.

The judges' judicial consideration regarding the criteria of *jinayat* action became the primary basis for seeking punishment formula. The following criteria must be fulfilled, namely: *First*, subjective, i.e person (someone) who can be accountable for legal action (bearer of rights and responsibilities). This means that the person can be held criminally liable. The identity has also been matched and clarified against the witnesses. *Second*, intentional. This element is actually a criterion recognized in crime/delict in general. *Third*, the element of the case or sexual harassment in this context; contains the defendant's confession in whatsoever wordings he/she expresses. The defendant, for instance, must acknowledge that he hit the victim on the breast and genital organs. *Fourth*, target, namely against an under-aged person/victim. Islam teaches that a mere confession is not enough. Confession must be proven with other evidence and followed by an explanation about the perpetrator's knowledge regarding the legal offense he/she has committed. Diagram 1 below shows the restorative justice framework

Subjective Substance: 1. someone who commits the action and is the subject of Law Intention

Objective Substance: 1. *Jarimah* of Indecency Action in public  
With an objection



Verification:

- Witness :



Two witnesses related to the perpetrator



Two witnesses related to the victim

-  
repertum

Evidence : 1. Visum et  
2. Birth Certificate

Diagram 1. Restorative Justice Framework

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The 24-page verdict issued by the *Mahkamah Syar'iyah* Meulaboh Number 18/JN/2016 MS Mbo dated on October 18, 2016, mentions the term of sexual harassment 33 times.<sup>29</sup> On the

<sup>29</sup> Mahkamah Syar'iyah Aceh, "Putusan Mahkamah Syar'iyah Aceh No: 11/JN/2016/MS-ACEH,"

consideration page, the verdict also mentions Law No. 11/2006 on the Governing of Aceh as one of its referred legal standings. This indicates that the *Mahkamah Syar'iyah* Meulaboh has the authority to persecute the crime with the authority granted by the government of the Republic of Indonesia instead of the Aceh's *Qanun* not showing the value of justices. The punishment on the basis of Aceh's *Qanun* (bylaw) should also be proven to respect humanity.<sup>30</sup> Islam greatly respects human rights and therefore, both Indonesian law and the spirit of Islam should have been reflected in the verdict because Islam provides neat and humane guidance in all matters including in the law of war, let alone in the matters of punishment.

Additionally, the verdict of the *Mahkamah Syar'iyah* Meulaboh does not mention Islamic shari'ah as a living law in Aceh's society. In fact, it is not sufficient for sharia law to merely rely on the *qanuns*. The *qanun* comes to exist under the support of the community's aspirations. Aspirations of the society are a part of living law leading to the laws that society wishes to manifest. The verdict which serves as the object of this study also mentions the wish of the defendant to prefer the punishment of caning instead of imprisonment. If the caning is categorized as a violation of human rights, why had the defendant preferred to choose to can? It can certainly be understood that in this context, caning is better or more acceptable than imprisonment.

Another thing is about the judges who did not consider the fact that the victim was a child who happened to be playing and then stepped over the perpetrator at the time of the incident. This ponders a question on whether the action can be categorized as delinquency.<sup>31</sup> Alignments will degrade the quality of the decision. Although the judges have absolute power to impose the judgment as they wish since they serve as the authorized agents to produce a fair decision, they still should provide clear and transparent considerations. For example, the judges could have named the victim as a part of a

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<sup>30</sup> Mohd. Hisyam Mohd. Kamal, "Human Rights Perspectives On Issues In The Implementation Of Islamic Criminal Law In Malaysia," *Petita : Jurnal Kajian Ilmu Hukum Dan Syariah* Volume 4, no. Nomor 1 (2019).

<sup>31</sup> Wagianti Soetodjo, *Hukum Pidana Anak* (Bandung: Refika Aditama, 2006).

vulnerable group. When she was playing too joyfully, she could possibly be unaware of whether or not others were disturbed. This is actually an important point to consider in the decision.

Out of legal considerations, there are five items taken by the judges from the prosecutors' attention. The five items are considered very important: (1) the prosecutor proposed 30 months imprisonment minus the period of detention. On the contrary, the defendant did not request for imprisonment reduction. Instead, he requested for being whipped or caned. (2) The panel of judges mentioned in their legal considerations that the defendant was not accompanied by a lawyer. This shows his acceptance of whatsoever judgment to be imposed on him and that he did not have a will to defend himself excessively. (3) The panel of judges indicated that the defendant had violated Article 47 of the *Qanun* Number 6 of 2014 regarding *Jinayat* Law. (4) The defendant accepted the contents of the indictment which shows that he had understood it and did not file any objection. (5) The panel of judges showed the evidence submitted by the Public Prosecutor (*Jaksa Penuntut Umum*) to the audience.

The judge must also have set the verdict as clear and transparent as possible because clarity and transparency are the hallmarks of Islamic law. Another judge's legal consideration that needs highlighting is the mentioning of the word 'child'. In their legal consideration, the judges repeat the word 39 times. This indicates that the Panel of Judges put the child as a high priority.<sup>32</sup> It shows how the judges paid very much attention to the need of child to gain multiple protections. However, the verdict did not mention or direct any legal attention to what the child must obtain as a victim, including restorative justice. If the law had been directed towards restorative justice, there would have been a signal to encourage legal thinking for seeking compensation against a crime experienced by the victim.

In fact, such an arrangement is not new to the legal community in Indonesia and the restorative justice law has been recognized in the customary law system. Therefore, restorative justice should be considered a legal obligation amongst judges so that they can explore

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<sup>32</sup> Indonesia's Supreme Court Regulation Number 3 Year 2017 Regarding the Guidelines on Prosecuting Women Cases before the Law.

the laws living in the society. Responding to this case, the head of *Mahkamah Syari'iyah* Aceh has stated as follows:

In the name of justice, the judges should rely on the verdict not only on the text of bylaws but also on the victim's side. The victim is a child who must be strongly protected as an affected victim of sexual crime and needs trauma healing for her future life. Punishing the perpetrator without giving rehabilitation to the child is a serious injustice.<sup>33</sup>

It can be inferred that the judges in that time only considered sentencing the punishment to the perpetrator without considering the victim's rights and needs to fulfill. This tribunal fact seemingly happened because the mindset of judges had concentrated only on the text of bylaws instead of the context of a case that should protect a child with a vulnerable position as a sexual abuse victim.

### **Conclusion**

The Verdict of 18/JN/2016/MS.MBO decided by *Mahkamah Syar'iyah* Meulaboh Aceh on sexual abuse against children has not indicated a value of justice, chiefly from the perspective of restorative justice. The panel of judges has only pursued the target of imposing punishment on perpetrator without considering the values of justice for the victims such as rehabilitation and trauma healing. In showing evidence, the judge's verification was carried out with a lack of judicial evidence as shown by persecutors. The *visum et repertum* report used for core evidence has not even been shown from the beginning until the end of the tribunal process. The distinctive opinion of the head judge and chairman should have been examined more deeply an appealing level. The case has also seemed a weird occasion because the displayed evidence during the tribunal process are inadequate for deciding a proper verdict as a final judgment. Judges have only relied on the evidence the testimony of the perpetrator's neighbor, who was not in the location whilst the case

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<sup>33</sup> Interviewed with Rosmawardhani, Head Mahkamah Syar'iyah Aceh (2021).

happened. The poor evidence in the tribunal process has indicated that a judgment has justice abused.

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## **The Dynamic of Worship and Responses of Nahdlatul Ulama Members in Bantul, Yogyakarta, Toward the Indonesian Council of Ulama's Fatwa on the Worship During the Covid-19 Pandemic**

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### **Abstract:**

This research explains the dynamic of worship in Bantul, Yogyakarta, as well as Nahdlatul Ulama (NU) members' responses toward the fatwa of the Indonesian Council of Ulama (MUI) on the worship during the Covid-19 pandemic. MUI's fatwa rose different responses ranging from obedience, resistance and ignorance. We argue that these differences stem from different characteristics of religiosity. Looking closely at this, this research studies the map of responses of NU people by focusing on the questions: (1) How was dynamic of worship during the pandemic in Bantul? (2) How did Bantul people

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respond to the MUI's fatwa? (3) What factors formed the differences in their responses? The data are collected through interviews with seven informants, observation, and focused-group discussions. Through sociological analysis referring to obedience and disobedience theory, we found that the unprecedented dynamic was found in the worship during the pandemic, such as at Pleret, in the case of several Friday prayer spots in one single village. Meanwhile, the NU members' responses to the fatwa into two patterns: reception and resistance. The forms of reception are (1) accommodation by observing all advice described in the fatwa and (2) contextualization by adjusting the advice in the fatwa to suit the local needs. It came from the structural influence of the organization of NU and people literacy. Meanwhile, the forms of resistance are (1) reactive-declarative refusal and (2) passive-permissive refusal. These patterns are influenced by a religiously fatalistic perspective and by the figures' reluctance to prohibit people from carrying out worship normally as before the pandemic.

**Keywords:**

Responses to Fatwa; Indonesian Council of Ulama (MUI);  
Covid -19 Pandemic; NU Members; Bantul

**Abstrak:**

Penelitian ini menjelaskan dinamika ibadah serta tanggapan warga Nahdlatul Ulama (NU) di Kabupaten Bantul, Yogyakarta, terhadap fatwa Majelis Ulama Indonesia (MUI) tentang ibadah selama pandemi Covid-19. Fatwa MUI tersebut menuai respon berbeda dari umat Islam Indonesia. Ada yang mematuhi, menentang, hingga mengabaikan. Kami berpendapat bahwa tanggapan yang berbeda ini berasal dari karakteristik religiusitas yang berbeda. Mencermati persoalan tersebut, penelitian ini mengkaji peta respon masyarakat yang berafiliasi dengan NU di Kabupaten Bantul dengan fokus pada pertanyaan: (1) Bagaimana dinamika ibadah selama pandemi di Bantul? (2) Bagaimana tanggapan masyarakat Bantul terhadap fatwa MUI tersebut? (3) Faktor apa saja yang membentuk perbedaan tanggapan mereka? Pengumpulan data dilakukan melalui wawancara dengan tujuh informan, observasi, dan diskusi kelompok terfokus. Melalui analisis sosiologis yang

mengacu pada teori ketaatan dan ketidaktaatan, ditemukan dinamika yang belum pernah terjadi sebelumnya dalam ibadah selama pandemi, semisal di Pleret, Bantul, dalam kasus adanya beberapa kelompok salat Jumat dalam satu desa. Sementara itu, respon anggota NU terhadap fatwa tersebut tampak dalam dua pola: penerimaan dan perlawanan. Bentuk pola penerimaan adalah (1) akomodasi dengan memperhatikan semua nasehat yang tertuang dalam fatwa dan (2) kontekstualisasi dengan menyesuaikan nasehat-nasehat dalam fatwa dengan kebutuhan lokal. Itu berasal dari pengaruh struktural organisasi NU dan literasi masyarakat. Sementara bentuk pola resistensinya adalah (1) penolakan reaktif-deklaratif dan (2) penolakan pasif-permisif. Pola-pola tersebut dipengaruhi oleh cara pandang keagamaan yang fatalistik dan keengganan tokoh dalam mencegah masyarakat melakukan peribadahan secara normal seperti sebelum pandemi.

#### **Kata Kunci:**

Respons Terhadap Fatwa; Majelis Ulama Indonesia (MUI);  
Pandemi COVID-19; Warga NU; Bantul

#### **Introduction**

Indonesian Council of Ulama (Majelis Ulama Indonesia, hereafter MUI) issued a fatwa on worship during the COVID-19 pandemic, namely fatwa number 14 (2020) on the worship during the Pandemic.<sup>1</sup> Normatively, MUI's fatwa has the religious moral ground and emotional bond that can be trusted and obeyed by the society for conducting worship. However, empirically, the fatwa got various responses. Some people support it and perform worship at their respective houses.<sup>2</sup> Others ignore it and choose to follow the appeal

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<sup>1</sup> MUI, "FATWA NO 14 TAHUN 2020 - PENYELENGGARAAN IBADAH DALAM SITUASI TERJADI WABAH COVID-19 - Majelis Ulama Indonesia," *MUI Digital*, last modified 2020, accessed May 26, 2022, <https://mui.or.id/berita/27674/fatwa-penyelenggaraan-ibadah-dalam-situasi-terjadi-wabah-covid-19/>.

<sup>2</sup> Muhamad Agus Mushodiq and Ali Imron, "Peran Majelis Ulama Indonesia Dalam Mitigasi Pandemi Covid-19 (Tinjauan Tindakan Sosial Dan

for figures that are followed in religious matters. This, among others, can be observed in Bantul, Yogyakarta where portrait of diversity is painted with a majority affiliated with Nahdlatul Ulama (NU).

The difference in the people's response toward the MUI's fatwa on the worship during the pandemic, sociologically, is to be expected. From a juridical point of view, the nature of MUI's fatwa is merely a moral appeal without any legal strength which otherwise should have been able to force people despite the fact that the fatwa is meant for the common good and in accordance with the medical requirements and political will.<sup>3</sup> However, in reality, the Moslem community prefers diverse views of Islamic Law for conducting worship during the pandemic.<sup>4</sup>

The disobedience of some Moslem communities against the MUI's fatwa is probably caused by several factors. *Firstly*, the MUI's fatwa that does not have a link to the task force such as the other Positive Laws creates an ambiguity in implementation. Johar's work<sup>5</sup> explains that the MUI's fatwa does not have the coercive legal force because its content and material are merely opinions without any legal force. Including in Moslem life, the MUI's fatwa is not binding and cannot be implemented in a coercive way, moreover serving as the only ground for sentence in a criminal action.<sup>6</sup>

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Dominasi Kekuasaan Max Weber)," *SALAM: Jurnal Sosial dan Budaya Syar-i* 7, no. 5 (2020).

<sup>3</sup> M. Asrorun Ni'am Sholeh, "Towards a Progressive Fatwa: MUI's Response to the COVID-19 Pandemic," *AHKAM: Jurnal Ilmu Syariah* 20, no. 2 (2020).

<sup>4</sup> Tri Bunga Firma, "Normal Baru Dalam Praktik Keagamaan Islam Pada Masa Pandemi Di Kota Padang," *Al-Adyan: Journal of Religious Studies* 1, no. 2 (2020): 144-162.

<sup>5</sup> Fitri Johar, "Kekuatan Hukum Fatwa Majelis Ulama Indonesia (MUI) Dari Perspektif Peraturan Perundang-Undangan Di Indonesia," *Badilag*, last modified 2019, accessed May 26, 2022, <https://badilag.mahkamahagung.go.id/artikel/publikasi/artikel/kekuatan-hukum-fatwa-majelis-ulama-indonesia-mui-dari-perspektif-peraturan-perundang-undangan-di-indonesia-oleh-al-fitri-johar-s-ag-s-h-m-h-i-11-1>.

<sup>6</sup> Diana Mutia Habibaty, "Peranan Fatwa Dewan Syariah Nasional-Majelis Ulama Indonesia Terhadap Hukum Positif Indonesia," *Jurnal Legislasi*

In Sarip's work,<sup>7</sup> the position of the MUI's fatwa in the legal system can only be put at the same level as the opinion of experts in law, language, and religion. The fatwa serves only as one of the normative grounds that can be referred to by the Moslem as well as binding religiously, as long as the differences between *mazhab* (school) do not exist among *ummah* (Islamic community).<sup>8</sup> In this context, it is understandable that the MUI's fatwa serves only as a moral appeal which legal position is *mubah* (allowable).<sup>9</sup>

Secondly, MUI consists of various Islamic affiliated associations whose identity is different from each other.<sup>10</sup> Didin Saepudin<sup>11</sup> analyses MUI that it often accommodates the government's policy and responds to discussed religious matters among the people. However, with such diverse personnel in the MUI, Didin questions if MUI is indeed an organization that represents the public interest in responding to religious matters.

Nevertheless, to some community members, the MUI's fatwa may impact their religious views and attitude so that they obey the appeal despite its weak authority. Syahputra's writing is a bibliographical footprint in analyzing the role that a MUI's fatwa played in Tjahaya Basuki Purnama case.<sup>12</sup> Akmaliah also explains

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*Indonesia* 14, no. 4 (2017), <https://ejournal.peraturan.go.id/index.php/jli/article/view/125>.

<sup>7</sup> Elya Kusuma Dewi Sarip, Diana Fitriana, "Mendudukan Fatwa MUI Sebagai Doktrin Perundang-Undangan," *Jurnal Legislasi Indonesia* 16, no. 3 (2019).

<sup>8</sup> . Iswahyudi, "MUI Dan Nalar Fatwa-Fatwa Eksklusif," *Al-Ihkam: Jurnal Hukum & Pranata Sosial* 11, no. 2 (2017): 361.

<sup>9</sup> Heri Firmansyah, "Qawaid Fiqhiyyah Dalam Fatwa Majelis Ulama Indonesia," *Al-Qadha: Jurnal Hukum Islam dan Perundang-Undangan* 6, no. 2 (2019).

<sup>10</sup> Tim Sekretariat MUI, *20 Tahun Majelis Ulama Indonesia* (Jakarta: Sekretaris MUI, 1995).

<sup>11</sup> Didin Saepudin, "Kedudukan Majelis Ulama Indonesia Di Tengah Umat Islam Dan Pemerintah" (Universitas Indonesia, 1987).

<sup>12</sup> Iswandi Syahputra, "Activities on Twitter and the 212 Defend Islam Rally through the Perspective of the Indonesian Ulema Council," *Al-Jami'ah* 58, no. 2 (2020): 323-354.

MUI's involvement in "Indonesian X Factor" in 2013 and its support to Fatin Shidqia who later became the winner of the contest.<sup>13</sup>

In a similar context, MUI's fatwa has a considerable influence on some people in the Ahmadiyah case. Alnizar explains that the MUI's fatwa in 2015 exerted an influence on some people that they attacked *jamaah* of Ahmadiyah.<sup>14</sup> Meanwhile, Hasyim analyses the influence of MUI's fatwa on religious diversity in Indonesia for which MUI considers some of them heresy.<sup>15</sup> MUI's fatwa has an impact on the attitude of persecution and hate narrative directed toward groups with different religious views or schools.

The diversity in the societal attitudes and views toward MUI's fatwa, sociologically, intersects with the diversity among the Moslem communities in conducting the MUI's fatwa on worship limitation during the pandemic. To prove the diverse responses among the Moslem community during the pandemic, we outline the research findings on the Moslem community's responses toward the MUI's fatwa in Bantul, Yogyakarta. The problems studied are of three aspects, namely: (1) how was the dynamic of worship during the pandemic in Bantul? (2) how Bantul people respond to the MUI's fatwa on the governance of worship during the pandemic and (3) what factors are in play in the differences of response?

## **Method**

The current paper is written based on field research whose objectives are to examine, study, and observe the responses of NU members in Bantul Regency to the MUI's fatwa on worship during the COVID-19 pandemic. To gather the data, we conducted interviews with seven figures (NU officials, *takmir* officials, and public figures) who are involved in the dynamics of those responses. To verify the

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<sup>13</sup> Wahyudi Akmaliah, "When Ulama Support a Pop Singer Fatin Sidqiah and Islamic Pop Culture in Post-Suharto Indonesia," *Al-Jami'ah* 52, no. 2 (2014): 351-373.

<sup>14</sup> Fariz Alnizar, "Pretext for Religious Violence in Indonesia: An Anthropolinguistic Analysis of Fatwas on Ahmadiyya," *Studia Islamika* 26, no. 3 (2019).

<sup>15</sup> Syafiq Hasyim, "The Council of Indonesian Ulama (Majelis Ulama Indonesia, MUI) and Religious Freedom," *Irasec's Discussion Papers*, no. 12 (2011): 1-26.

interview data, we conducted observation in Pleret Sub-district area and hold FGD inviting fifteen NU figures in Bantul District area. We used a sociological approach to describe the two patterns of responses among the NU members in Bantul. In this approach, we employed the obedience and disobedience theory<sup>16</sup> as a framework of thinking in examining various problems among the NU members in Bantul, especially those related to the reception and resistance patterns.

## **Discussion and Result**

### **Dynamics of Worship during the COVID-19 Pandemic in Bantul; People's Response to the MUI's fatwa**

Worship, in public understanding, is understood only as a religious practice in the form of ceremony or rituals (*ibadah mahdlah*). Daily activities which are not rituals in nature are often underestimated and taken for granted because they are considered "not worship" activities. Such a view, in a certain limit, may result in putting activities outside worship on the lower level in the list. Some community members even take an extreme measure that they feel they have not yet conducted the worship when they do not perform ritualistic activities yet. Moreover, for some people, the ritualistic worship "must" be performed in a congregation (*berjamaah*) as worship performed individually is considered imperfect or at least does not provide "satisfaction".

The attitude and understanding of worship as such have become more evident and stronger at the start of the Covid-19 pandemic at the beginning of 2020.<sup>17</sup> Pandemic situation and condition that require obedience to health protocols from all parties becomes an arena of "struggle" for some Bantul people to maintain their influence and legitimacy. Instead of supporting and implementing the appeal from the government and related parties to

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<sup>16</sup> Stefano Passini and Davide Morselli, "Authority Relationships between Obedience and Disobedience," *New Ideas in Psychology* 27, no. 1 (2009): 96-106.

<sup>17</sup> Kuku, "Di Tengah Covid-19, 220 Masjid Di Yogya Gelar Salat Id | Gaya Hidup," *Gatra*, last modified May 2020, accessed May 26, 2022, <https://www.gatra.com/news-479778-gaya-hidup-di-tengah-covid-19-220-masjid-di-yogya-gelar-salat-id.html>.

conduct worship in their house, they posit their arguments which are more emotional than rational in nature, namely by continue conducting ritualistic worship in the congregation. Such worship of course has the potential to result in crowding which in turn may result in a new cluster of Covid-19.

The forms of ritualistic worship conducted in the congregation by some Bantul people during the pandemic are usually related to *mahdlah* worship, especially prayer (*salat*), both the *wajib* (mandatory) and the *sunna* (not a compulsory) ones. There are two mandatory prayers that are often talked about and sometimes lead to debate during the pandemic, namely Friday Prayer (*Salat Jumat*) and the five mandatory prayers (*salat lima waktu*). The *sunna* prayers are *tarawih* (performed during Ramadhan evenings) and Eid prayers. These ritualistic worships are taught to be performed in the congregation. On the other hand, however, to prevent the proliferation of the Covid-19 pandemic, people are urged to do social distancing and avoid crowds. In fact, prayer worship is an activity that may lead to a crowd when conducted in a congregation.

The paradoxical situation and condition between the requirements for preventing the Covid-19 proliferation on one hand, and the requirement to conduct prayer in the congregation on the other hand, pose challenges to shareholders. Therefore, mass and religious organization figures, such as those affiliated with MUI, NU, and Muhammadiyah, also have their roles, each according to their respective capacities, to provide information and enlightenment to the people in terms of worship during the pandemic. Various forms of rules and provisions for worship during the pandemic have been issued (fatwa, edict, circulars, and instruction), all of which are directed to curb the Covid-19 so that its proliferation is under control and less extensive.<sup>18</sup>

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<sup>18</sup> Some examples of fatwa issued by NU, Muhammadiyah, and MUI: a) Circulars Number 3953/C.I.034/04/2020 on the governance of *tarawih* and Idul Fitri prayers during the Covid-19 pandemic; b) Muhammadiyah Notice on the Limitation of Worship in Mosque, available in this Muhammadiyah, "Edaran PP Muhammadiyah Tentang Tuntunan Idulfitri 1442 H Dalam Kondisi Pandemi Covid-19 - Muhammadiyah," *Muhammadiyah.or.Id*, last modified 2021, <https://muhammadiyah.or.id/edaran-pp-muhammadiyah->

Riyanta, dkk.

However, Bantul society is highly dynamic in responding to the problems in worship and other religious activities during the Covid-19 pandemic. This can be categorized into three groups. *Firstly*, worship in an emergency condition model. These models is conducted by the community group who obeys and observe the government and religious organizations' appeal by avoiding worship activities that could lead to crowd forming. Therefore, during certain times, this group suspended the Friday prayer and substituted it with the *zuhur* (mid-day) prayer, performed congregational prayer in their respective homes, and temporarily ceased all social-religious and societal activities. *Secondly*, the new normal adaptation worship model. The model is conducted by the group that still conducted the Friday prayer, the five mandatory prayers in the congregation, and social-religious and societal activities, but accompanied by strict implementation of health protocols. *Thirdly*, the normal worship model. The model is conducted by a group that totally ignores the pandemic and health protocols in conducting worship and other religious activities.<sup>19</sup>

In the MUI's fatwa Number 14 the Year 2020 on the Governance of Worship in Covid-19 Pandemic Situation, the legal provision that governs worship in the emergency conditions is in the point 4 reads as follows:

“in a condition where the spread of the Covid-19 is out of control in an area that it threatens life, Moslem must not conduct Friday prayer in that area, until the condition comes back to normal and must substitute it with the *zuhur* prayer in the respective place. It is also forbidden to conduct worship activity that involves many people

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tentang-tuntunan-idulfitri-1442-h-dalam-kondisi-pandemi-covid-19/; c) MUI's fatwa Number 14 Year 2020 On the Governance of Worship during the Covid-19 Pandemic MUI's fatwa Number 31 Year 2020 on the governance of Friday prayer and congregational prayers to Prevent Covid-19 Pandemic

<sup>19</sup> Result of *Focus Group Discussion* (FGD) with religious figures, conducted on 22 November 2020, and observation in some mosques in Pleret Sub-district on 1 November 2022

and is believed to be able to become the medium for the spread of Covid-19, such as the five prayers/rawatib, tarawih, and Eid prayers at mosques or other public place and attending general recitation and majelis taklim".<sup>20</sup>

The provision could not be immediately implemented. People who wanted to implement it were confronted with the problem of arising the phrase "*in a condition where the spread of Covid-19 is out of control in an area that it threatens life*". Some questions arose: has Bantul District fall under the area category as mentioned, how to know it, what was the ground, and who has the authority to stipulate the condition of an area?

Such questions required clear and firm answers to avoid confusion in society. However, the absence of explanation and confirmation on the condition of Bantul District area as mentioned in the MUI's fatwa made people interpret the provisions individually according to their understanding. There was an interpretation conducted collectively by involving some people who were considered public figures, and one conducted individually by a public figure with considerable influence who is well respected. The grounds for the decision were also different one to each other. Some were based on the Decision Letter of the Governor of the Special District of Yogyakarta and the Decision Letter of the Regent of Bantul on the State of Covid-19 Disaster Emergency Response; the others were based on conviction and common sense in relation to the local community situation and condition.<sup>21</sup>

As a result of the difference in such interpretations, there were dual interpretations in the congregational worship conducted in some areas. For example, one occurred at a hamlet in Pleret Village, Pleret Sub-district, Bantul District. Public and religious figures with the

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<sup>20</sup> MUI, "FATWA NO 14 TAHUN 2020 - PENYELENGGARAAN IBADAH DALAM SITUASI TERJADI WABAH COVID-19 - Majelis Ulama Indonesia." *MUI Digital*, last modified 2020, accessed May 26, 2022, <https://mui.or.id/berita/27674/fatwa-penyelenggaraan-ibadah-dalam-situasi-terjadi-wabah-covid-19/>.

<sup>21</sup> Based on the result of the *Focus Group Discussion* (FGD) with religious figures, conducted on 22 November 2020.

coordinated by the Head of the Hamlet collectively decided to follow the MUI's fatwa by suspending the Friday prayer and congregational mandatory prayers, *rawatib* (not a compulsory prayers before and after the five mandatory ones) as well as other religious and social activities until the situation and condition were declared safe by the authority. The ground for the decision was the Decision Letter of the DIY Governor supported by the Decision Letter of the Bantul Regent on the State of Covid-19 Disaster Emergency Response.<sup>22</sup> The decision was then distributed to the members of the community through circulars signed by all officials of the hamlet and the head of *takmir* (mosque manager) and was known by the Head of the Hamlet.<sup>23</sup>

However, then appeared a group of people who claim to act on behalf of members of the community and refused hamlet officials' decision as well as took a different attitude. They provisioned their own decision by continuing the congregational Friday prayer and mandatory prayers/*rawatib* as well as other religious activities at the mosque. The ground was the recommendation from the local public figure on the situation and condition in the area which according to him were still safe and under control. It was also reinforced by their monolithic understanding of fate and narrow understanding of *mahdlah* worship. Therefore, different interpretations of the emergency status of the area in turn gave rise to dynamics in the second category of worship, namely the new normal adaptation worship model. In this case, some parts of the community still held Friday prayer, congregational prayers at the mosque, and other religious and social activities while obeying strict health protocols.<sup>24</sup>

The first and second groups believed that their respective decisions were true and that they could not be compromised. As a result, there were two worship models conducted by the community in that area, namely worship in emergency conditions and new

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<sup>22</sup> Until the current article was written, the Governor of DIY and Bantul Regent's Letter of Decisions on the Emergency State of Covid-19 Pandemic has been extended 7 times.

<sup>23</sup> Interview with Mr. Mujiono, Head of RW 08, Kerto Hamlet, Pleret Village, Pleret Sub-district on 20 November 2020.

<sup>24</sup> Interview with Mr. Basuki Raharjo, Head of Kerto Hamlet, Pleret Village, Pleret Sub-district on 20 November 2020.

normal adaptation worship. The two models of worship also divided the community into two groups. Some people called the two groups “Friday prayer school (*Jumatan mazhab*)” and “no Friday prayer school (*there is No Jumatan Prayer mazhab*)”.

When the first difference appeared, there was a tension that prompted them to conduct repeated mediation and discussion. While the situation did not lead to a split, it seemed the community was divided due to the difference. Moreover, the issue was then taken to the political domain which incidentally was at the same time as the election of the head of *takmir*. The tension, which should have been resolved after the local public figures agreed to follow the New Normal Adaptation policy, drag on after the election was completed. Something that should not happen was unavoidable, namely the politicization of the mosque.<sup>25</sup>

The above case shows rather complicated social and religious (worship) dynamics in responding to the pandemic situation and condition. It was related to the formal policy stipulated by the shareholders who have the formal position in the community on one hand, and the non-formal policy decided by one or more public figures or those considered to have authority on the other hand. The figures or people considered as public figures did not have formal positions or “forums”, but their personality or seniority made them role models to the other community members.

The basis for conducting the worship (the Friday prayer) during the pandemic for the people was counterfeit (*taqlid*). This is understandable because the major parts of the community, especially in rural areas, are lay in religious matters. To maintain peace and harmony among the people, while the *takmir* decided to suspend Friday prayer and other congregational prayers, the decision was not imposed on parties who disagreed. In this case, they hold on to an Al-Qur’an quote that reads: *لَا أَعْمَالُنَا وَلَاكُمْ أَعْمَالُكُمْ* (to me are my deeds, and to you are yours).<sup>26</sup> Nevertheless, the *takmir* staffs were aware

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<sup>25</sup> Interview with Muh. Rosid Husaini, public figure in Kerto Hamlet, Pleret Village, Pleret Sub-district, Bantul District on 23 November 2020.

<sup>26</sup> The quote from Al-Qur’an can also be found, among others, in QS. al-Qashash/28 verse 55.

that the situation and condition were not a small burden both psychologically and sociologically.<sup>27</sup>

Besides the two groups above, there was another group who performed worship without any changes whatsoever. They held Friday prayer, congregational five prayers at the mosque, *tarawih* prayer, routine recitation, and others as usual just like before the pandemic. Appeals from the government and other related parties on the mandatory health protocols were totally ignored. In this case, the *takmir* officials and community members were of the same view in responding to Covid-19. They believed that the pandemic would not reach their area. This belief was based on two things: *firstly*, their residence was considered far from the urban area which was believed to be the site of the Covid-19 spread, and *secondly*, the local people's mobility was quite low.<sup>28</sup>

Dynamics in worship do not link only to the dualism in the policy on Friday prayer, namely between conducting or suspending it. The responses to the pandemic also gave rise to more than one Friday prayer spot in a single hamlet. This happened at the Kerto Hamlet, Pleret Village, Pleret Sub-district, Bantul District. In the beginning, before the pandemic, all residents of 13 RT (Neighbour Association) and 3 RW (Community Association), RW 7, 8, and 9, conducted Friday prayer at the hamlet mosque, namely al-Falah. The

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<sup>27</sup> According to the narrative from the informant, who happened to be the head of *takmir*, such situations and condition have put some psychological burden and made him into a complicated position. In addition to his position as the head of *takmir* who is responsible for the mosque management and all its activities, he resides close to the mosque so that he could hear and see all activities during the pandemic. To reduce the burden, he was "forced" to go to his office every Friday although he should have worked at home (WFH/Work-From-Home) on that day. Interview with Muhammad Busro, Head of Takmir of Quwatul Islam Mosque, Kuwaru, Poncosari, Srandakan, Bantul on 24 November 2020.

<sup>28</sup> It was informed that there was a view different from that of the majority of people coming from the local youths. They disagreed with the Friday prayer policy and even did not obey health protocols strictly. However, their voice was almost unheard because the community ignored it and eventually it vanished. Interview with Abdur Razak Paryanto, public figure in Suren, Pleret, Pleret, Bantul, Yogyakarta on 9 October 2020.

mosque, built-in 1935, is located at RW 08. Although the two other RW also built mosques circa the 1990s (respectively named al-Yasir and al-Furqan), up to the beginning of 2020, al-Falah was established as the hamlet mosque to conduct common Friday prayer for all residents.<sup>29</sup>

The establishment of Friday prayer outside al-Falah occurred when the decision of the hamlet officials on the suspension of Friday prayer during the pandemic was not obeyed by some parts of the community. People who live in RW 07 were disappointed because the Friday prayer was still held in al-Falah, especially by the adherents of “*mazhab Jumatan*”, although it was officially suspended. The disappointment prompted some religious figures in RW 07 to initiate an independent Friday prayer at the mosque located in RW 07 neighborhood, namely al-Furqan. For several weeks, seeing the pandemic situation and condition were yet to end, residents of RW 09 then also held their own Friday prayer at al-Yasir. Therefore, from the start of the pandemic until now, most of the residents who have been attending the Friday prayer at the hamlet mosque (al-Falah) were limited to residents of RW 08.<sup>30</sup>

The multiple Friday prayers at several mosques in one village were not without turmoil. In addition to a historical reason that must be kept and maintained by all residents in the village,<sup>31</sup> it was also related to the validity according to the *fiqh* law. In *fiqh* study, the Friday prayer in one village is called *ta'ddud al-Jum'ah*. *Safīnatun Najah* mentioned that there are six requirements of validity for Friday prayer, and one of them reads “must not be preceded or occurred at

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<sup>29</sup> Interview with Muh. Rosid Husaini, public figure in Kerto Hamlet, Pleret Villag, Pleret Sub-district, Bantul District on 23 November 2020.

<sup>30</sup> *Ibid.*

<sup>31</sup> According to the story, al-Falah mosque was built by people who wanted to preserve the tradition and deeds of *ahlus sunnah wal jamaah*. The mosque was decided as the hamlet mosque. Besides serving as a center for worship and social-religious activities, it also serves as a symbol of unity and oneness for the residents. As such, based on the statement from the Head of Hamlet, their ancestors instructed Kerto residents to continue conducting Friday prayer at the village mosque.

the same time with other Friday prayer in one *balad* (village)”<sup>32</sup> Its explanation (*syarh*) book stated that “... if Friday prayer should be conducted in more than one place (hamlet, *balad* or *qaryah*) due to the necessity that makes it difficult to gather in one place, it is allowed to perform more than Friday prayers and all are valid based on more authoritative *qaul* (opinion), whether the *takbîratul ihram* (initial *takbir*, opening of a prayer ritual) of the imam are simultaneously or in sequence.” However, it is advised as a *sunna* to repeat the *zuhur* prayer to prevent *khilaf*/differences in opinion among ulemas.<sup>33</sup>

The *fiqh* provisions on *ta'addud al-Jum'ah* above were attention and energy-consuming matter of debate among local religious figures. The debate revolved around the meaning of *balad/qaryah*, “difficult to gather”, and the validity of the Friday prayers which are measured by *takbîratul ihram* recited by the imams. Each has their arguments that a deal were unable to be taken. They instead agreed to disagree (in a single opinion). Therefore, Friday prayers have been conducted in three mosques in one hamlet until now.

Interestingly, in the subsequent development, as a basis for Friday prayer, some residents and religious figures did not consider the area issue (*balad* or *qaryah*) anymore. Instead, they focused more on confidence and satisfaction. Therefore, although Friday prayers were held in each administrative area called RW, it did not prevent some residents of the other administrative area to hold Friday prayers at the hamlet mosque (al-Falah). They think that conducting Friday prayer at the village mosque gives them more confidence and satisfaction. In addition, they did it due to historical reasons, namely

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<sup>32</sup> In the book *Safînah al-Najâh*, it is mentioned that there are 6 conditions of validity for Friday prayer, namely: 1) The whole Friday prayer is conducted during the *zuhur* time; 2) The Friday prayer must be conducted (still) within the limits of a *balad* (village or small area); 3) Must be conducted in congregation; 4) Must consists of 40 adult and males, and *mustawthin* (settled residents in the area); 5) Must not be preceded by or at the same time with other Friday prayer in the same *balad*; 6). The Friday prayer must be preceded by 2 sermons. For further reading, see Salim ibn 'Abdullah ibn Sumair al-Hadhrami Salim ibn 'Abdullah ibn Sumair Al-Hadhrami, *Safînah Al-Najâh* (Surabaya: Dâr al-'Ilm, n.d.). p. 19.

<sup>33</sup> Muhammad Nawawi ibnu Umar al-Jâwi al-Bantaniy Al-Syâfi'iy, *Kâsyifah Al-Sajâ Syarh Safînah Al-Najâh* (Limassol: Dâr ibn Hazm, 2011). p. 373

to respect the service of their ancestors. As such, Friday prayers at three different mosques in the same village did not sociologically split the community based on the area of the Friday prayer implementation.

### **Accommodative and Contextual Response among NU Members of Bantul**

Several factors influenced the reception of the fatwa among Bantul NU members, namely structural, structural NU figure, and knowledge. In the structural factor, there was an “alternative fatwa” that strengthened that of MUI instead of denying or negating each other. As its nature is organizational and systemic, the “counter fatwa” was more effective because it binds every affiliated person including the sympathizers. In K.H. Damanhuri’s words, MUI is religious organization that possesses no mass basis. On the contrary, almost all Bantul people have affiliated with a mass religious organization, especially NU. Compared to a vehicle, for Damanhuri, MUI is a train with empty cars and without passengers.<sup>34</sup> This makes its fatwa far from the society that serves as its mass basis as a prerequisite for a fatwa.

Besides religious figures (*kyai*), the guiding references, which were used by NU members in conducting worship during the pandemic, were in the form of instructions or circulars issued by NU officials. Structurally, the instruction or circulars were issued gradually from the *Pengurus Besar Nahdlatul Ulama* (PBNU) on the central or national level,<sup>35</sup> then *Pengurus Wilayah Nahdlatul Ulama* (PWNU) on provincial level, and *Pengurus Cabang Nahdlatul Ulama* (PCNU) on district level. The circular from PCNU was then delivered to *Majelis Wakil Cabang Nahdlatul Ulama* (MWCNU) on the sub-district level before eventually being forwarded to people through

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<sup>34</sup> Statement by K.H. Damanhuri, Rois Syuriah Pengurus Cabang Nahdlatul Ulama (PCNU) Bantul District, delivered during the *Focus Group Discussion* (FGD) with religious figures on 22 November 2020.

<sup>35</sup> Mohay Faisal, “PBNU Keluarkan Edaran Pelaksanaan Salat Tarawih Dan Idul Fitri Dalam Keadaan Pandemi Covid-19,” *Tribunnews*, last modified 2020, <https://www.tribunnews.com/corona/2020/04/04/pbnu-keluarkan-edaran-pelaksanaan-salat-tarawih-dan-idul-fitri-dalam-keadaan-pandemi-covid-19>.

*Pengurus Ranting* on the village level and *Pengurus Anak Ranting* on the hamlet level. The circulars related to legal matters are typically issued by *Lembaga Bahtsul Masail* (LBM) NU targeting all NU members, whether structurally (NU members who hold a position in the organization) or culturally (members whose religious activities are those of NU).

The circular followed by NU members was the one issued by the NU instead of the MUI's fatwa although implicitly, their spirits were the same. NU members' obedience to the organization is also exemplary. However, as NU is a social-religious organization that is inseparable from *pesantren*, their obedience had been ambiguous. In addition to the obedience to the organization, *nahdliyin* who are dominated by religious students (*santri*) are also required to obey *kyai* and this can be greater than the obedience to the organization.<sup>36</sup> As such, *kyai* or religious figures in NU tradition has great influence who become role model for their congregation that they serve as the important key for the community's obedience to the essence of MUI's fatwa. The example can be drawn from the case in Pleret, in which the people follow the unofficial fatwa from Kyai Haji Ihsanuddin from Binaul Ummah *pesantren* in performing their daily rituals.<sup>37</sup>

In the figure factor, *kyai* or religious figures among NU typically do not have any structural hierarchal position and may not communicate with each other. They might even have opposite stances on this specific issue. If the hierarchy was present, its nature is cultural and built through *pesantren's* chain of knowledge (*sanad*). Therefore, *nahdliyin* who have no pupil-teacher bond with *kyai pesantren* are rather independent. The influence of K.H. Rosyid Mulyadi from Jejeran, Pleret, whose opinion on the issue is taken by some *takmir* there.<sup>38</sup>

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<sup>36</sup> Zaenal Arifin, "Kepemimpinan Kiai Dalam Ideologisasi Pemikiran Santri Di Pesantren-Pesantren Salafiyah Mlangi Yogyakarta," *Inferensi* 9, no. 2 (2015): 351; also read Zamakhsari Dhofier. "Tradisi Pesantren Studi Tentang Pandangan Hidup Kiai dan Visinya Mengenai Masa Depan Indonesia." (Jakarta: LP3ES. 2011) p. 55.

<sup>37</sup> Result from *Focus Group Discussion* (FGD) with religious figures in Bantul District on 22 November 2020.

<sup>38</sup> In the cases where the *takmir* in some areas accepted and implemented the advice on the prevention of Covid-19 by suspending the

In addition, the reception by NU members was set by the third factor, namely the community's knowledge and understanding of the fatwa, both relating to its existence and content. In-depth, limited discussion involving religious figures in Bantul District in the focus group discussion supported this.<sup>39</sup> It was mentioned that MUI's fatwa on the worship during the pandemic was not well known among Bantul people. One of the reasons for this is the lack of socialization.

However, people who knew about it did not immediately accept it. They questioned the technical aspect of the fatwa implementation in the field as the current fact showed that MUI's fatwa was not like medicine which could be taken and administered right away. It was like a portion of fast food that needs processing to consume and the result may be different from one person to another. The processing was necessary because the content of the fatwa still needs interpretation or at least adjustment with the situation and condition on the field. In relation to this, based on observation and interview results with related parties, at least there found two patterns of reception by Bantul people.<sup>40</sup>

*Firstly*, accommodation pattern. This pattern appeared when the community or some of its members and related parties accepted MUI's fatwa and implemented it fully. The accommodative nature of this reception pattern indicates openness in the community toward information and change. As such, it can be confirmed that this group possesses good access to information and was not *jumud* (frozen or static) in their thinking. Generally, they came from learned or educated groups, especially ones with higher literacy. Economically, they fall into the middle or upper class and are relatively established. Usually, they have a strategic position in the society and government, such as *takmir* officials, hamlet officials, village officials, and others

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Friday prayer, as mentioned in the previous subheadings, the *takmir* was affiliated to NU.

<sup>39</sup> Result from *Focus Group Discussion* (FGD) with religious figures on 22 November 2020.

<sup>40</sup> Result from *Focus Group Discussion* (FGD) with religious figures on 22 November 2020.

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like a public servant (Aparatur Sipil Negara/ASN) and members of TNI/Polri (National Army or The Police).<sup>41</sup>

The influence of educational background on the accommodative reception pattern is rather logical and grounded because one of the causes beyond low acceptance among Bantul people toward MUI's fatwa was the lack of socialization. For the learned or educated group with higher literacy, the issue was automatically resolved. Advances in technology supported by sophisticated communication devices (smartphones) were available to almost all people enabled them to access information wherever and whenever. They can also gather additional information and diverse views on the fatwa. Therefore, this group was enabled to have wider social and religious insights than the other groups to determine their stance toward MUI's fatwa.

*Secondly*, contextualization pattern. In this case, Bantul NU members' response to MUI's fatwa was conducted contextually in line with the specific situation and condition on the field. For them, the contextualization of MUI's fatwa was necessary considering that the factual situation and condition among Bantul people were diverse. This diversity was related to many factors; among others were geographical position, environmental condition, cultural background, and social-religious organization affiliation. Bantul people who followed this contextual reception were rather numerous, and even probably a majority. They live and spread the whole Bantul District area, both in urban and rural areas.

Bantul NU members' contextualization pattern in accepting MUI's fatwa could be seen in daily worships. For example, the first provision of the fatwa affirms that every person must try to maintain health and avoid anything that is believed to be able to expose him or

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<sup>41</sup> An example is one occurred in Pandak Sub-district, Bantul District. There was a mosque in which the religious figure happened to be the Head of Village (*Kepala Desa*), while the *takmir* official is a public servant working as a doctor in a local public hospital. Since the government stipulated the emergency status for the Covid-19 pandemic, the mosque was closed from any worship activity. This statement was made by K.H. Damanhuri in the *Focus Group Discussion (FGD)* with religious figures in Bantul District on 22 November 2020.

her to disease as it is a part of maintaining the primary goal in religion (*al-dharuriyat al-khams*)".<sup>42</sup> This provision was implemented by applying strict health protocols, among others by providing a hand washing facility at some points in the mosque area, body temperature checking for visitors, hand sanitizer in certain places, and obliging the congregation to wear the mask. In addition, to support the worship and religious activities during the pandemic, preventive measures were also in place, such as distancing prayer rows, folding the mat or carpet, installing banners in front of the mosque with the appeal to observe health protocols, and installing announcement that the mosque was only for local residents.<sup>43</sup>

### **The Resistance among NU Members of Bantul: Reactive-Declarative and Passive-Permissive**

MUI is a religious Islamic institution consisting of ulemas from various elements and groups whose undoubted competency and authority do not immediately guarantee that its fatwa will be accepted by all Bantul people. This even still happened although the intention and objective of the fatwa are directed toward the common good. Resistance (refusal) toward the fatwa also surfaced on various forms and expressions. Although they were not always shown in an explicit and demonstrative way, the refusal was clear in some following patterns.<sup>44</sup>

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<sup>42</sup> MUI, "FATWA NO 14 TAHUN 2020 - PENYELENGGARAAN IBADAH DALAM SITUASI TERJADI WABAH COVID-19 - Majelis Ulama Indonesia." OVID-19 - Majelis Ulama Indonesia," *MUI Digital*, last modified 2020, accessed May 26, 2022, <https://mui.or.id/berita/27674/fatwa-penyelenggaraan-ibadah-dalam-situasi-terjadi-wabah-covid-19/>, also read Salman Abdul Muthalib et al., "Changes in Congregational Prayer Practices During the Covid-19 Pandemic in Aceh from Maqashid Al-Sharia Perspective," *Al-Ihkam: Jurnal Hukum dan Pranata Sosial* 16, no. 2 (2021): 421-449.

<sup>43</sup> Observation results on some mosques in Pleret Village, Pleret Sub-district, Bantul District.

<sup>44</sup> Based on the observation and statement from Kyai Musta'in during the routine recitation on the evening of Tuesday *Kliwon* in al-Falah, Kerto Hamlet, Pleret Village, Pleret Sub-district, Bantul District on 18 January 2021.

Firstly, the reactive-declarative pattern. In this case, refusal toward the fatwa was performed using oral narrative and real actions. In terms of numbers, the groups who refused the fatwa in this manner were rather small. They came from groups with various backgrounds, whether tribal, cultural, educational, or social-religious affiliation. However, they were members of society who have the “stage” so that, despite their small numbers, their voices could be loud and clear. There were two main stages to spread their narratives, namely the cultural stage and the digital stage (social media).<sup>45</sup>

The refusal narrative through the cultural stage was usually delivered by religious figures who have a cultural mass basis (congregation) and were not involved in the NU organizational structure. The narrative was rather effective in influencing the congregation until it sinks into the unconsciousness as it was wrapped in religious language. Included in this kind of narrative was a provocative statement that looked simple but could be misleading, such as: “are you more afraid of Allah than of Corona virus?”, or the mention of Corona in Javanese slanted into “...kon ora...” (Which means: ...are asked not to...) in a statement delivered during a routine recitation: “due to kon ora, everything is ignored; Friday prayer is ignored, the five mandatory prayers are ignored, Qur’anic recitation is ignored, tahlilan is ignored”.<sup>46</sup>

There was also a statement that was claimed to come from a *riwayat* (narrated saying) yet being told while opposing intention to the prevention of Covid-19 proliferation: “the mosque is the best place in the world, so use it as a place of protection. Do not be far from it”. Another statement was correct but when misunderstood, it could mislead the listeners: “Corona is a being/creature belonging to Allah. It will not lead to harm unless with Allah permission, so do not be afraid of Corona”. There were still many other statements with narratives refusing the effort to prevent Covid-19. Those narratives which were rather provocative

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<sup>45</sup> As stated by K.H. Nasih Ridwan in the *Focus Group Discussion (FGD)* with religious figures on 22 November 2020.

<sup>46</sup> As stated by K.H. Hasan Asy’ari in the routine recitation to commemorate Isra’ Mi’raj Prophet Muhammad Saw in al-Falah, Kerto, Pleret, Bantul, Yogyakarta on 9 November 2020.

were also spread through social networks and media such as Whatsapp, Facebook, YouTube, and others.<sup>47</sup>

The effectiveness of such narratives was greater when delivered by people with influence and became the role model for the community. It even works better when the verbal narrative was also followed by demonstrative actions or deeds and performed in front of the audience, congregation members, or followers. An example of this is the case in a hamlet in Wonokromo Village, Pleret Sub-district, where a *kyai* did not want to wear a mask when attending a religious gathering because he doubted its efficacy so he delivered his opinion openly in front of the congregation. When protested by one of the local religious/social figures, the *Kyai* even tried to defend using arguments that were also delivered in front of the forum. This could be conditioned after the government officials consisting of the police, TNI, health officers, and the task force of Covid-19 came and provided education and socialization, especially on Corona virus and its prevention measures.<sup>48</sup>

The MUI's fatwa indeed does not explicitly state the use of the mask. Nevertheless, implicitly, the fatwa contains a legal provision that requires everybody to obey the health protocols during the Covid-19 pandemic, one of which is the wearing of a mask.<sup>49</sup> This is

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<sup>47</sup> Jabbar Ramdhani, "Warga Demo Masjid Ditutup Untuk Tarawih Dan Jumatan, Polisi Ajak Dialog," *Detik*, last modified 2020, accessed May 26, 2022, <https://news.detik.com/berita/d-4998650/warga-demo-masjid-ditutup-untuk-tarawih-dan-jumatan-polisi-ajak-dialog>. And also Abu Sahma Pane, "Pro Kontra Larangan Sholat Jum'at Di Tengah Wabah Corona : Okezone Tren," *Okezone*, last modified 2020, accessed May 26, 2022, <https://www.okezone.com/tren/read/2020/03/19/620/2185963/pro-kontra-larangan-sholat-jum-at-di-tengah-wabah-corona>. And also Ibid.

<sup>48</sup> As stated by K.H. Nasih Ridwan in the *Focus Group Discussion (FGD)* with religious figures on 22 November 2020.

<sup>49</sup> The provision read "Every person must try to maintain health and avoid anything that is believed to be able to expose him or her to disease as it is a part of maintaining the primary goal in religion (al-Dharuriyat al-Khams)". Read MUI, "FATWA NO 14 TAHUN 2020 - PENYELENGGARAAN IBADAH DALAM SITUASI TERJADI WABAH COVID-19 - Majelis Ulama Indonesia."

because mask usage is recommended by health experts in the World Health Organization.<sup>50</sup>

The disobedience toward the health protocols as stated implicitly in MUI's fatwa probably would not have a significant impact when conducted by lay people. They typically do not have any influence over their neighborhood. This was different from members of society who were considered public figures, whether in religious or social matters. Religious figures were the important key to the society's obedience to both MUI's fatwa and health protocols.<sup>51</sup>

*Secondly*, the passive-permissive or silent pattern. This was conducted by some NU figures and their supporters. Structurally, these figures were not in a strategic position, but they have a big influence culturally. Some of them were made into public figures (*a role model person*), whether they were religious or social figures. Therefore, they have many supporters and followers.<sup>52</sup>

In responding to the pandemic situation and condition, they prefer silence and apathy. The silence was shown by not giving any statement, neither verbal support nor refusal, on every social distancing policy at worship sites. This was because they paid more attention to the local people's beliefs that were used to the normal worship practice. One figure in Kretek<sup>53</sup> even said that he was reluctant if he were to appeal for worship limitations in the mosque.

Therefore, each time the government or other parties gave advice to every religious or local figure to urge their congregations to follow every social distancing policy in worship sites and obey the health protocols in conducting religious activities, these religious figures chose to be silent. This attitude was also shown toward the

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<sup>50</sup> World Health Organization, "Penggunaan Masker Dalam Konteks COVID-19," *World Health Organization* (2020): 1-23, [https://www.who.int/docs/default-source/searo/indonesia/covid19/penggunaan-masker-dalam-konteks-covid-19.pdf?sfvrsn=9cfbcc1f\\_5](https://www.who.int/docs/default-source/searo/indonesia/covid19/penggunaan-masker-dalam-konteks-covid-19.pdf?sfvrsn=9cfbcc1f_5).

<sup>51</sup> Result from the *Focus Group Discussion (FGD)* with religious figures on 22 November 2020.

<sup>52</sup> Observation result from Suren Hamlet, Pleret Village, and Wonokromo I Hamlet, Wonokromo Village, Pleret Sub-district, Bantul.

<sup>53</sup> Interview with Muhammad Busro, Head of *Takmir* Quwatul Islam Mosque, Kuwaru, Poncosari, Srandakan, Bantul on 24 November 2020.

MUI's fatwa which was issued to strengthen the government policy that had not been well-responded. Nevertheless, he still limited himself in worship at the public mosque and conducted worship activities in his own home more often instead.

In addition to silence, there were also religious figures who chose to completely ignore the social distancing policy in worship sites. There was even a public figure who openly refused any policy from anybody to limit activities in mosques. He believed that when worship is conducted in an optimum and perfect way, Allah will protect and keep him from any virus.

In this context, the fatalistic view became one of the socio-religious phenomenons shown by some parts of society in responding to the Covid-19.<sup>54</sup> In such a fatalistic view, one of the figures in Kretek Sub-district ignored the health protocols in his every activity. Social and religious activities, including Friday prayer at the mosque, continued to be conducted in a normal way. Although there was some doubt about the decision, the resigned attitude (*tawakkal*) had greater dominance over their decision.<sup>55</sup>

### **Conclusion**

During the COVID-19 pandemic, Muslims in Bantul, Yogyakarta, Indonesia performs their daily rituals in three patterns. Firstly, they obey the government's advice by doing the worship in their houses to suit the emergency condition. Secondly, the worship adapts to new normal habits by implementing the health protocols in public mosques. Thirdly, the worship runs as usual and is continuously carried out by ignoring the health protocols. This dynamic is in line with the NU members' responses toward MUI's fatwa on the worship during the pandemic. There had been pro- and contra- among society in responding to the fatwa. People who obey the fatwa conducted all their daily *mahdlah* (purely ritual) worship in their respective houses and avoided the *ghairu mahdlah* (impurely

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<sup>54</sup> Nur Hidayah, "Dari Jabariyah, Ke Qadariyah, Hingga Islam Progresif: Respons Muslim Atas Wabah Corona Di Indonesia," *SALAM: Jurnal Sosial dan Budaya Syar-i* 7, no. 5 (2020): 423–438.

<sup>55</sup> As stated by Drs. Abu Yazid, *takmir* official of al-Takwa Mosque, Wonokromo Village, Pleret Sub-district, Bantul District, in various occasions.

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ritual) activities as stipulated in the MUI's fatwa. The research shows as well that there was polarization among NU members in Bantul in responding to the above-mentioned MUI's fatwa in the forms that may be classified into two. The first was the reception and the second was the resistance. In the former, they respond to the fatwa in two models, namely accommodation and contextualization. In the accommodation model, they fully implemented the fatwa. Meanwhile, in the contextualization model, they adjusted their rituals based on the situation and condition on the field due to the notion that, for them, the factual situation and condition of the society were highly diverse. This pattern was influenced by structural NU figures that possessed knowledge literacy. Meanwhile, the resistance formed two models. First, the reactive-declarative model which was delivered openly by NU figures who were not in NU structural organization. They urged their congregations to continue doing worship at the public mosque as usual and did not pay attention to the health protocols. Second, the passive-permissive model is conducted silently by the public figure. Personally, the figure disagreed with the MUI's fatwa, but they expressed this disagreement personally, not outwardly.

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### **Interviews**

- Interview with Muhammad Busro, Head of *Takmir* Quwatul Islam Mosque, Kuwaru, Poncosari, Srandakan, Bantul on 24 November 2020
- Interview with K.H. Nasih Ridwan in the *Focus Group Discussion (FGD)* with religious figures on 22 November 2020.
- Observation result from Suren Hamlet, Pleret Village and Wonokromo I Hamlet, Wonokromo Village, Pleret Sub-district, Bantul.
- Observation and statement from Kyai Musta'in during the routine recitation on the evening of Tuesday *Kliwon* in al-Falah, Kerto Hamlet, Pleret Village, Pleret Sub-district, Bantul District on 18 January 2021.
- K.H. Nasih Ridwan's statement in the *Focus Group Discussion (FGD)* with religious figures on 22 November 2020.
- As stated by K.H. Hasan Asy'ari in the routine recitation to commemorate Isra' Mi'raj Prophet Muhammad Saw in al-Falah, Kerto, Pleret, Bantul, Yogyakarta on 9 November 2020.

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Interview with *takmir* affiliated to NU on 22 November 2020.

Interview the Head of Hamlet, Kerto, Pleret Bantul on 22 November 2020

Interview with Muhammad Busro, Head of Takmir of Quwatul Islam Mosque, Kuwaru, Poncosari, Srandakan, Bantul on 24 November 2020.

Interview with Abdur Razak Paryanto, public figure in Suren, Pleret, Pleret, Bantul, Yogyakarta on 9 October 2020.

Interview with Muh. Rosid Husaini, public figure in Kerto Hamlet, Pleret Villag, Pleret Sub-district, Bantul District on 23 November 2020.

Interview with Mr. Mujiono, Head of RW 08, Kerto Hamlet, Pleret Village, Pleret Sub-district on 20 November 2020.

Interview with Mr. Basuki Raharjo, Head of Kerto Hamlet, Pleret Village, Pleret Sub-district on 20 November 2020.



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## **The Use of Maxims (*al-Qawā'id al-Uṣūliyyah wa al-Fiqhiyyah*) in Legal Argumentation of Sharia Economic Court Decisions in Indonesia**

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### **Abstract:**

All sharia economic court decisions in Indonesia are supposed to include sharia principles as the basis for adjudicating the case. Therefore, the judges must be able to understand the legal norms of sharia economics. This study aimed to explore how fundamentalistic maxims (*al-qawā'id al-uṣūliyyah*) and jurisprudential maxims (*al-qawā'id al-fiqhiyyah*) as parts of sharia economic legal norms or sharia principles were used by judges as legal argumentation in court decisions. We analyzed 384 court decisions categorized as sharia economic cases on the Indonesian Supreme Court website from April 20, 2016, to April 20, 2020, and set them as a universe of cases. Each decision that contained the maxim (*qā'idah*) in its legal consideration was selected as relevant case sample and was then analyzed to find how the maxim was used as legal argumentation to respond to a petition and/or demurrer. Then, we found 15 legal maxims from 28 legal argumentations of 14

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decisions (3.65% of the universe of cases). In general, the use of those maxims as legal argumentation has already conformed to their conventional usage with a few notes related to specific legal findings (*rechtsvinding*) in sharia economic cases.

**Keywords:**

Court Decision; Sharia Economic; Legal Maxim;  
Al-Qawā'id al-fiqhiyyah; Al-Qawā'id al-Uṣūliyyah

**Abstrak:**

Putusan ekonomi syariah di Indonesia diharuskan memuat prinsip-prinsip syariah sebagai dasar mengadili kasus. Karena itu, para hakim diharuskan mampu memahami norma-norma hukum ekonomi syariah. Penelitian ini bertujuan menjelaskan bagaimana kaidah usul dan kaidah fikih sebagai bagian dari norma-norma hukum ekonomi syariah atau prinsip syariah digunakan hakim sebagai argumentasi hukum dalam berbagai putusan ekonomi syariah di Indonesia. Kami meneliti 384 putusan dengan klasifikasi kasus ekonomi syariah periode 20 April 2016 (terregistrasi) - 20 April 2020 (unggahan terakhir) di laman resmi Mahkamah Agung RI sebagai semesta kasus. Putusan yang memuat kaidah usul dan atau kaidah fikih dalam pertimbangan hukum menjadi sampel kasus relevan untuk dianalisis bagaimana penggunaannya sebagai argumentasi hukum oleh hakim dalam menjawab petitum dan atau eksepsi. Ditemukan 15 kaidah dari 28 argumentasi hukum dalam 14 putusan (3,65% dari semesta kasus). Umumnya, penggunaan kaidah-kaidah tersebut sebagai argumentasi hukum telah sesuai dengan sesuai kelaziman peruntukan dengan sejumlah catatan terkait penemuan hukum khas perkara ekonomi syariah.

**Kata Kunci:**

Putusan Pengadilan; Ekonomi Syariah; Kaidah Hukum;  
Al-Qawā'id al-Fiqhiyyah; Al-Qawā'id al-Uṣūliyyah

**Introduction**

Islamic economics or sharia economics is the knowledge and application of prescriptive and prohibitive injunctions of the Qur'ān, the Sunnah, and rules of sharia (Islamic law) regarding the acquisition and disposal of any available resources. It aims to provide

satisfaction to individuals to enable them to perform their obligations to Allah and society. The rules of the shariah signify the set of principles determined with precision and their subordinate legal maxims.<sup>1</sup> Islamic law, like other laws, has its own “sources” (*maṣādir*). It also has its “guiding principles” (*uṣūl*) that dictate the nature of its “evidence or clues” (*adilla* (pl), *dalil* (sing)). Likely, it equally employs “legal maxims” (*al-qawā'id*) and utilizes several underlying “objectives” (*maqāṣid*) to underpin the structure of its legal theory.

In this context, Islamic legal maxims or *al-qawā'id al-fiqhiyyah* and fundamentalistic maxims or *al-qawā'id al-uṣūliyyah* play a vital role in the process of legal judgment.<sup>2</sup> Islamic scholars (*ulama'*) consider that the difference between both types of maxims was shown first by Shihāb al-Dīn al-Qarāfi (d. 682/1281) in his book “*al-Furūq*”.<sup>3</sup> He argues that a court decision can be reversed if it contains a violation of any generally accepted maxim. Moreover, without having a command over legal maxims, one cannot be a good jurist<sup>4</sup> and law expert.<sup>5</sup>

On the website of The Indonesia Supreme Court, meanwhile, as of April 12, 2021, there were 1,882 decisions classified as sharia economic cases originating from the area of religious courts at levels of the district court (first level); appeal; cassation; and judicial review.<sup>6</sup> Each decision came from legal argumentation which was based on general practical argumentation for special cases but within the limits

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<sup>1</sup>Hasanzaman, *The Economic Relevance Of The Sharia Maxims (Al Qawaid Al Fiqhiyyah)* (Jeddah: Scientific Publishing Centre, King Abdulaziz University., 1997).

<sup>2</sup> Mohamed Elewa Badar, “Islamic Law (Shari'a) and the Jurisdiction of the International Criminal Court,” *Leiden Journal of International Law* p 431. 24 (2): 43 (n.d.), <https://doi.org/https://doi.org/10.1017/S0922156511000082>.

<sup>3</sup> Muḥammad al- Zuhayli, *Al-Qawā'id Al-Fiqhiyyah Wa Tatbiqātuhā Fī Al-Madhāhib Al-Arba'ah* (Damaskus: Dār al-Fikr, 2006), <https://al-maktaba.org/book/21786>.

<sup>4</sup> Sg: *faqīh*, Pl: *fuqahā*

<sup>5</sup>Hafiz Abdul Ghani, “A Study of The History of Legal Maxis of Islamic Law,” *International Journal of Arts and Commerce* 1 (2): 98 (2012).

<sup>6</sup>Mahkamah Agung RI, Putusan Ekonomi Syariah 2021. <https://putusan3.mahkamahagung.go.id/direktori/index/kategori/ekonomi-syari-ah-1.html>.

of a legal order. It is elaborated from an institutionalized form as a part of the procedure: a discussion concerning the correctness of a normative statement has an institutional and authoritative character.<sup>7</sup> Chapter 5 of Indonesia Supreme Court Regulation No. 14 of 2016 regarding Procedure in Resolving Sharia Economic Cases<sup>8</sup> orders that “all court decisions and determinations in the field of sharia economics shall contain the reasons and basis for the decision and sharia principles that are used as the basis for adjudicating”.

Since 2014, The Directorate General of the Religious Courts of the Indonesia Supreme Court has enforced the Standard Format of the Religious Courts Minutes of Hearing and Decision of 2014 (*Standar Format BAS – Berita Acara Sidang – 2014*) which stipulates that *al-qawā'id al-fiqhiyyah* together with al-Qur'ān and ḥadīth should be considered as part of legal argumentation in the legal consideration of Religious Court's decision.<sup>9</sup> One of the goals is to facilitate and accelerate the completion of work and minimize disparities in decisions that occur between one religious court and another.<sup>10</sup> Through the search, among others, we found a Religious Court Decision in Banjarnegara<sup>11</sup> in which its legal consideration contained a jurisprudential maxim, *al-ḍararu yuzālu* (harm must be eliminated), as legal argumentation. What is interesting is that the judges in their decision mentioned *al-ḍararu yuzālu* maxim as *al-qawā'id al-fiqhiyyah* which is supposed to be *al-qawā'id al-uṣūliyyah*. This was

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<sup>7</sup> Eveline T Feteris, “Fundamentals of Legal Argumentation,” *Springer* 2nd ed. Vo (2017), <https://doi.org/https://doi.org/10.1007/978-94-024-1129-4>.

<sup>8</sup> PERMA No. 14 of 2016

<sup>9</sup> Standar Format BAS., “Standar Format BAS Dan Format Putusan Pengadilan Agama/Mahkamah Syar'iyah,” Badan Peradilan Agama Mahkamah Agung RI, 2014, <https://badilag.mahkamahagung.go.id/pengumuman-elektronik/pengumuman-elektronik/standar-format-bas-dan-putusan>.

<sup>10</sup> A Zahri, “Mencermati Template Putusan Badilag,” Badan Peradilan Agama Mahkamah Agung RI, 2017, <https://badilag.mahkamahagung.go.id/artikel/publikasi/artikel/mencermati-template-putusan-badilag-oleh-h-a-zahri-s-h-m-hi-19-1>.

<sup>11</sup> Banjarnegara Religious Court Decision No. 354 of 2016

explained by Masyhudi Muqorobin<sup>12</sup> in his research which discussed *qawa'id fiqhiyyah* and its implication on economic behavior and idea in public, especially among Moslems. His research focused on 99 (ninety-nine) *qawa'id* compiled by Moslem scholars at Dynasties of Turki Usmani through *al-majallah al-Ahkaam al-Adliyyah* about the early century of thirteenth Hijriyah or precisely around the year of 1286 H. Also, Irwan Maulana analyzed the implementation of *qawa'id fiqhiyyah* in Islamic economics and finance.<sup>13</sup> The purpose of his paper is to find out how the implementation of *qawaid fiqhiyyah* in the sharia economy and financial industry is.

After reviewing the above literature, the significance of the current study exists because it aims to empirically portray the practices of judges when using Islamic legal maxims in formulating their *ijtihad* (diligence in formulating the law) result while considering sharia principles (*ahkām*), particularly command law (*hukm taklifi*) by using affixation (*ilhāq*) as a part of applying the law (*taṭbiq al-ahkām*). Considering the issue in the legal argumentation of Banjarnegara Religious Court Decision Number 354 of 2016, we prefer to acquire more court decisions on sharia economic cases as a sample of the population to answer the questions we posed earlier. Of course, concluding qualitative facts prior to cases by pointing to only two or three cases as evidence may help foresee what courts are likely to do in future cases. However, it may impede future legal analysis and allow for either conscious or unconscious bias.<sup>14</sup> Moreover, although many studies on Islamic legal maxims have been conducted, no research has been found on how judges use jurisprudential and fundamentalist maxims as legal argumentation, particularly in

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<sup>12</sup> Masyhudi Muqorobin, "Qawaid Fiqhiyyah Sebagai Landasan Perilaku Ekonomi Umat Islam: Suatu Kajian Teoritik," *Jurnal Ekonomi Dan Studi Pembangunan*, Vol. 8, No (2007): 198-214, <https://journal.umy.ac.id/index.php/esp/article/view/152>.

<sup>13</sup> Irwan Maulana, "Implementasi Qawaid Fiqhiyyah Dalam Ekonomi Dan Industri Keuangan Syariah," *Jurnal Asy-Syukriyyah* Vol. 19, N (2018), <https://doi.org/https://doi.org/10.36769/asy.v19i2.34>.

<sup>14</sup>and Anup Malani Baude, William, Adam S Chilton, "Making Doctrinal Work More Rigorous: Lessons from Systematic Reviews," *The University of Chicago Law* 84 (1) (2017).

adjudicating sharia economic cases in Indonesia. For that reason, the purpose of this study is to understand how judges use maxims as legal argumentation in sharia economic cases in Indonesia.

### Method

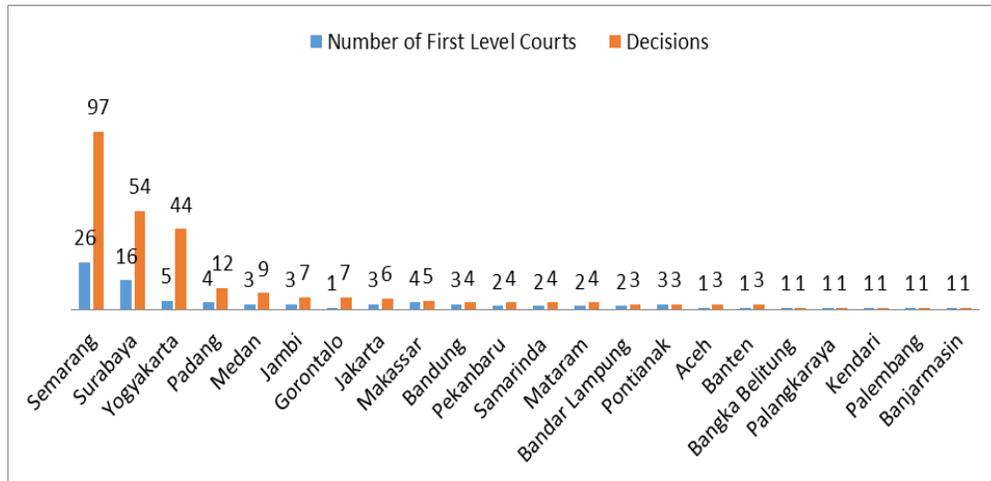
We attempted to identify all court decisions classified as sharia economic cases that were publicly available on the Indonesian Supreme Court website as of April 12, 2021. Because PERMA No. 5 of 2016 was issued in 2016, we considered limiting the scope of the study to decisions made after the regulation was issued, particularly cases that were officially uploaded with case registration information from April 20 2016 until April 20, 2020. From the sampling, we obtained 384 decisions and used these as the universe of case. Further, we examined the contents of those 384 decisions to see whether the keywords "*fikih*," "*ushul*," "*fiqh*," "*kaidah*," "*qaidah*," or a combination of these key phrases are explicitly mentioned in the legal arguments by judges so that at the next level, they could be analyzed quantitatively. We also identified which court and at what level those decisions were issued in a systematic review for quantitative analysis.<sup>15</sup> We then established that the relevant case samples are decisions that contain the legal maxim in its legal considerations and identified the following aspects: the names of the judges who used the maxim, the types of cases, as well as the contracts and objects in dispute. Legal maxims were then analyzed using systematic identification on whether there is justification from scholars about either those maxims are jurisprudential or fundamentalist; whether the mention of those maxims is textually written by the judge in the decision; how the usage of those maxims in legal argumentation is, whether those maxims were used to deduce legal rulings from the source of law and whether the evidence (*dā'il*) was used to adjudicate the acts of *mukallaf* (obligated people). Finally, we conducted a qualitative analysis by contrasting scholars' perspectives on each maxim that appeared while demonstrating empirical evidence on how such maxims are used by judges as legal argumentation in adjudicating a petition or a demurrer in the case.

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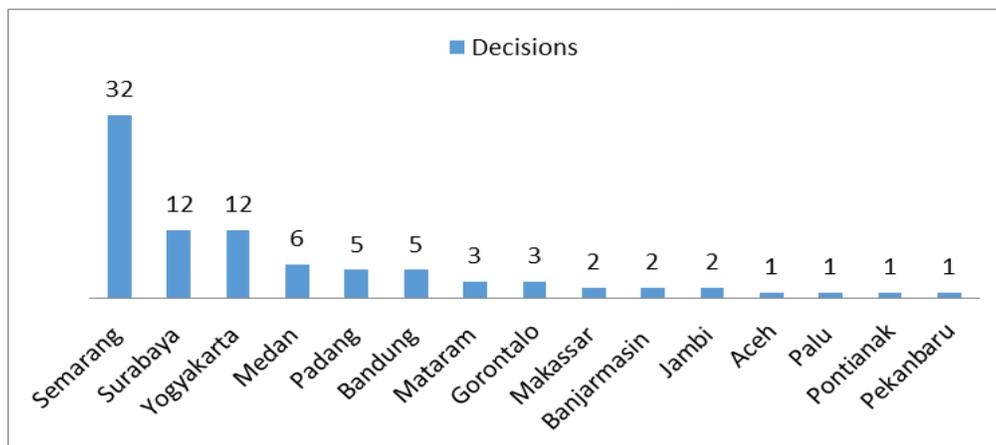
<sup>15</sup> Baude, William, Adam S Chilton.

**Discussion and Result**

The universe of cases for this study consists of 362 sharia economic case decisions, including 274 decisions from the first-level religious courts and 88 decisions from the appeals level. Those data can be seen in Chart 1 and Chart 2 below:



**Chart 1.** First level court decisions of the high religious court (n=274)



**Chart 2.** Appeal level court of the high religious court (n = 88)

Based on the chart 1 dan chart 2 above, we found that there were 14 decisions (3.87% of 362 decisions/universe of cases) which consist of:

- a. Eight decisions from the first-level court:
  - 1) Gorontalo Religious Court Decision No. 599/Pdt.G/2018/PA.Gtlo, judges: Tomi Asram; Iskandar; Mohammad H. Daud;
  - 2) Gorontalo Religious Court Decision No. 0293/Pdt.G/2017/PA.Gtlo, judges: Tomi Asram; Suyuti; Khairah Ahmad;
  - 3) Banjarnegara Religious Court Decision No. 0354/Pdt.G/2016/PA.Ba, judges: Mugni Labib; Rohmat; Muridi;
  - 4) Sintang Religious Court Decision No. 0132/Pdt.G/2016/PA.St, judges: Abdul Aziz; Yusri; Muhammad Rais;
  - 5) Karanganyar Religious Court Decision No. 1217/Pdt.G/2017/PA.Kra, judges: Hadi Suyoto; M. Muslih; Muhamad Imron;
  - 6) Banda Aceh Syar'iyah Court Decision No. 319/Pdt.G/2017/MS.Bna, judges: Mazharuddin; ANB. Muthmainah; Ahmad Sobardi;
  - 7) Gorontalo Religious Court Decision No. 0241/Pdt.G/2018/PA.Gtlo, judges: Iskandar; Tomi Asram; Mohammad H. Daud;
  - 8) Banda Aceh Syar'iyah Court Decision No. 319/Pdt.G/2018/MS.Bna, judges: Mazharuddin; ANB. Muthmainah; Ahmad Sobardi; and
- b. Six decisions from the appeal level:
  - 1) Semarang Religious High Court Decision No. 264/Pdt.G/2016/PTA.Smg, judges: Jaliensyah; Helmy Thohir; Cholidul Azhar;
  - 2) Banjarmasin Religious High Court Decision No. 43/Pdt.G/2016/PTA.Bjm, judges: Syamsuddin Ahmad; Shaleh; Aridi;
  - 3) Surabaya Religious High Court Decision No. 08/Pdt.G/2017/PTA.Sby, judges: Achmad Hanifah; Agus Dimyathi Hamid; Abdullah Cholil;
  - 4) Surabaya Religious High Court Decision No. 406/Pdt.G/2018/PTA.Sby, judges: Achmad Hanifah; Humam Iskandar; Masruri Syuhadak;

- 5) Surabaya Religious High Court Decision No 138/Pdt.G/2017/PTA.Sby, judges: Achmad Hanifah; Agus Dimyathi Hamid; Humam Iskandar;
- 6) Surabaya Religious High Court Decision No. 338/Pdt.G/2017/PTA.Sby, judges: Achmad Hanifah; Agus Dimyathi Hamid; Humam Iskandar.

Those relevant samples consist of 7 disputes of selling plus (*murābahah*) contracts (50% of 14 cases); 3 disputes of selling plus by delegation (*murābahah bi l-wakālah*) contracts (21.4% of 14 cases); 3 disputes of cooperation (*mushārahah*) contracts (21.4% of 14 cases); and 1 dispute of trustee finance (*muḍārabah*) contract. For further detailed information, among those 14 cases, we detailed the information can be seen in table 1 below, as the type of cases in court decisions.

**Table 1.** Type of Cases in Court Decisions

No	Decision No.	Type of case	Contract	Object of Dispute
1	0354/Pdt.G/2016/PA.Ba	Breach of Contract	<i>mushārahah</i>	mortgage and fiduciary guarantee
2	0132/Pdt.G/2016 PA.Stg	Breach of Contract with an accessory contract (insurance)	<i>murābahah</i>	mortgage guarantee
3	264/Pdt.G/2016/PTA.Smg	Tort	<i>murābahah</i>	fiduciary guarantee
4	0043/Pdt.G/2016/PTA.Bjm	Tort	<i>murābahah</i>	mortgage guarantee
5	08/Pdt.G/2017/PTA.Sby	Breach of Contract, stay of execution (perlawanan eksekusi), and absolute jurisdiction demurrer	<i>murābahah bi l-wakālah</i>	mortgage guarantee
6	138/Pdt.G/2017/PTA.Sby	Breach of Contract, stay of execution, and absolute jurisdiction demurrer	<i>mushārahah</i>	mortgage guarantee
7	0293/Pdt.G/2017/ PA.Gtlo	Breach of contract, stay of execution	<i>murābahah</i>	mortgage guarantee
8	319/Pdt.G/2017/ MS.Bna	Breach of Contract	<i>murābahah bi l-wakālah</i>	mortgage guarantee
9	1217/Pdt.G/2017/ PA.Kra	Breach of Contract with damages liability	<i>murābahah</i>	mortgage and fiduciary guarantee
10	0241/Pdt.G/2018/ PA.Gtlo	Breach of Contract	<i>murābahah</i>	mortgage guarantee
11	338/Pdt.G/2017/ PTA.Sby	Breach of Contract with the stay of execution, and absolute jurisdiction demurrer	<i>mushārahah</i>	mortgage guarantee
12	599/Pdt.G/2018/ PA.Gtlo	Breach of Contract with the stay of execution	<i>murābahah</i>	mortgage guarantee
13	406/Pdt.G/2018/ PTA.Sby	Breach of Contract with the stay of execution, and absolute	<i>muḍārabah</i>	mortgage guarantee

		jurisdiction demurrer			
14	319/Pdt.G/2018/ MS.Bna	Tort		<i>murābahah bi l-wakālah</i>	mortgage guarantee

Based on the type of cases, in table 1 above, it is known that 78.6% or 11 decisions are cases of default or breach of contract (dutch: *wanprestatie*) and 21.4% are tort/unlawful act (*perbuatan melawan hukum*) cases. The majority of disputed objects (78.6%) are immovable objects bound by the mortgage. The rests were mortgage and fiduciary guarantees (movable objects).

Besides, among the 14 cases, we found 15 maxims in the sample of relevant decisions. This detailed information is represented in table 2 below.

**Table 2.** The Maxims Mentioned by the Judge in the Court Decision

No	Decision No.	Maxim	Textually mentioned by judges	Remarks	Usage & status (A/B)*	Sample of justification as	
						jurisprudential maxim	fundamentalist maxim
01	0354/Pdt. G/2016/PA. Ba	<i>Al-ḍararu yuzālu</i>	qoidah ushulul-fiḥi	Arabic with translation	A	(al-Suyuti 1990:83; al-Subki 1991:41)	
02	0354/Pdt. G/2016/PA. Ba	<i>Lā ḍarar wa-lā ḍirār</i>	Hadis al-Mālik & ad-Dāraquṭnī	Arabic with translation	A	(al-Zarqa 1989:165; M. al-Zuhayli 2006:199)	
03	0132/Pdt. G/2016/PA. Stg	<i>Al-riḍā bi l-shay' i riḍān bimā yatawalladu minhu</i>	kaidah fiḥiyah	Arabic with translation	A	(al-Suyuti 1990:141; M. al-Zuhayli 2006:727)	
04	264/Pdt.G / 2016/PT A.Smg	<i>Al-riḍā bi l-shay' i riḍān bimā yatawalladu minhu</i>	kaidah fiḥiyah	Arabic with translation	A	Same as above	
05	264/Pdt.G / 2016/PT A.Smg	<i>Al-aṣlu fi l-mu'āmalāti al-ibāḥah 'illā 'an-yadulla dalīl 'alā taḥrīmihā</i>	kaidah fiqh	Arabic with translation	A	(Fatwa No. 4 2000; Djazuli 2006:130; Azhari 2015:135)	
06	264/Pdt.G / 2016/PT A.Smg	<i>Lā ḍarar wa-lā ḍirār</i>	Hadis (Ḥadīth)	Arabic with translation	A	Same as above	
07	0043/Pdt. G/2016/PT A.Bjm	<i>Lā ḍarar wa-lā ḍirār</i>	Hadis	Arabic with translation	A	Same as above	

The Use of Maxims (*al-Qawā'id al-Uṣūliyyah wa al-Fiqhiyyah*)

08	08/Pdt.G/ 2017/PT A.Sby	<i>Al-riḍā bi l-shay' i riḍān bimā yatawalladu minhu</i>	qoidah fiqhiyyah	Only Indonesian translation	B	Same as above
09	138/Pdt.G / 2017/PT A.Sby	<i>Al-riḍā bi l-shay' i riḍān bimā yatawalladu minhu</i>	qoidah fiqhiyyah	Only Indonesian translation	B	Same as above
10	0293/Pdt. G/ 2017/PA. Gtlo	<i>Mā lā yatimmu l- wājibu illā bihi fahuwa wājibu</i>	kaidah ushul fiqh	Arabic with translation	A	(al-Subki 1991:88; Hakim, n.d.:54) (al-Burni 1996:393)
11	0293/Pdt. G/ 2017/PA. Gtlo	<i>Taşarruf l-imāmi 'alā al-ra' iyyati manūṭun bi l- maşlahah</i>	kaidah ushul fiqh	Arabic with translation	A	(al-Suyuti 1990:88; Hakim, n.d.:52)
12	0293/Pdt. G/ 2017/PA. Gtlo	<i>Al-ḥukmu yadūru ma' a ' illatihi wujūdan wa 'adamān</i>	kaidah ushul fiqh	Arabic with translation	B	(Hakim, n.d.:64; Ibrahim 2019:149) (al-Zamil 2001:281)
13	319/Pdt.G / 2017/MS. Bna	<i>Al-aşlu fi l- 'aqdi riḍā al- muta' āqidayn wanatijatuh mā iltazamāh bi l- ta' āqud</i>	kaidah ushul fiqh	Arabic with translation	A	(Djazuli 2006:130; Azhari 2015:177)
14	1217/Pdt. G/ 2017/PA. Kra	<i>Al-ḍararu yuzālu</i>	kaidah fiqh	Only Indonesian translation	A	Same as above
15	0241/Pdt. G/ 2018/PA. Gtlo	<i>Al-aşlu fi l- 'aqdi riḍā al- muta' āqidayn wanatijatuh mā iltazamāh bi l- ta' āqud</i>	kaidah ushul fiqh	Arabic with translation	A	Same as above
16	338/Pdt.G / 2017/PT A.Sby	<i>Al-riḍā bi l-shay' i riḍān bimā yatawalladu minhu</i>	qoidah fiqhiyyah	Only Indonesian translation	B	Same as above
17	599/Pdt.G / 2018/PA. Gtlo	<i>Al-bayyinatu 'alā l-mudda' i wa 'l- yamīnu 'alā man ankar</i>	risalatul qadha	Arabic with translation	A	(M. al-Zuhayli 2006:589; A. al- Zarqa 1989:369)
18	599/Pdt.G / 2018/PA. Gtlo	<i>Al- 'ibrah fi l- 'uqūdi li l- maqāşidi wa l- ma' ānī lā lil-alfāz wa l-mabānī</i>	kaidah ushul fiqh	Arabic with Indonesia translation	A	(M. al-Zuhayli 2006:403; A. al- Zarqa 1989:55)
19	599/Pdt.G / 2018/PA. Gtlo	<i>Al-ḥājatū tanzīlu manzilāt al- ḍarārah, 'amma kānat aw khāşşah</i>	qaidah ushul fiqh	Arabic with translation	A	(al-Suyuti 1990:88; Ibn Nujaym 1999:91)
20	599/Pdt.G / 2018/PA. Gtlo	<i>Mā lā yatimmu l- wājibu illā bihi fahuwa wājibu</i>	kaidah ushul fiqh	Arabic with translation	A	Same as above

21	599/Pdt.G / 2018/PA. Gtlo	<i>Taşarruf l-imāmi 'alā al-ra'iyati manūṭum bi l- maşlahah</i>	kaidah ushul fiqh	Arabic with translation	A	Same as above	
22	599/Pdt.G / 2018/PA. Gtlo	<i>Al-wilāyatu l- khaṣṣah aqwā min al-wilāyati l- 'āmmah</i>	kaidah ushul fiqh	Arabic with translation	A	(al-Suyuti 1990:154; M. al- Zuhayli 2006:486)	
23	599/Pdt.G / 2018/PA. Gtlo	<i>Al-ḍararu yudfa'u biqadri l-imbān</i>	kaidah ushul fiqh	Arabic with translation	A	(al-Burni 1996:256; M. al- Zuhayli 2006:208)	
24	599/Pdt.G / 2018/PA. Gtlo	<i>Al-tābi'u tābi'un</i>	kaidah ushul fiqh	Arabic with translation	B	(al-Suyuti 1990:91; Ibn Nujaym 1999:120)	
25	599/Pdt.G / 2018/PA. Gtlo	<i>Al-tābi'u lā yufradu bi l-ḥukmi</i>	kaidah fiqh	Arabic with translation	B	(al-Suyuti 1990:117; M. al- Zuhayli 2006:441)	
26	599/Pdt.G / 2018/PA. Gtlo	<i>al-ḥukmu yadūru ma'a 'illatihi wujūdan wa 'adaman</i>	kaidah ushul fiqh	Arabic with translation	B	Same as above	Same as above
27	406/Pdt.G / 2018/PT A.Sby	<i>Al-riḍā bi l-shay'i riḍān bimā yatawalladu minhu</i>	qoidah fiqhiyyah	Arabic with translation	B	Same as above.	
28	319/Pdt.G / 2018/MS. Bna	<i>Al-aşlu fı l-'aqdi riḍā al- muta'āqidayn wanatijatuh mā iltazamāh bi l- ta'āqud</i>	kaidah ushul fiqh	Arabic with translation	A	Same as above	

The 15 maxims, as listed in Table 2 above, appeared in 28 legal arguments. Specifically, each maxim is used as the rationale for the decision (*ratio decidendi*) by judges in response to one of numerous petitions or demurrers submitted by the plaintiff or defendant in their suit or reply. Textually, judges used several utterances to refer to the maxim, such as "qoidah ushulul-fiqhi", "kaidah fiqhiyah", "qoidah fiqhiyyah", "kaidah ushul fiqh", "kaidah fiqh," and "kaidah ushul fiqih".

In 10 of 14 decisions (71%), the maxims were written in Arabic text and their meaning/translation, while the 29% were in translation only. Additionally, in 20 of 28 (71%) decisions, maxims were used as legal argumentation to adjudicate the acts of *mukallaf* or apply the law to *mukallaf's* actions as the facts (*taṭbīq al-ahkām*) (\*A). For the rest (29%), meanwhile, judges used maxims to deduce rulings (*istinbāt al-ahkām*) from the source of law (\*B).

Those 15 maxims are detailed below, arranged from the most frequently used ones.

The first of the maxims reads: *Al-riḍā bi l-shay'i riḍān bimā yatawalladu minhu* which means “accepting something implies acceptance of the consequences thereof”. This jurisprudential maxim, according to al-Suyūṭī, is contained in the chapter on general and universal in nature, but is not applicable to all issues of Islamic jurisprudence.<sup>16</sup> It becomes the most frequently used jurisprudential maxim by judges in sharia economic cases (appeared in 6 of 14). The judges of the Surabaya Religious High Court frequently used this maxim, most, and it was found in four decisions with Achmad Hanifah as chairman of the judges in all four cases. The use of this maxim in those decisions seem to be compatible with how this maxim is conventionally applied as a jurisprudential maxim because judges utilized it to adjudicate the act of *mukallaf*.

However, we also found that judges used this maxim to deduce the law from a legal source: a contract agreed upon by the parties that contain an arbitration clause that the judge refused to examine the case due to the court's absolute competence. Although this usage is closer to the fundamentalistic maxims, it's still relevant as seen in cases No. 08/Pdt.G/2017/PTA.Sby; No. 138/Pdt.G/2017/PTA.Sby; No. 406/Pdt.G/2018/PTA.Sby; and No. 338/Pdt.G/2017/PTA.Sby which were indicated as specific legal findings.

The second is a maxim that reads: *lā ḍarar wa-lā ḍirār*, meaning “no harming and no reciprocating harm”. This maxim is adapted from a ḥadīth<sup>17</sup> and enables us to draw multiple interpretations with living relevance to modern times. Muṣṭafā al-Zuhaylī establishes this ḥadīth as the primary jurisprudential maxim with a derivative maxim

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<sup>16</sup> Jalāl al-Dīn al-Suyūṭī, *Al-Ashbāh Wa Al-Nazāir* (Beirut: Dār al-Kutub al-'Ilmiyyah, 1990), <https://al-maktaba.org/book/21719>. Badru al-Dīn al-Zarkashī, *Al-Manthūr Fī Al-Qawā'id Al-Fiqhiyyah* (Madīnah al-Kuwayt: Wazārah al-awqāf al-Kuwaytīh, 1985), <https://shamela.ws/book/21592>.

<sup>17</sup>Ibnu Majah, Muhammad Bin Yazid Al-Quzwini, *Sunan Ibnu Majah* (T: Abdul Baqi: Daar Ihya' al-Kutub al-arabiyyah, n.d.).

that reads: “harm is to be removed.”<sup>18</sup> In the context of this research, we found that judges applied this maxim to several following situations.

*First*, to dismiss contract terms that obliged someone else to do something they were not necessarily capable of, as in decision No. 0354/Pdt.G/2016/PA.Ba. In the case, judges decided that burdening an advocate's services to an opponent, who has the weak economic condition, is unlawful because the opponent's harm is not allowed to be harmed anymore; It is like what happened in the Customary Court of Aceh in which the court gave the legal protection for disputing parties.<sup>19</sup>

*Second*, to prohibit the use of any rights that harm others, as in decision No. 264/Pdt.G/2016/PTA.Smg. In the case, judges prohibited the execution of fiduciary objects by the bank without paying attention to social ethics;

*Third*, to prohibit anyone from using any rights that could cause harm to himself as indicated in decision No. 43/Pdt.G/2016/PTA.Bjm. In this case, people who purchase immovable goods and they are not immediately followed up with relevant administration of its legal documents are considered unlawful.

The third maxim reads *al-aşlu fı l-‘aqdi riđā al-muta‘āqidayn wanatijatuh mā iltazamāh bi l-ta‘āqud* which means “the basic rule of the contract is the consent of the contracting parties, and its result is what they committed themselves to in the contract”. The fundamental principle of contracts or transactions, according to the maxim, is the consent of the two contractual parties. This is established with *dālil* from both the Qur‘ān and the Sunnah. We found that this maxim was used to obligate the parties to be responsible for the terms of the agreed contract, including the consequences if they ignore the

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<sup>18</sup> Muhammad al- Zuhayli, Al-Qawā‘id Al-Fiqhiyyah Wa Tatbiqātuhā Fı Al-Madhāhib Al-Arba‘ah (Damaskus: Dār al-Fıkr, 2006), <https://al-maktaba.org/book/21786>.

<sup>19</sup> Fitriah M Suud Dahlia Farida, Hamid Sarong, Darmawan, “Legal Protection for Disputing Parties through the Aceh Customary Court,” Al-Ihkam: Jurnal Hukum Dan Pranata Sosial Vol. 15, N (2020), <https://doi.org/https://doi.org/10.19105/al-lhkam.v15i1.2250>.

contract's articles as indicated in decision No. 319/Pdt.G/2017/MS.Bna; No. 0241/Pdt.G/2018/PA.Gtlo; and No. 319/Pdt.G/2018/MS.Bna.

The fourth maxim reads: *al-dararu yuzālu* or "harm must be eliminated". This maxim is based on the maxim 2 above and sourced from a prophetic ḥadīth: "*lā ḍarar wa-lā ḍirār*". Understanding of this maxim is based on explanation from many chapters of *fiqh* and al-Qāḍī (judge) Ḥusayn al-Marrūzī is deemed as the first known person to formulate this maxim. The moral message in this maxim aims to teach and describe the principles of the ethical codes that exist in every Muslim in living life, namely not harming others.<sup>20</sup> This maxim was used as an excuse to eliminate the obligation to pay a late fee like loaning (*qarḍ al-ḥasan*) funds in Decision No. 0354/Pdt.G/2016/PA.Ba. It was also used as the basis for determining the appropriate amount of compensation to the entitled party without burdening another party, as in Decision No. 1217/Pdt.G/2017/PA.Kra.

The fifth maxim reads: *mā lā yatimmu l-wājibu illā bihi fahuwa wājibun* which means that what is necessary for the fulfillment of an obligation also becomes an obligation. According to Ṣidqī al-Būrṅū, this is a fundamentalistic maxim instead of a jurisprudential one because it is a fore part of the obligation.<sup>21</sup> Regarding the use of this maxim among Indonesian judges to adjudicate petitions or demurrers in cases, we found that it is used to oblige the creditor to change the contract (addendum) so that the debtor who is in difficulty can be helped to fulfill his obligation to pay off the debt. This was mentioned in Decision No. 0293/Pdt.G/2017/PA.Gtlo and 599/Pdt.G/2018/PA.Gtlo. In those two cases, the judges substantially

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<sup>20</sup> Mohd. Fazlul Karim. Ahmad, Abu Umar Faruq, Noor Mohammad Osmani, A.K.M. Shahed, "Shari'ah Maxims and Their Implication on Modern Financial Transactions," *Journal of Islamic Economics, Banking, and Finance* 6 (3) (2010): 75–104. See also Muhammad Al-Amin Deribe. Shettima, Muhammad, Hama Adam Bui, "The Relevance of Islamic Legal Maxims In Determining Some Contemporary Legal Issues," *IJUM Law Journal* 24 (2) (2016): 415–451, <https://doi.org/https://doi.org/10.31436/iiumlj.v24i2.254>.

<sup>21</sup> Muḥammad Ṣidqī al-Būrṅū., *Al-Wajīz Fī Īdhāḥ Qawā'id Al-Fiqh Al-Kuliyyah* (Beirut: Muassasah al-Risālah, 1996), <https://shamela.ws/book/8379>.

adjudicated the *mukallaf's* action by applying (*taṭbiq*) this maxim as law. Thus, this maxim was not used to deduce (*istinbāt*) law from existing legal sources as 'how to use a fundamentalistic maxim conventionally'. Instead, it was applied similarly to 'how jurisprudential maxims are applied'. For that reason, we contend that the manner of such usage is a form of specific legal finding on concrete facts in sharia economics cases.

The sixth maxim reads: *taṣarrufl-imāmi 'alā al-ra'īyyati manūṭun bi l-maṣlahah* which means "the leader's policy towards the people must follow the benefit (*maṣlahah*) of the society". Some academics interpret "*maṣlahah*" in this jurisprudential maxim as public interest,<sup>22</sup> while *maṣlahah* can also mean interests recognized by the law.<sup>23</sup> This maxim denotes that power must be exercised for the public benefit. We found that this maxim was used to compel an independent party to act in the best interests of the dependent one, as in Decision No. 0293/Pdt.G/2017/PA.Gtlo and No. 599/Pdt.G/2018/PA.Gtlo. In those cases, the creditor (bank) is the first independent party, while the debtor is the second party which is reliant on the first party to carry out a contract addendum. Without an addendum to the contract approved by the first party, the debtor will be unable to pay the debt and consequently, the collateral would be seized. In fact, prior to the dispute, the relationship between creditors and debtors was equal, unlike the relationship between the leader or government and the people.

The seventh maxim reads: *al-ḥukmu yadūru ma'a 'illatihi wujūdan wa 'adamān* which means "the law can be changed when the reason behind it has changed". It implies that the reason (*'illah*) is the

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<sup>22</sup>Luqman Zakariyah, *Islamic Legal Maxims (Al-Qawā'id Al-Fiqhiyya): Historical Development, Concepts, and Content*. (Brill: Nijhoff, 2015), [https://doi.org/https://doi.org/10.1163/9789004304871\\_003](https://doi.org/https://doi.org/10.1163/9789004304871_003).

Intisar A Rabb, *Doubt in Islamic Law: A History of Legal Maxims, Interpretation, and Islamic Criminal Law* (Cambridge: Cambridge University Press, 2015), <https://doi.org/https://doi.org/10.1017/CBO9781139953054>.

<sup>23</sup> Ibrāhīm ibn Mūsā Abū Ishāq al-Shāṭibi., *The Reconciliation of The Fundamentals of Islamic Law (Al-Muwāfaqāt Fī Uṣūl Al-Sharī'a)*, ed. Edited by 'Abd Allah Darrāz. Translated by Imran Ahsan Khan Nyazee (Reading: Garnet Publishing, 2012).

*maṣlahah* (interest/benefit) or *mafsadah* (injury/evil) instead of the cause, whether it exists or disappears.<sup>24</sup> We found the above maxim was used as the principle of *'illah* to deduce a legal consequence of a *petitum/petite/petit* adjudicated in Decision No. 0293/Pdt.G/2017/PA.Gtlo and 599/Pdt.G/2018/PA.Gtlo. The case happened to a plaintiff (customer) who signed a *murabahah* financing agreement with the defendant I (bank), which has installments for 48 months and a plot of land and buildings as the object rights dependents. In the middle of the second year of the contract, the plaintiff became ill and was hospitalized. He had surgery because of bone loss and this situation enabled him to make the deposit.

Meanwhile, the defendant I considered the plaintiff to be in a default situation and therefore issued Warning Letters I, II, and III. The plaintiff, on the other hand, considered the illness he suffered hindering the fulfillment of achievements as a state of force majeure permitted by law so that he cannot be declared in a default situation. After the surgery, he was known to contact the defendant I to settle the installments and at the end of the second year of the contract, he paid it below the minimum deposit. However, the defendant I notified the plaintiff to do an auction of the object of the mortgage because the plaintiff was deemed in a normal situation. The auction was conducted by a defendant II (auctioneer) following regulations on the tender application submitted by defendant I. The tender was later won by defendant III as a buyer in good faith. The fourth defendant, namely the notary, committed the process of changing the name of the owner according to the regulations, while the execution of the emptying of the object was carried out by defendant V (District Court). Thus, the judge adjudicated one petition and the maxim was then applied as a legal argument to respond to the next petitions depending on the first petition.

The eighth maxim reads: *al-aṣlu fī l-mu'āmalāti al-ibāḥah 'illā 'an-yadulla dalīl 'alā taḥrīmihā* which means “the basic norm of transactions (*mu'āmalat*) is permissible unless there is a clue for the prohibition on it”. This maxim is a derivative of the primary maxim which reads: *al-yaqīnu lā yuzālu bi l-syakki* “certainty is not overruled by doubt”, and as a more specific one than another maxim which reads; *al-aṣlu fī l-*

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<sup>24</sup>Ibrāhīm ibn Mūsā Abū Ishāq al-Shāṭibī.

*'ashyā' i l-'ibāḥah ḥattā yadulla l-dalīlu a lā l-taḥrīm* which means "the basic rule about things (in the scope of *mu'āmalāt*) are allowed until there is evidence indicating that they are forbidden."

The word *ibāḥah* means lawful and it denotes an action that is not rewardable for doing and not sinful for leaving. The principle of permissibility (*ibāḥah*) as the natural state in *mu'āmalāt* (lit. "transactions" or "dealings") also means that freedom (either to do or not to do) is the normative position of the shariah about foodstuffs; animals on land and in the sea; customary matters; commercial transactions and contracts. This is as indicated in Q.S, Al-Baqarah: 29 which means: "It is He (Allah) who created for you all of that which is on the earth..." unless there is a clue or legal evidence for the prohibition on it.<sup>25</sup> We found that the judge applies this jurisprudential maxim to state that something is permissible and valid if it is shown as not prohibited as in The Verdict No. 264/Pdt.G/2016/PTA.Smg.

The ninth maxim reads: *al-bayyinatu 'alā l-mudda'ī wa'l-yamīnu 'alā man ankar* " which means that evidence is for him who claims, an oath is for him who denies". This maxim has become a standard in the law of evidence, particularly in procedural law, because the maxim places the burden to provide proof on the petitioner to help judges for deciding cases. If any claim is made, it must be substantiated with evidence either circumstantial or conclusive.<sup>26</sup> After all, as in Decision No. 599/Pdt.G/2018/PA.gtlo, this study found that judges used this ninth jurisprudential maxim to complete their written legal argumentation in their decisions. This is because the proving process should, after all, be carried out in the court, and the judge added this maxim in the legal consideration to strengthen their legal argument in sharia principles regarding the burden of proof.

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<sup>25</sup> Shahrul Hussain, *A Treasury of Sacred Maxims: A Commentary on Islamic Legal Principles (Treasury in Islamic Thought and Civilization)* (Markfield: Kube Publishing, 2016). See also H.A. Djazuli, *Kaidah-Kaidah Fikih* (Jakarta: Kencana, 2006).

<sup>26</sup> Shahrul Hussain, *A Treasury of Sacred Maxims: A Commentary on Islamic Legal Principles (Treasury in Islamic Thought and Civilization)*. See also Rabb, *Doubt in Islamic Law: A History of Legal Maxims, Interpretation, and Islamic Criminal Law*.

The tenth maxim reads: *al-‘ibrah fī l-‘uqūdi al-maqāṣidi wa l-ma‘ānī lā lil-alfāz wa l-mabānī* which means that "contracts are considered based on their meanings and goals not wordings and construction of sentences".<sup>27</sup> In Decision No. 599/Pdt.G/2018/PA.Gtlo in which the plaintiff is a debtor, the disputed contract did not mention any force majeure clause even though it is typically found in a *murabahah* contract. Consequently, this is disadvantageous to the plaintiff when facing a force majeure situation. This jurisprudential maxim was used as a legal argument to rule on the creditor's actions in order for the force majeure clause can be used even though it is not written in the contract. At last, the judges' use of this jurisprudential maxim was still in conventional usage.

The eleventh maxim reads: *al-ḥājatu tanzilu manzilat al-darūrah, ‘amma kānat aw khāṣṣah* which means "humanly need, whether public or private in nature, are treated as exigency (*darūrah*)". This maxim emphasizes that easing is not only valid for exigency (*darūrah*), but also common needs (*ḥajah*).<sup>28</sup> As contained in Decision no 599/Pdt.G/2018/PA.Gtlo, this maxim was used by the judges as a legal argument on the force majeure condition experienced by the plaintiff (the debtor) so that it must be alleviated by the defendant (the creditor).

The twelfth maxim reads: *al-wilāyatu l-khaṣṣah aqwā min al-wilāyati l-‘ammah* which means that "special jurisdiction is more powerful than general jurisdiction". This maxim means that the jurisdiction of an entrusted, commissioned or person in charge (*al-muwālī*) is stronger than the jurisdiction of a public figure, such as the *qāḍī* (judge).<sup>29</sup> As contained in Decision No.

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<sup>27</sup> al-Majalla. Article 3, 1875. "Al-Majallah al-Ahkam al-Adaliyyah (The Ottoman Courts Manual (Hanafi))." 3. [https://www.iium.edu.my/deed/lawbase/al\\_majalle/index.html](https://www.iium.edu.my/deed/lawbase/al_majalle/index.html).

<sup>28</sup>Suyūṭī, *Al-Ashbāh Wa Al-Nazāir*.

<sup>29</sup> Abdul Baki As-Safi, *Islamic Jurisprudential Maxims 114 Maxims Expounded and Rendered Into English* (Amman, Jordan: Amwaj for publication and distribution, 2012), [https://www.uop.edu.jo/download/Research/members/424\\_2062\\_A.B..pd](https://www.uop.edu.jo/download/Research/members/424_2062_A.B..pd)

599/Pdt.G/2018/PA.Gtlo., we found that the judge employed this jurisprudential maxim to compel the defendant (the creditor) to accept the plaintiff's (debtor in good faith) force majeure situation. The debtor must also be treated specifically outside the general provisions applicable in the contract between the parties.

The thirteenth maxim reads: *al-dararu yudfa'u biqadri l-imkān* which means "harm should be avoided as much as possible". This principle largely applies to circumstances when the practice of a legally permissible action has the possibility of leading to an impermissible consequence.<sup>30</sup> In Decision No. 599/Pdt.G/2018/PA.Gtlo., we have found the plaintiff (a good faith debtor) attempted to pay back the obligations that he had previously postponed due to his illness (force majeure). However, even though he had paid back as much as he could until he got approved by the creditor's agent, the creditor as a corporation kept attempting to seize the guarantee. The judge considered that the creditor's actions did not prevent losses, especially those related to the loss of public trust in creditors.

The fourteenth maxim reads: *al-tābi'u tābi'un* which means "the appurtenant is deemed appurtenant". This jurisprudential maxim means that whatever belongs to a certain thing goes with it to which it belongs. The maxim is based on a Prophetic ḥadīth narrated by Jabir ibn Abdulla which tells: "The slaughter of embryo is included when its mother is slaughtered".<sup>31</sup> This study found that maxim *al-tābi'u tābi'un* was used by judges to explain that a follower is something whose form cannot stand alone and its existence, therefore, must follow the principal thing as something to be followed. In Decision No. 599/Pdt.G /2018/PA.Gtlo, the jurisprudential maxim was used to change the legal status of three things which are deemed

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f. See also Muhammad al-Zuhaylī, Al-Qawā'id Al-Fiqhiyyah Wa Tatbiqātuhā Fī Al-Madhāhib Al-Arba'ah.

<sup>30</sup>Sayyed Mohamed Muhsin, Muhammad Amanullah, and Luqman Zakariyah, "Framework for Harm Elimination in Light of the Islamic Legal Maxims," *Islamic Quarterly* 63, no. 2 (2019): 233-72.

<sup>31</sup> Abū Dāwūd. n.d. "Partial Translation of Sunan Abu-Dawud." Translated by Ahmad Hasan. IIUM. Accessed March 18, 2022. 9:2822. [https://www.iium.edu.my/deed/hadith/abudawood/009\\_sat.html](https://www.iium.edu.my/deed/hadith/abudawood/009_sat.html).

as accessories: Plaintiff was declared in default situation and the auction of his property (mortgage) was permitted by the General Court Judges under some provision; the mortgage auction was made by defendant II (auctioneer) along with the auction minutes; the auction winner (defendant III) as a buyer has completed the process of changing the name of the certificate on the mortgage based on the auction minutes. These three things were required to follow the Religious Court judge's decision on the case's subject matter which proclaimed that the plaintiff is not in a default situation but was experiencing force majeure necessitating the addendum of the contract between the plaintiff and defendant I. Therefore, we consider that the use of this maxim is to deduce (*istinbāt*) the legal status of the *accessoires*/accessories cases based on the judgement/judgment made in the principal case. It means that the judgement/judgment to the principal case becomes the source of law to deduce the legal ruling of the *accessoires*/accessories cases.

The last maxim reads *al-tābi'u lā yufradu bi l-ḥukmi* which means "what follows shall not be judged separately". This maxim, as a derivative of the fourteenth, is closely related to or even an explanation of *al-tābi'u tābi'un* which can be rephrased as: "judgment cannot be given separately for a thing that follows another".<sup>32</sup> We found that this maxim was used in the legal argument in Decision No. 599/Pdt.G/2018/PA.Gtlo to explain the fourteenth maxim above.

Hereinafter, the majority of the legal maxims above were used as legal arguments to answer the principal of the case, while the rest were used as a part of legal arguments to respond to demurrers or related to procedural law applicable to the case. Furthermore, in 68% of the 28 times use, legal maxims have been used as legal argumentation conventionally with no significant differences found with how each maxim should be used theoretically. The rest (32%), meanwhile, was used as specific legal findings on concrete facts of sharia economic cases. They consist of:

- a) The use of analogy (*qiyās*) to the substance of the maxim, as has been exemplified and explained in the sixth maxim;
- b) Interchange of the use of legal maxims from their conventional

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<sup>32</sup>As-Safi, *Islamic Jurisprudential Maxims 114 Maxims Expounded and Rendered Into English*.

usage:

- jurisprudential maxim was used as the conventional use of fundamentalistic maxim because it was used to deduce legal rulings from the source of law, such as the use of maxims *al-tābi 'u tābi 'un*, *al-tābi 'u lā yufradu bi l-ḥukmi*, and *al-riḍā bi l-shay 'i riḍān bimā yatawalladu minhu* as explained above; and
- fundamentalistic maxim was used as the conventional use of jurisprudential maxim because it was used to judge the acts of *mukallaf*,

such as maxim reading *mā lā yatimmu l-wājibu illā bihi fahuwa wājibu* in Decision No. 0293/Pdt.G/2017/PA.Gtlo and 599/Pdt.G/2018/PA.Gtlo.

### Conclusion

As shown above, scholars have justified determining whether the 15 maxims listed above are jurisprudential or fundamentalistic. Of course, there seem to be more than 15 Islamic legal maxims that judges can use as legal argumentation in ruling a case. Although there are different opinions on whether certain maxims are jurisprudential or fundamentalistic, the uses of legal maxims by the judges were already in conformity with their conventional use. This fact can be a precedent or one of the factors that influence judges in writing the type of maxims in the decision. At the same time, it will support the thesis that jurisprudential and fundamentalistic maxims can be mingled or interchanged in their use. We provide empirical evidence to support the claim of the possibility of interchange depending on the angle and use of maxims. Establishing more detailed differences between both helps provide the principles of distinction between both in the context of how to use them as legal argumentation in judicial decisions, especially in sharia economic cases of Indonesia. One of which, for instance, is that the object of fundamentalistic maxims is the clue of law while their use is to deduce legal rule from the source of laws while the object of jurisprudential maxims is the act of *mukallaf* and its use is to render judgement/judgment.

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## **Al-Mubâdalah fî Mafhûmi Fiqhi al-Mar`ah al-Mu`âshirah bî Indûnîsiyâ**

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### **Abstract:**

Man is a leader of the household, while the wife serves as the household manager. Generally, this paradigm is embedded in our society because men are always put as the main guard at the front while wives are always set in the limited area. Contextually, the problem is in the role of women which is no longer solely in the domestic sphere. Most of them also have a role outside the home to help husbands earn a living. The purpose of this study is to obtain a reconstruction of reciprocal fiqh (mubâdalah fiqh) principle in terms of rights and obligations of both husband and wife. This research is a literature review with a qualitative type using the reciprocal (mubâdalah) approach. The results of this study show that partners in realizing justice in the household, according to the mubadalah approach, are required to make mutual help

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through working together, such as mutual consultation, mutual democracy and mutual taking and giving in building harmonious relationship.

**Keyword:**

The Concept of Exchange (Mubâdalah); Contemporer Fiqh; Rights; Obligations; Woman

**ملخص:**

الرجل هو رب الأسرة والزوجة ربة المنزل. هذا النموذج جزء لا يتجزأ من مجتمعنا بشكل عام، لأن الرجل هو الحارس الرئيسي وكان دائماً في المقدمة بينما تكون الزوجات دائماً في المنطقة المحدودة. وتكون المشكلة في أن دور المرأة لم يعد في المجال المنزلي فقط، بل معظمهن أيضاً لهن دور خارج المنزل لمساعدة الأزواج في كسب لقمة العيش. والسؤال كيف تتم حقوق وواجبات الزوج والزوجة في هذا السياق؟ الغرض من هذه الدراسة هو إعادة بناء الحقوق والالتزامات الجديدة التي تعكس مبادئ فقه المبادلة من حيث حقوق والتزامات الزوج والزوجة. هذا البحث عبارة عن مراجعة أدبية، ونوعي بمنهج التبادل (المبادلة). نتائج هذه الدراسة أن الشركة بين الرجل والمرأة في تحقيق العدالة في الأسرة يجب أن تكون مساعدة متبادلة في العمل معاً مثل التشاور، والديمقراطية، والإحسان لبعضهم البعض في المعاملة.

**الكلمات المفتاحية:**

مفهوم المبادلة؛ فقه النوازل؛ الحقوق؛ الواجبات؛ المرأة

## مقدمة:

إرث النظام الأبوي في علاقات الزوج والزوجة في إندونيسيا جزء لا يتجزأ من قانون الزواج رقم ١٩٧٤،<sup>١</sup> وذهب منصور فقيه إلى أن النساء ستختبر أبداً بالمعاملة مثل التبعية والتهميش والترقيم الثاني ومختلف أشكال الظلم إذا كان قانون الزواج الذي ينظم علاقات الزوج والزوجة لم تتم مراجعته.<sup>٢</sup> وهذا الرأي يعزز رأي فضل الرحمن الذي ينص على أن المظالم التي تتعرض لها المرأة من حين لآخر ناتجة عن الظروف البيئية التي تتشكل في إندونيسيا، حيث يتم تقنين البيئة في الواقع في لائحة رسمية لها آثار على التهميش الهيكلي للمرأة.<sup>٣</sup>

إن صياغة اللوائح باستخدام منظور ذكوري هي العامل الرئيسي وراء الإرث الأبوي في قانون الزواج في إندونيسيا.<sup>٤</sup> اقترحت نيكين سافيتري أن التاريخ كتب بالفعل من منظور ذكوري بحيث لا يعكس تجارب النساء في عملية الزواج في تنسيقه. هذا له تأثير على التحيز لوجود الإمكانيات البشرية، وإمكانيات النوع الاجتماعي، والهندسة الاجتماعية التي تعكس الشخصية والقيم من وجهة نظر الرجال.<sup>٥</sup>

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<sup>1</sup> Habib Shulton Asnawi, "HAM Dalam Ruang Domestik: Studi Terhadap UU. No. 23 Tahun 2004 Tentang PKDRT," *Al-Mawarid Journal of Islamic Law* 11, no. 2 (2011): 457.

<sup>2</sup> Mansour Fakih, "Analisis Gender Dan Transformasi Sosial, Yogyakarta" (Insist Press, 1996), 12-23.

<sup>3</sup> Fazlur Rahman, "Status Wanita Dalam Islam, Sebuah Penafsiran Pemikiran Modernis," *As-Syir'ah* 35, no. II (2001): 2.

<sup>4</sup> Dina Agnia, "Kajian Kritis Budaya Patriarkhisme Dalam Agama Dan Keadilan Perempuan (Studi Ketentuan Poligami Dalam Uu. No. 1 Tahun 1974)," *Fikri: Jurnal Kajian Agama, Sosial Dan Budaya* 1, no. 1 (2016): 38, <https://doi.org/10.25217/JF.V1I1.6>.

<sup>5</sup> Niken Savitri, *HAM Perempuan* (Bandung: PT. Rafika Aditama, 2008), 27-28.

وهناك عامل آخر هو استخدام نصوص الفقه دون النظر إلى الواقع الذي يحدث في إندونيسيا. الفقه في الأساس هو تفسير ثقافي لآيات القرآن. الفقه محلي ومرن وغير دائم. لذا فإن مجرد الإشارة إلى دراسة الفقه من خلال ترك القانون الأساسي الشامل والدائم سينتج بالتأكيد منتجات قانونية تتداخل مع الواقع.<sup>6</sup> ذلك يناسب رأي موسدا موليا الذي ينص على أن الثقافة الأبوية في إندونيسيا لها ما يبررها من خلال تفسير التعاليم الدينية والقانون الوضعي.<sup>7</sup> ترتبط هذه الثقافة ارتباطاً وثيقاً ولها تأثير على جميع خطوط حياة الناس، سواء في المجالات الاجتماعية والاقتصادية والتعليمية. ويحاول العديد من الخبراء والقادة الدينيين والنسويات في إندونيسيا تقديم الحلول والخطوات التي يمكن اتخاذها لإخراج الشعب الإندونيسي من الميول إلى الثقافة الأبوية. أحدها من خلال منهج تبادل الفقه (المبادلة).

إن المبادئ الإسلامية المتمثلة في مراعاة النوع الاجتماعي هي الأساس في سلسلة تفسيرات آيات القرآن بأكملها. يتم حذف الموضوع والهدف من النص الرئيسي، حيث تولد بذلك فكرة النص الذي يشمل جميع الأجناس، ذكوراً كانوا أو إناثاً. هذه الأساسيات الثلاثة تؤدي إلى عملية التبادل وتحقيق المبادلة.<sup>8</sup>

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<sup>6</sup> Abdul Jalil and Muhammad Taufiq, "Al-Âtsâr Al-Mutarattibah 'Âla PERPPU (Lawâih Al-Hukûmiyyah Al-Badaliyyah) Min Al-Munazhzhâmât Al-Mujtama'iyah Raqm 2 Li 'Âm 2017 Dlidâ Wujûd Hizb Al-Tahrîr Indûnisiyâ Min Manzâhûr Saddi Al-Dzarî'Ah," *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 14, no. 1 (2019): 144, <https://doi.org/10.19105/al-ihkam.v14i1.1982>.

<sup>7</sup> Siti Musdah Mulia, *Islam Dan Hak Asasi Manusia, Konsep Dan Implementasinya* (Jakarta: Naufan Pustaka, 2010), 46.

<sup>8</sup> Faqihuddin Abdul Qadir, "Qira'ah Mubadalah: Tafsir Progressif Untuk Keadilan Gender Dalam Islam," *Yogyakarta: IRCiSoD*, 2019, 28.

تم تطوير مبدئ التبادل إلى منظور وتفاهم في علاقة معينة بين طرفين، والتي تحتوي على قيم وروح المشاركة والتعاون والتبادل ومبدأ المعاملة بالمثل.<sup>9</sup> وبعبارة بسيطة، يقوم مفهوم التبادل على معنيين، أحدهما: علاقة المشاركة المتبادلة بين الرجل والمرأة، والثاني: كيف يتضمن النص الإسلامي معنى المساواة للنساء والرجال. من خلال هذين المفهومين للتبادل، تقدم هذه المقالة طريقة جديدة لتفسير حقوق الزوج والزوجة التي ينظمها قانون الزواج في إندونيسيا. إلى جانب ذلك، فإن الدراسات الفقهية التي تحتوي على الفروق الدقيقة بين الجنسين والتمييز ضد المرأة تصبح علاقات متبادلة على أساس الإنسانية. تقدم هذه الورقة أيضًا منظورًا آخر باستخدام فقه المبادلة أو التبادل كمحاولة لإثارة لوائح عدالة النوع الاجتماعي ضمن مبادئ الشريعة. يريد المؤلف إبراز القيم الإنسانية في نص القرآن الذي يخاطب كلا الجنسين دون استثناء.

## مفهوم المبادلة

### ١. تعريف المبادلة

المبادلة هي كلمة عربية تعني التبادل المادي مثل التجارة وغير المادي مثل التسامح.<sup>10</sup> ويعني أيضًا المعاملة بالمثل أو المعاملة التبادلية. تستخدم هذه الكلمة للتعبير عن حركة التفاهم والمقاومة ضد جميع أشكال القيم والسلوك الاستبدادية والهيمنة والتمييزية والتغييرات في الأعراف ووجهات النظر حول العلاقة بين المرأة

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<sup>9</sup> Wilis Werdiningsih, "Penerapan Konsep Mubadalah Dalam Pola Pengasuhan Anak," *IJouGS: Indonesian Journal of Gender Studies* 1, no. 1 (June 22, 2020): 9, <https://doi.org/10.21154/IJOUGS.V1I1.2062>.

<sup>10</sup> Qadir, "Qira'ah Mubadalah: Tafsir Progresif Untuk Keadilan Gender Dalam Islam."

والرجل التي تؤدي إلى القيم التبادلية والتضامن والتعاون والمساواة والتكاتف من أجل حياة أفضل بعدالة وسلامة والازدهار. على وجه التحديد، الهدف هو الحصول على سعادة الدارين.

المبادلة في اللغة منظور متبادل. ويمكن تعريفها في الاصطلاح على أنها "المبادئ الإسلامية فيما يتعلق بالتفاعل بين الرجل والمرأة في أداء دور الجنسين داخل المنزل وخارجه، على أساس المساواة بينهما والعدالة والمنفعة لكليهما، بحيث لا يهيمن أحدهما على الآخر. و / أو الوقوع ضحيةً للظلم من الآخرين. ومع ذلك، فإن العلاقات هي كيفية دعم بعضهما البعض، والعمل معًا، ومساعدة بعضهما البعض. المبادلة أو المنظور التبادلي بعبارة بسيطة هو إذا كان الابتسام، والضيافة، والخدمة، وكل الأعمال اللطيفة يعتبر حسنة من حسنات الزوجة لزوجها، ومن ثم فإنه من الجيد أيضًا أن يفعلها الزوج لزوجته. كذلك كل الأشياء السيئة كعدم القدرة على الاحترام، والسب، والشتيم، والضرب، والعنف، وغيرها من القيام بكل أنواع الأعمال غير المرضي الذي لا يمكن أن يتقبلها الزوج من زوجته، يجب على الزوج أيضًا أن يتجنب كل تلك الأشياء السيئة حتى لا يفعلها لزوجته ولم يحدث لزوجته على الإطلاق. هذا مثال على تفسير المبادلة في الحياة المنزلية.<sup>11</sup>

وفي المجال العام، تتطلب المبادلة أو منظور التبادل وجود المساواة بين المرأة والرجل كمواطنين في القانون. وبالتالي، يتمتع كلاهما بنفس الحقوق والالتزامات، حتى يتمكن من التكامل والتقوية وبناء الحياة الاجتماعية الجيدة للمجتمع بأكمله. يجب أن تُمنح النساء مثل الرجال فرصًا واسعة ليتمكن من المساهمة في المجال العام والاستفادة منه. في الوقت نفسه، يجب أيضًا تشجيع الرجال على المساهمة في الفضاء

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<sup>11</sup> Qadir.

المنزلي والاستمتاع بالعلاقة الحميمة مع العائلات وخاصة الأطفال.<sup>12</sup> طبعاً هذا كله دون استبعاد احتمال وجود فروق مميزة بين الرجل والمرأة. حتى أن هناك اختلافات بين الأفراد، وخاصة ذوي الاحتياجات الخاصة.

هذه الحياة ملك لكل من الرجال والنساء، لذلك يجب أن يشعر كل منهما بالفوائد والمصالح على حد سواء. لأن الإسلام نزل لمصلحة الكل،<sup>13</sup> فيجب أن يقرأ القرآن للتأكد من حصولهما على الخير. وفي الوقت نفسه، فإن العديد من جوانب الحياة مخصصة للرجال فقط، وليس للنساء فيها نصيب. وهناك أيضاً العديد من جوانب الحياة المنزلية المفروضة على النساء، وليس على الرجال من ذلك شيء. وبالمثل، تُقرأ النصوص الإسلامية في كثير من الأحيان، من خلال النظر إلى الرجال على أنهم موضوع النص والمرأة هدفه.<sup>14</sup>

على سبيل المثال، عرفنا فقط مفهوم الزوجة الصالحة للزوج. ولكن نادراً ما يتم تقديم مفهوم الزوج الصالح لزوجته. بشكل عام، الافتراض القائل بأن النساء دائماً إنما خلقن للإغواء والسحر والافتتان بحيث تكون خاضعة للسيطرة وتبرر جميع أنواع المخطورات المفروضة على أنشطتها. إلى جانب ذلك، لا ننسى أن الرجال أيضاً مغوون وسحرة، لكن نتسامح لهم كل ما كان جراً ذلك من الضرر والفساد. إن تصور الناس عن الرجال يعطي تقديريهم لكونهم ربات البيوت والقائمين بالإفناق على العيال. ونحن

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<sup>12</sup> Faqihuddin Abdul Kodir, "Mafhum Mubadalah: Ikhtiar Memahami Qur'an Dan Hadits Untuk Meneguhkan Keadilan Resiprokal Islam Dalam Isu-Isu Gender," *Jurnal Islam Indonesia* 6, no. 2 (2016), <http://jurnal-islam-indonesia.isif.ac.id/index.php/Jurnal-Islam-Indonesia/article/view/28>.

<sup>13</sup> 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>.

<sup>14</sup> Werdiningsih, "Penerapan Konsep Mubadalah Dalam Pola Pengasuhan Anak."

ننكر أن هناك العديد من النساء يعولن أسرهن وننسى الاحترام لهن. ولهذا الأمر، من المهم تقديم المنظور والتبادل أو طريقة المبادلة.<sup>١٥</sup>

## ٢. النظام الأساسي للمبادلة

وجدت آيات كثيرة تشكل أساس التبادل. ومن أوضحها سورة التوبة الآية ٧١. وَالْمُؤْمِنُونَ وَالْمُؤْمِنَاتُ بَعْضُهُمْ أَوْلِيَاءُ بَعْضٍ يَأْمُرُونَ بِالْمَعْرُوفِ وَيَنْهَوْنَ عَنِ الْمُنْكَرِ وَيُقِيمُونَ الصَّلَاةَ وَيُؤْتُونَ الزَّكَاةَ وَيُطِيعُونَ اللَّهَ وَرَسُولَهُ أُولَئِكَ سَيَرْحَمُهُمُ اللَّهُ إِنَّ اللَّهَ عَزِيزٌ حَكِيمٌ

تؤكد هذه الآية على أن العلاقة بين الرجل والمرأة تبنى على أساس التعاون بأن كان أحدهما معاونًا للآخر، داعمًا ومحبًا للآخر. وكتب تفسير المتقدمين سواء كان بالمأثور أو بالرأي تفسر لفظ "بعضهم أولياء بعض" بالتناصر والتحابب والتعاقد بعضهم من بعض. فهذه معاني "بعضهم أولياء بعض" تدل على وجود أوجه تشابه ومساواة بين بعضهم البعض.

هناك العديد من الآيات الأخرى التي تؤكد منظور المبادلة خاصةً وصرحةً في معاملة الرجل والمرأة بحد سواء في المجال الاجتماعي أو المنزلي، وذلك كما تقرر في سورة البقرة ١٩٧؛ ٢٣٢؛ ٢٣٣، وسورة آل عمران ١٩٥، وسورة النساء ١٩.١٦، بالإضافة إلى الآيات العامة حول أهمية الترابط في هذه الحياة، كما في سورة المائدة ٢، وسورة الأنفال ٧٢.

<sup>١٥</sup> <https://referensi.mubaadalahnews.com/2016/09/deskripsi-singkat-perspektif-dan-metode-mubadalah/>, تم الوصول إليه في تاريخ ٣٠ يونيو ٢٠٢٠.

<sup>١٦</sup> Lukman Budi Santoso, "Eksistensi Peran Perempuan Sebagai Kepala Keluarga (Telaah Terhadap Counter Legal Draft-Kompilasi Hukum Islam Dan Qira'ah Mubadalah)," *Marwah: Jurnal Perempuan, Agama Dan Jender* 18, no. 2 (January 21, 2020): 107-20, <https://doi.org/10.24014/MARWAH.V18I2.8703>.

في حين أن النص الأكثر إلهامًا لمنظور المبادلة هو الرواية التالية: عَنْ أَنَسٍ عَنِ النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ: "لَا يُؤْمِنُ أَحَدُكُمْ حَتَّى يُحِبَّ لِأَخِيهِ مَا يُحِبُّ لِنَفْسِهِ"، وفي رواية مسلم زيادة: "أَوْ قَالَ لِجَارِهِ مَا يُحِبُّ لِنَفْسِهِ"، وفي رواية النسائي زيادة: "مَا يُحِبُّ لِنَفْسِهِ مِنَ الْخَيْرِ"، وأما رواية أحمد: "لَا يُؤْمِنُ أَحَدُكُمْ حَتَّى يُحِبَّ لِلنَّاسِ مَا يُحِبُّ لِنَفْسِهِ". (رواه الشيخان، والترمذي، والنسائي، وابن ماجه، وأحمد)<sup>١٧</sup>

### ٣. منهج المبادلة

يعتبر مفهوم المبادلة أحد الأساليب التي تتكامل بشكل مباشر مع قضايا النوع الاجتماعي. أصبح مفهوم المبادلة يوازن نظرية النوع الليبرالية.<sup>١٨</sup> يمكن استخدام مفهوم المبادلة كقاعدة لتفسير النص. إلى جانب ذلك، فإن مفهوم المبادلة يبدأ سمعةً جديدةً لأسلوب الفقه المترابط، لا سيما في المسائل المتعلقة بقضايا العلاقات بين الجنسين. ولهذا، النصوص المخصصة للرجال يمكن أن تشمل النساء لغويًا، وكذلك النصوص الخاصة بالنساء يمكن أن تشمل الرجال أيضًا، طالما أن موضوعات النص عامة وتشمل كلا الجنسين. وفي الوقت نفسه، أدى الفصل بين النصوص الخاصة بالرجال والنصوص الخاصة بالنساء إلى ظهور تفسيرات إسلامية مختلفة للجنس على الإطلاق والتي تعتبر متحيزة على المرأة وغير متكافئة وتدعم العنف ضد المرأة. كما ولدت هذه الثنائية ثقافة سائدة من جنس إلى آخر، ومهيمنة، ومدمرة في نهاية المطاف.<sup>١٩</sup>

<sup>١٧</sup> <https://referensi.mubaadalahnews.com/2016/09/deskripsi-singkat-perspektif-dan-metodemubadalah/>, تم الوصول إليه في تاريخ ٣٠ يونيو ٢٠٢٠.

<sup>١٨</sup> يقصد بالليبرالية أن تكون مفرطة في الاستجابة لحقوق الإنسان، مما يؤدي إلى ظهور اتهامات سلبية ضد الرجال، بحجة المساواة.

<sup>١٩</sup> Qadir, "Qira'ah Mubadalah: Tafsir Progresif Untuk Keadilan Gender Dalam Islam."

لا يركز النصُّ القرآنيُّ أو الحديث على موضوع يحتوي عادة على عناصر ذكورية وأنثوية فحسب. لأن اللغة العربية كثيفة للغاية مع بنية الكلمات والجمل النموذجية للرجال والنساء. ومع ذلك، مضمون اللفظ ومعانيه التي نريد استفادتها أولى بالاهتمام. ويمكن ربط تلك المعاني بمبادئ التبادلية المتناثرة في الآيات الأخرى والأحاديث المختلفة ثم تطبيقها بالتتابع. فإذا كان الأمر بالمعنى الحرفي تدل على الرجال، فإنه يمكن أخذ دلالاته أيضا على النساء بمنظور المبادلة. لذلك، من الجدير بمكان تطبيق معاني النص على كلا الجنسين معا.

قال الله في سورة الروم الآية ٢١ (أن خلق لكم من أنفسكم أزواجا لتسكنوا إليها)، فالمخاطب بهذه الآية هو الرجل دون المرأة؛ لأن ضمير "كم" يستعمل لجمع المذكور. فالمعنى الحرفي من الآية "إن الله خلق النساء لأجل لسعادة الرجال واطمئنان قلوبهم"، مع أن الرسالة الرئيسية للنص تدور حول الزواج الذي يحقق السلام المتبادل بين الزوج والزوجة، وانظر على سبيل المثال سورة البقرة الآية ١٨٧. لذلك فإن تقنية التفسير على مفهوم المبادلة أن نأخذ الرسالة الرئيسية ونسائر الموضوع على كلا الطرفين بدون تفريق؛ فيكون المعنى: "كما خلِقَ النساءُ لأزواجهن ليسكنوا إليها.. فإن الله خلق الرجال لأجل النساء ليأخذن السكينة منهم". وإذا نظرنا إلى اللغة الإندونيسية فإنها لا تفرق بين الذكور والإناث في سياقها وضمائرها، فيمكن بالفعل ترجمة الآية مباشرة إلى الجنس الأكثر تبادلاً، فيكون التقدير: "من آياته أن خلق (لكم/ لكن) أزواجا -أي: زواجا- (لتسكنوا/ لتسكنن) (إليها/ إليهم)".

وانظر أيضا على سبيل المثال سورة البقرة الآية ٢٢٣ (نساؤكم حرث لكم فأتوا حرثكم أنى شئتم)، فمعنى الآية أن الزوجات شُبِّهَت بالحرث في الاستمتاع مع أزواجهن حسب إرادتهم، وهذا هو المعنى الحرفي لهذه الآية الذي يثبت أن الرجال هم

المخاطبون بها دون النساء، والأمر فيها لهم دونهن. وإذا قمنا بتفسيرها من وجهة مفهوم المبادلة كان التقدير: "أزواجك -أيها الزوجات- حرث لكن، لذلك فأتوهم أني شئت". وذلك لأن الاستمتاع حق للزوج والزوجة، كما توضحه الآيات والأحداث المختلفة، فيجب تفسير الآية بالتساوي وإلا سيكون الفهم أعرج لا يستقيم، ولا يمكن للمرأة أبداً أن تأخذ حقها في الاستمتاع.

الترجمة الأولى في الترتيب هي الترجمة الحرفية، ثم تأتي بعدها الترجمة على مفهوم المبادلة. ومن الإمكان ترجمة الآية على مفهوم المبادلة في اللغة الإندونيسية "شريكك في الزواج هو حرثك الجنسي، لذا يمكنك مباشرته وفقاً لفرحتك".

هذا التفسير بشكل عام لا يختص بالنصوص الدينية فحسب، بل يجري على كل النصوص وحقائق الحياة لأنها لا يمكن أن تفترق عن هوية الرجال والنساء، طالما أننا نؤمن بمبادئ وقيم المبادلة، فيمكن تطبيق هذا المنهج. علاوة على ذلك، فإن القاعدة الفقهية تقول: "لكل قاعدة مستثنائات"، تعني أن كل القاعدة لها ما يخالفها، فهذه الاستثناءات ضرورية لها أيضاً، خاصة بالنسبة للأشياء البيولوجية كالحمل والرضاعة. ولذلك، لا تزال قاعدة التفسير بمفهوم المبادلة هذه بحاجة إلى التحسين من قبل مختلف الأطراف.<sup>20</sup> يمكن أيضاً تطوير مفهوم المبادلة كقاعدة التعليم والقوانين فيما يتعلق بقضايا علاقة الرجال والنساء في الإسلام. هذه القاعدة تُعرف باسم "قواعد الأحكام الفقهية"، بحيث تتم صياغة قواعد فقه المبادلة في الجملة التالية: "مَا يَصْلُحُ لِأَحَدِ الْجِنْسَيْنِ يُجَلْبُ لِكِلَيْهِمَا وَمَا يَضُرُّ بِأَحَدِهِمَا يُدْرَأُ مِنْ كِلَيْهِمَا"<sup>21</sup>

<sup>20</sup> Taufan Anggoro, "Konsep Kesetaraan Gender Dalam Islam," *Afkaruna: Indonesian Interdisciplinary Journal of Islamic Studies* 15, no. 1 (June 25, 2019): 129-34, <https://doi.org/10.18196/AIJIS.2019.0098.129-134>.

<sup>21</sup> <https://referensi.mubaadalahnews.com/2016/09/deskripsi-singkat-perspektif-dan-metode-mubadalah/>

## أشكال عدم المساواة بين الجنسين

- عدم المساواة بين الجنسين هو نظام يكون كل من الرجال والنساء ضحايا له.<sup>٢٢</sup> قال سفيان في الفقه النسوي نقلاً عن مصدر فريد مسعود أن هناك خمسة أشكال من عدم المساواة بين الجنسين كمظهر من مظاهر التحيز الجنساني، وهي:
١. العبء، تتحمل المرأة عبء العمل المنزلي أكثر من الرجل.
  ٢. التبعية، إحتقار الرأي من المرأة في كافة مجالات التعليم والاقتصاد والسياسة.
  ٣. التهميش، وهو محاولة تقثير المرأة لعدم مشاركتها في صنع القرار في الأمور الهامة المتعلقة باقتصاد الأسرة.
  ٤. الصورة النمطية، هناك تصنيف سلبى للمرأة، لأنها تعتبر معيلة إضافية.
  ٥. العنف، وجود عنف جسدي ونفسي ضد المرأة لافتراض أن الزوج هو الحاكم الوحيد في الأسرة.<sup>٢٣</sup>
- وذهب ماصور فقيه أن هناك خمسة عوامل تجعل المرأة مظلومة، وهي:
١. وجود غطرسة ذكورية لا تعطي المرأة فرصة للتطور بالشكل الأمثل.
  ٢. هناك افتراض أن الرجال هم المعيل الرئيسي للأسرة.
  ٣. وجود الثقافة التي تفضل الرجل وترسخ في المجتمع.
  ٤. القواعد القانونية والسياسية التمييزية.

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<sup>22</sup> Agus Hermanto, "Islam, Perbedaan Dan Kesetaraan Gender," *Nizham Journal of Islamic Studies* 5, no. 1 (2017): 31-49, <https://e-journal.metrouniv.ac.id/index.php/nizham/article/view/928>.

<sup>23</sup> Hermanto, "Islam, Perbedaan Dan Kesetaraan Gender."

٥. النساء معرضات بشكل كبير للاغتصاب أو التحرش الجنسي، وإذا حدث ذلك فسوف يضر بالصورة والأعراف في الأسرة والمجتمع. ولذلك، يجب تقييد النساء بقواعد خاصة تترجم المرأة في المنطقة المنزلية فقط.

قال حسين محمد نشأ الإسلام اجتماعياً وثقافياً في بداية أمره في المجتمع العربي العريق بالثقافة الأبوية. وكانوا يمجدون الرجال والرجولة بشكل كبير، وعلى العكس من ذلك يقللون من إمكانيات المرأة. تؤثر هذه الثقافة على الوعي وتشكله بأن النساء خلقت سلبية بينما الرجال هم القادرون على الاستمرار في النشاط. لذلك فإن هذا الوعي والافتراضات تؤثر بشكل كبير على أشكال التقدير الديني الذي ورثناه إلى اليوم.<sup>٢٤</sup>

### مفهوم العدل بين الجنسين

يقوم القرآن بشكل أساسي على مبادئ العدل والمساواة والديمقراطية والتنشئة الاجتماعية بشكل جيد.

#### ١ - مبدأ العدل

لا شك أن تشكيل الخطاب الفقهي الإسلامي لا يمكن فصله عن مبدأ العدل، فالأئمة يبنون الخطاب الفقهي على أساس العدل وضوابطه، لذلك في هذا السياق فإن مبدأ العدل في الفقه هو عبارة عن التوازن في النظر إلى الحقوق والواجبات بين الرجل والمرأة مهنيًا، وهو يقوم على الفطرة التي خلقها الله سبحانه وتعالى لنوعين من البشر على قدم المساواة والتوازن.

وهذا العدل يناسب وصفا من أوصافه تعالى وقال في كتابه العزيز "إن الله لا يظلم الناس شيئاً"، فلا يمكن استخدام القرآن باعتباره كلام الله كمصدر للظلم

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<sup>24</sup> K H Husein Muhammad, *Fiqh Perempuan; Refleksi Kiai Atas Wacana Agama Dan Gender* (LKIS PELANGI AKSARA, 2001).

البشري، ولا يفهم الظلم للمرأة المسلمة على أنه من عند الله، ومقصود الإسلام هو إقامة العدل على وجه الأرض.

يجب أن تتواجد المساواة والتوازن باعتبارهما من المبادئ الأساسية للعدالة في سياق إنشاء منظور فقهي جديد لتحقيق العدالة بين الجنسين، والعدالة بين الجنسين المشار إليها تهدف إلى المساواة بين الرجل والمرأة، بدون تفرقة وبدون اختلافات متعارضة بينهما.<sup>25</sup>

## ٢. مبدأ المساواة

يجب أن تغطي هذه المساواة مختلف مجالات ومستويات الحياة، ولا يعني معنى المساواة في هذا السياق المساواة الجسدية بين الرجل والمرأة، كما تم رفضه بشدة من قبل النسويات. المساواة المقصودة هي المساواة بين الحقوق والواجبات بين الرجال والنساء أمام الله سبحانه وتعالى، لأن عدم المساواة بينهما إنما نتج في الغالب عن البناء الاجتماعي والثقافي، وليس من تعاليم الدين نفسه. وقد أوضح الله تعالى أن جميع العباد متساوون أمامه، لا فرق ولا فضل لأحد منهم على الآخر إلا بالتقوى، وهي ليست أمراً متحيزاً لأحد الجنسين فقط، بل لكل فرد حق في تحقيقه.<sup>26</sup>

## ٣. المشاورة

على الرغم من أن المشاورة ذكرت مرة واحدة في القرآن، إلا أن ممارستها في حياة النبي صلى الله عليه وسلم كانت تتم في كثير من الأحيان. وذلك على وجه الخصوص عندما أرادوا تنفيذ استراتيجيات الحرب أو أمور أخرى تتعلق بالمصلحة

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<sup>25</sup> Syafiq Hasyim, *Hal-Hal Yang Tak Terpikirkan Tentang Isu-Isu Keperempuanan Dalam Islam* (Bandung: Mizan, 2001), 262.

<sup>26</sup> Muhammad, *Fiqh Perempuan; Refleksi Kiai Atas Wacana Agama Dan Gender*, 263.

العامّة. ٢٧ وفي هذه المشاورة لم يكن لرسول الله وأصحابه نفس الرأي بل قد يختلفون في الرأي اختلافا ظاهرا في بعض من الأحيان، ووقع هذا جليا في وقعة أحد عندما وضع الرسول والصحابة استراتيجية الحرب.

وفي العصر الحديث، غالبًا ما يتم تحديد مفهوم المشاورة هذه بالديمقراطية. وربما وجدت أوجه التشابه في العبارتين (المشاورة والديمقراطية) من الناحية المعرفية، ولا سيما في الممارسة، ومن أهم أوجه التشابه بينهما أنهما تستوعبان تطلعات المجتمع وأن اتخاذ القرار لا يعتمد فقط على رأي شخص واحد، ولكنه يخضع لصوت الأكثر منطقية أو الأكثر دعما. ولهذا السبب، فإن المفكرين الإسلاميين المعاصرين يعتبرون المشاورة والديمقراطية متطابقتين.

لم يكن مفهوم المشاورة هذه مفيدًا للمسائل الكلية فقط كالحياة العامة وشؤون الدولة، ولكنه يفيد أيضًا للأمر الجزئية أو الحياة الخاصة كالحياة الأسرية. ويرجى أيضا أن يكون مفهوم المشاورة آلية في حل النزاعات التي قد تحدث في سياق الحياة الأسرية. وفيما يتعلق بخطة إعادة بناء الفقه الجديد من منظور نوعي قد يتوقع أيضًا توفير المنصة المعرفية لمفهوم المشاورة، فيجب أن يُبنى العلم على أساس المبادئ الديمقراطية، بمعنى أنه حال من بعض التحيزات، بما في ذلك من التحيز النوعي.

#### ٤. المعاشرة بالمعروف

المعاشرة بالمعروف هي تحقيق معنى الإنسانية، فهذا المبدأ يطالب أن يتعامل الإنسان معاملة حسنة مع الآخرين، لا سيما في العلاقات الزوجية. ولفظ "المعروف" لا يتعلق بالخير فحسب، بل يحتوي أيضًا على الخير الذي يهتم بالخصوصية والمكانة.

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<sup>27</sup> Taufiq, "A Critique against the Perspective of Al-Thufy on the Contradiction of Maslahat and the Holy Text."

وتطبيق المعاشرة بالمعروف يجعل الأبويات المتعلقة بشخصية المرأة مفهومة على الأقل.<sup>28</sup>

### بدء الفقه الجديد

الفقه هو علم بالأحكام الشرعية المستفادة من الاستنباط والاستدلال، وتلك الأحكام يشار إليها غالباً بالفقه. واليوم، لم يعد المقصود بمصطلحات الفقه كأداة لمعرفة الأحكام، بل المسائل الفقهية نفسها تسمى بالفقه. وبعبارة أخرى، الفقه هو الأحكام التي استنبطها العلماء بناءً على فهمهم للنص، لذلك فإن دلالة الفقه ليست قطعية، بل ظنية.<sup>29</sup>

وإن موضوع فقه المرأة (النسوي)<sup>30</sup> موجود من الناحية المادية منذ زمن طويل. على الرغم من أن النموذج لا يزال بسيطاً للغاية، وهو مجرد تصنيف الأعمال للمرأة من حيث المسؤولية وما لا يجوز فعله عليها في العبادة والمعاملة والأحوال الشخصية. في حين أن الأمر المتأكد هو أن الفقه لا يزال أدنى من منظور النوع الاجتماعي والدفاع العقلي عن المرأة.

وفي هذا العصر، يعتبر الفقه النسوي في سياق التقاليد الإسلامية مهمًا وملحًا للغاية. وإن تحقيق التحول الاجتماعي وخاصة في المجتمع الإندونيسي في هذه

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<sup>28</sup> Muhammad, *Fiqh Perempuan; Refleksi Kiai Atas Wacana Agama Dan Gender*, 264-65.

<sup>29</sup> Sofyan A. P. KAU and Zulkarnain Suleman, *Fikih Feminis: Menghadirkan Teks Tandingan* (Yogyakarta: Pustaka Pelajar, 2014), 56.

<sup>30</sup> تأتي الحركة النسوية من الكلمة اللاتينية *fenina* للمؤنث في الإنجليزية، مما يعني امتلاك سمات المرأة.

Kamla Bashin, *Persoalan Pokok Mengenai Feminisme Dan Relevansinya* (Jakarta: Gramedia, 1995), 1.

الحالة أشد احتياجا في تحرير المرأة المسلمة والرجل المسلم من الهيكل الاجتماعي وأنظمة التدريس التي لا تسمح لهم ببناء نمط من العلاقات المتوازنة والنزيهة. سجلنا عددًا عبر التاريخ الإسلامي من الجهود الكثيرة لتجديد أحكام الشريعة الإسلامية، سواء تم تنفيذها بشكل جذري أو تدريجي. وهذا ليس أمرا مفاجئًا؛ لأن الجهود المبذولة لتجديد أحكام الشريعة الإسلامية ممكنة جدًا طالما أنها لا تزال تشير إلى القيم الأخلاقية للقرآن. وهناك ستة مبادئ رئيسية للقيمة الأخلاقية في القرآن على النحو التالي: (١) روح العصر التي تستمر في التطور والتي ولدت أشكالًا مختلفة من التغيير الاجتماعي؛ (٢) يتم تجديد أحكام الشريعة الإسلامية في الأمور التي لا تتعلق بالشرعيات (المبادئ الأساسية للدين)، ولكنه يدور أيضًا حول القضايا الفقهية (أي: استنباطات العلماء في الأحكام الشرعية الإنسانية والزمنية)؛ (٣) تجديد الشريعة الإسلامية على أساس مبدأ "المحافظة على القديم الصالح، والأخذ بالجديد الأصح"؛ (٤) يجب أن يتبع تجديد الشريعة الإسلامية موقف نقدي تجاه تراث العلماء التقليديين دون فقدان الاحترام لهم؛ (٥) تجديد الشريعة الإسلامية يعني فهم ومراجعة جميع التقاليد الإسلامية، بما في ذلك من تفسير القرآن والحديث والقوانين من خلال القيام بالفهم الأخلاقي والفكري والسياقي، ويمكن اتخاذ القانون الذي لا يركز فقط على الجوانب القانونية الرسمية التي تميل إلى أن يكون جزئيًا ومحليًا؛ (٦) لا يزال تجديد الشريعة الإسلامية متمسكًا بمقاصد الأحكام الشرعية ولأجل تحقيق مصلحة الإنسان.<sup>31</sup>

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<sup>31</sup> Bantara Munti, "Ratna," *Posisi Perempuan Dalam Hukum Islam Di Indonesia*. Yogyakarta: LKiS, 2005; Muhammad Taufiq and Masyithah Mardhatillah, "Polygamy in Indonesian Family Law: Analysis of Maqashid Syariah," *Journal of Islam in Asia* 17, no. 3 (2020); Muhamad Taufiq, "Nikah Sirri Perspektif Maqashid Syariah," *Al-Manhaj: Journal of Indonesian Islamic Family Law* 1, no. 2 (2019): 114, <https://doi.org/10.19105/al->

يحتوي القرآن والسنة كدليل حياة للمسلمين على قيم عالمية ومبادئ توجيهية تنفع حياة الإنسان، وتشمل على القيم الإنسانية والعدالة والمساواة والاستقلال وما إلى ذلك. ولا يتسامح الدين الإسلامي فيما يتعلق بقيم المساواة والعدالة وجود الاختلافات والتمييز، وهذا يتضح جليا بتساوي مكانة الرجل والمرأة (أي: في الدين)، ومما يؤكد ذلك قوله تعالى في سورة البقرة ١٨٧، وآل عمران ١٩٥، والتوبة ٧١ وغيرها، فكل هذه الآيات تقدم مبدأ المساواة في النظر إلى المرأة والرجل، سواء من حيث العبادة أو الحياة المنزلية.

الإسلام يعلم الجميع عن المساواة بأن المرأة لا تعمل في المنزل فحسب، بل لها حق أيضًا في تلقي الدراسة كالرجل. أصبح مفهوم المساواة في الأسرة نقاشًا مثيرًا للاهتمام جنبًا إلى جنب مع ظهور الفهم النسوي الذي يتطلب المساواة بين الرجل والمرأة في جميع الجوانب، كذلك النقاش حول طبيعة المرأة كان له تأثيره على الجدل. القائلون بالتفسير النسوي إنما يريدون وضع السياق لفهم القرآن من خلال التقاط روح الأفكار الموجودة ضمانيًا من ألفاظ النص، فلا يغيرون القرآن ولا يرفضونه، وإنما هدفهم هو تطوير تفسير القرآن فقط. وفي الواقع، إن رفض منتجات التفسير لا يعني رفض القرآن نفسه.

يميل النموذج من التفسير النسوي إلى افتراض أن الآيات المتعلقة بالعلاقات بين الجنسين سياقية، وليست بيانات معيارية توضح حالة الوجود، بل حالة الصيرورة،

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manhaj.v1i2.3138; 'Abd al-Majid Al-Najjar, "Maqāsid Al-Sharī'ah Bi Ab'ād Jadīdah" (Beirut: Dar el-Gharb al-Islami, 2008); Jasser Auda, *Fiqh Al-Maqāsid Inaṭatu Al-Ahkām Al-Syari'ah Bī Maqāsidihā* (Virgiana, USA: Internasional Institute of Islāmīc Thought, 2006); Jasser Auda, *Maqāsid Al-Syāriah as Philosophy of Islāmīc Law, A System Approach* (London: Internasional Institute of Islāmīc Thought, 2008); °Abdullāh Ibn Bayyah, "Mashāhid Min Al-Maqāsid," 2018.

وبعبارة أخرى أن الآيات المتعلقة بالميراث وتعدد الزوجات والقيادة والحجاب والشهادة وحقوق الزوج والزوجة وواجباتهما إنما تحدثت عن الواقع الاجتماعي التاريخي للمجتمع العربي في ذلك الوقت فقط. وللأسف كان المتقدمون من المفسرين وأتباعهم فهموا من الآيات الاجتماعية فهماً حرفياً ونصياً فقط، ولذلك تظهر نتائج التفسير عند قراءتها في السياق الحالي من الانكسار النوعي.

إلى جانب ظهور قضايا النوع الاجتماعي التي يتردد صداها بشكل متزايد من قبل الناشطات على المستوى المحلي والوطني والدولي فإن إعادة بناء طريقة تفسير القرآن أمر جيد بالتأكيد لأجل إنتاج تفسيرات أكثر حساسية تجاه النوع الاجتماعي وقادرة على استيعاب المشكلات الاجتماعية البشرية.

وأشار أصغر علي إنجنير إلى الشئيين في معنى المساواة بين الرجل والمرأة ، وهما: (١) تعني عمومًا قبول كرامة كلا الجنسين على قدم المساواة ؛ (٢) يجب أن يعرف الإنسان أن الرجال والنساء لهم حقوق متساوية في المجالات الاجتماعية والاقتصادية والسياسية.<sup>٣٢</sup>

وحيث كان الفقه متولداً من الاجتهاد فإنه سينتج في الواقع الاستنباط الفرعي، فلا يزال الفقه يتطور ويحدث التحديثات وفقاً للحالة والظروف. ويتضمن فقه المبادلة عدة أمور مهمة، وهي: أولاً، العلاقة العادلة بين الزوج والزوجة في الأسرة. ثانياً، يقدم هذا الكتاب مفهوم العدالة الصالحة الذي يعد أيضاً نقداً لمفهوم النظرية النسوية الحديثة. علاوة على ذلك، أوضح فقيه الدين -مؤلف كتاب "قراءة مبادلة"- أن المساواة في العلاقة بين الزوج والزوجة في إندونيسيا لا يتم تنفيذها بالكامل، فالبناء

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<sup>32</sup> Asghar Ali Engineer, Farid Wajidi, and Cici Farkha Assegaf, *Hak-Hak Perempuan Dalam Islam* (Lembaga Studi dan Pengembangan Perempuan dan Anak, 2000).

الاجتماعي الذي يضع المرأة في مرتبة أدنى من الرجل يعيق تحقيق هذه العدالة. لذلك، تكون المرأة غالباً في موقف صعب عند مواجهة النزاعات المنزلية.<sup>33</sup> في سياق بيان حقوق وواجبات المتزوجين، يركز الفقه التقليدي على ثلاثة أمور؛ العلاقة الطيبة (المعاشرة بالمعروف)، والإنفاق بالمال، والخدمات الجنسية، فالعلاقة الأولى تستهدف كلا الطرفين، يجب على كل من الزوج والزوجة أن يتخذ هذه العلاقة الطيبة أساساً للقيام بالحياة المنزلية على حد سواء. والعلاقة الثانية وجوب الإنفاق بالمال على الزوج لزوجته، على الرغم من أن المرأة قد تطالب بمساعدة الزوج في تحقيق ذلك. وفي العلاقة الثالثة وهي الخدمات الجنسية تؤكد الدراسات الفقهية على واجبات الزوجة تجاه زوجها.

يتم تفسير النفقة والاستمتاع من منظور المبادلة على أنهما حقوق وواجبات لكل من المتزوجين، كما أن كلا منهما يجب أن يقوم بالعلاقة الطيبة (المعاشرة بالمعروف). لذلك، فإن احتياجات الأسرة والأموال المكتسبة هي مسؤوليتهما معاً ومملك مشترك بينهما. وبالتالي، لم تعد هناك غطرسة من أحدهما، ولا هيمنة في الأسرة لأن كل ما ينتج في المنزل هو ملك مشترك بينهما. ومع ذلك، يجب أن يخاطب أحدهما حاجته إلى الاستمتاع بشكل صحيح، ويجب عليهما التأكد من حصول المتعة وعدم الإكراه. والأهم ضرورةً هو فتح باب من أبواب التواصل بين المتزوجين لتحقيق حقوق والتزامات متبادلة، لأن كل عائلة لديها قدرة وجودية وكمية مختلفة.<sup>34</sup>

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<sup>33</sup> Lukman Hakim, "Corak Feminisme Post-Modernis Dalam Penafsiran Faqihuddin Abdul Kodir," *Jurnal Studi Ilmu-Ilmu Al-Qur'an Dan Hadis* 21, no. 1 (2020): 237-59.

<sup>34</sup> Qadir, "Qira'ah Mubadalah: Tafsir Progresif Untuk Keadilan Gender Dalam Islam," 382.

علّمنا مفهوم المبادلة في الأساس أن ننظر إلى أنفسنا وإلى الآخرين على أنهم بشر محترمون على قدم المساواة، ويؤكد هذا المفهوم قوله صلى الله عليه وسلم: "لا يؤمن أحدكم حتى يحب لأخيه ما يحب لنفسه". من خلال الاستجابة للنظرية النسوية العالمية، كان من الأفضل العودة بالنظر إلى مفهوم العدالة الذي يأتي من القرآن والسنة في تقديم نقد وتوازن للنظرية الغربية مقابل التعاليم التي غرست في المعاهد الإسلامية والتي تقدم مصالح الإنسان بناءً على تعاليم السلف الصالح.<sup>٣٥</sup>

يُقدّم كتاب "قراءة مبادلة" تفسيرات حول معاني النصوص والتقاليد من منظور المبادلة بين الرجل والمرأة على الآيات القرآنية والنصوص الحديثية والتراث الإسلامي. وهذا التفسير جاء ليحيي روح "الإسلام رحمة للعالمين" بما فيهم من الرجال والنساء، وليس لأحدهما فقط، وكلاهما يحتاج إلى التعاون القائم على الثقة المتبادلة وعدم الشك والخوف وبدون الهيمنة والإكراه والعنف.

يستند تفسير المبادلة إلى منظور تبادلي يضع الرجل والمرأة بوعي كإنسان كامل ومتساوٍ، لا يهيمن أحدهما الآخر بل يدعم ويكمل بعضهما البعض. وهذا التفسير يحاول تحويل العلاقات الهرمية إلى علاقات متكافئة وتعاون وتكافل، ومن الإساءة تعريف العدالة بوضع الرجال في مكانة أعلى من النساء بحيث ينبغي تقديرهم وخدمتهم وفقا للنظام الأخلاقي والاجتماعي، بل حقيقة العدالة هي وضع كل من الرجال والنساء كبشر متساو وشركاء يتعاونون مع بعضهم البعض. لا تزال المساواة

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<sup>٣٥</sup> فقيه الدين عبد القادر، يعقد جمعية النهضة الشبكية في مدرسة كارابيك الإسلامية الداخلية مناقشة

وتحليل كتاب قراءة مبادلة. مأخوذ من: <https://www.nu.or.id/post/read/101746/diskusi-buku-qiraah-mubadalah-ungkap-pentingnya-peran-perempuan>، يوجياكارتا، يوم الاثنين (١/٢١).

تعطي اهتماما خاصا للاختلافات البيولوجية بين النساء في فترة الحيض والحمل والولادة والرضاع، فضلا عن إمكاناتهن في هامش الحياة الاجتماعية.

لا ينبغي حسب منظور المبادلة استخدام التفسيرات والممارسات الدينية أساسا لسيطرة أحد الجنسين على الآخر، فضلا عن الاستبداد والهيمنة. لا شك أن هناك فرقا بين الرجل والمرأة لأنهما جنسان مختلفان بيولوجياً، ولا يعني هذا الاختلاف تمييزاً أحدهما على الآخر ولا ارتفاع أحدهما من الآخر. وينبغي لأحدهما أيضا أن لا يتكبر على الآخر، وأن لا يكون أكثر أنانيةً تجاه الآخر، وأن لا يهمل ويهان بسبب الآخر. وكذلك ينبغي أن لا أن يكون أحدهما ضحية للعنف الجسدي والنفسي والاقتصادي والسياسي والاجتماعي خاصة إذا كان باسم الإسلام.

يؤكد هذا الكتاب في الواقع على منظور ديني يركز على توازن العلاقة وتبادلتها، وقد أطلق المؤلف على هذا المنظور والنهج مصطلح "المبادلة" في تفسير قضايا العلاقة بين الرجل والمرأة في الإسلام بناءً على النص المرجعي والتراث الإسلامي. وباختصار يطلب منظور المبادلة كلَّ فرد أن يعامل الآخرين بالطريقة التي يريدها.

كما يعارض منظور المبادلة في هذا الكتاب المنظور المعاكس لها حيث يضع النساء دائماً في الوضع الصحيح ويضع الرجال مذنبين ومصادر للمشاكل. فهذا الكتاب لا يعني رفع شأن المرأة أو إلقاء اللوم عليها، كما لا يقصد التقليل من شأن الرجل أو تشويه سمعته. ولكنه يؤكد الإدراك بأن هذا العالم بسيط للغاية إذا تم تناوله من منظور ذكوري فقط؛ فيجب أن يُنظر إلى هذا العالم من منظور الرجال والنساء، وأن يديره الرجال والنساء، وأن يتمتع به الرجال والنساء، كما يجب أن تكون العلاقة بين الاثنين مشاركة ومعاونة، يعزز كلٌّ منهما الآخر ويكمله ويدعمه ويساعده.

إن منظور المبادلة في هذا الكتاب يعتبر جزءاً من النشاط الدعوي لإتمام مكارم الأخلاق التي كانت قائمة على أساس المصلحة والخير والكرم.<sup>36</sup> والدعوة إلى إتمام مكارم الأخلاق هي الهدف الرئيسي لبعثته صلى الله عليه وسلم، والتي لا يزال يتعين علينا القيام بها بشكل مستمر. كان التقليد الأكاديمي في تفسير النصوص الإسلامية جيداً حتى الآن. ومع ذلك، حدث التحريف وتطلب التحسين، والتحريف يعني التعامل مع النصوص من جانب الرجال فقط دون مشاركة النساء.<sup>37</sup> التحسين المقصود يتأتى بمنظور المبادلة الذي يريد ضمان وجود المرأة وتقريبها من النص، وعليه فإن الأخلاق الطيبة يجب أن تكون مفيدة للرجل والمرأة، ويمكن تطبيق الأخلاق الحميدة إذا كانت لمصلحة كل من الرجال والنساء. وبالمثل، فإن السمات الكريمة سيتم تطبيقها بتكريم النساء والرجال على قدم المساواة. ولهذا السبب جاء كتاب المبادلة.

عن أبي هريرة رضي الله عنه قال: قال رسول الله صلى الله عليه وسلم: "إِنَّمَا بُعِثْتُ لِأَتَمِّمَ صَالِحَ الْأَخْلَاقِ". (مسند أحمد حديث رقم ٩٠٧٤). وفي رواية أخرى: "بُعِثْتُ لِأَتَمِّمَ حُسْنَ الْأَخْلَاقِ" (موطأ مالك، رقم حديث: ١٦٤٣)، وفي رواية أخرى: "إِنَّمَا بُعِثْتُ لِأَتَمِّمَ مَكَارِمَ الْأَخْلَاقِ". (سنن البيهقي، حديث: ٢٠٧٨٢).<sup>38</sup>

إن طرح كتاب قراءة مبادلة يعتبر مساهمة مهمة في الواقع، وليس في فهم النصوص الدينية فقط، بل وسيلة للنظر إلى العالم. على الرغم من أن هذه الطريقة

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<sup>36</sup> Muhammad Taufiq, *Filsafat Hukum Islam; Dari Teori Ke Aplikasi*, ed. Abd. Jalil, I (Pamekasan: Duta Media, 2019), 144-46.

<sup>37</sup> Hakim, "Corak Feminisme Post-Modernis Dalam Penafsiran Faqihuddin Abdul Kodir," 237-59.

<sup>38</sup> [https://mubaadalahnews.com/buku/detail\\_buku/2019-06-06/3](https://mubaadalahnews.com/buku/detail_buku/2019-06-06/3) تم

الوصول عليه في تاريخ ٣٠ يونيو ٢٠٢٠

تهدف إلى الرد على النصوص الأولية في الإسلام التي تستخدم لغة الوعي النوعي، إلا أن نفس الطريقة يمكن أن تكون أيضًا طريقة جديدة لرؤية التنوع الاجتماعي لثلا تتولد منه فجوة العلاقة وعدم المساواة، فبالإمكان أن يؤدي عدم المساواة في العلاقة إلى زيادة الظلم لأنه يبدأ من منظور سلبي حول الاختلافات بين الأطراف. ومن التحديات الخطيرة لتحقيق العدالة بين الجنسين المنظور الثنائي للرجل والمرأة، فاختلافهما قد يؤدي إلى اعتبارهما متناقضان مع بعضهم البعض وإلى أن ينتصر أحد الطرفين على الآخر، وإن لا -أي وإن لم ينتصر- فسيتم هزيمته. النظام الأبوي له دور كبير في تحقيق منظور ثنائي، فالرجل يعتبر أعلى مرتبة من المرأة وهي دونه مرتبة وكانت خادمة له، ويتم تحديد قيمة المرأة من خلال مدى إفادتها للرجل.<sup>٣٩</sup> لا ينطبق مبدأ المبادلة على العلاقة الزوجية أو العلاقة الأسرية فقط، بل يمكن أيضًا تطبيقه في العلاقة بين المنظمات أو شركات.<sup>٤٠</sup>

على عكس الكتب النسوية الأخرى التي تميل إلى معارضة أفكار العلماء المتقدمين وكتبهم والتي تكون غالبًا في ازدياد، فكتاب قراءة مبادلة هذا يقدم منظورًا حكيماً فيما يتعلق باحترام آراء السلف الصالح، ويستخدم مفهوم المبادلة أداة لتفسير العدالة بين النساء والرجال.

<sup>٣٩</sup> <https://shopee.co.id/Qiraah-Mubadalah-Tafsir-Progresif-untuk->

[Keadilan-Gender-dalam-Islam-i.355786-91.1849487112](https://shopee.co.id/Qiraah-Mubadalah-Tafsir-Progresif-untuk-Keadilan-Gender-dalam-Islam-i.355786-91.1849487112) تم الوصول عليه في تاريخ ٣٠

يونيو ٢٠٢٠

<sup>٤٠</sup> <https://fahmina.or.id/fahmina-institute-terapkan-prinsip->

[mubadalah-dalam-organisasi/](https://fahmina.or.id/fahmina-institute-terapkan-prinsip-mubadalah-dalam-organisasi/) تم الوصول عليه في تاريخ ٣٠ يونيو ٢٠٢٠

## الخلاصة

أما بالنسبة لنتائج هذه الدراسة، فإن المشاركة بين الرجال والنساء في تحقيق العدالة الأسرية يجب أن تكون تبادلية، كالمشاورة وتحقيق الديمقراطية المتبادل والإحسان في المعاملة. وفي الواقع لا يميز الإسلام بين الرجل والمرأة من الناحية المثالية - المعيارية، لا سيما عن التمييز ضد المرأة، بل رفع الإسلام مكانة المرأة كدليل على أفضليتها تحت شعار المصلحة والرحمة للعالمين. يأتي تقييم التحيز النوعي أساساً من ثلاثة افتراضات أساسية حول المعتقدات الدينية، وهي: (١) افتراضات عقائدية تضع النساء صراحة كمكتملات، (٢) وجهات نظر مادية، (٣) اعتقاد المجتمع المكسي الجاهلي الذي يحتقر دور المرأة في عملية الإنتاج.

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## **From the Public Space to the Prison Space: Regulation Polemic and the Implementation of Caning Law in Aceh**

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### **Abstract:**

The implementation of caning law in Aceh Province is still sporadic due to a lack of coordination among the government institutions involved in caning law. Then, the prison infrastructure to impose the caning law is also not adequate, and socialization has also not been fully carried out. Besides, in determining the location of the caning, Islamic law requires the fulfillment of two principles namely "open space" and "visible" to the public. Furthermore, the law that guides the implementation of sharia in Aceh does not regulate detail of where the caning can be executed. Hence, the issues that need to be scrutinized in this study are about shifting the norm from "open space" to "prison space" and why there is a disparity in

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determining the place of caning sentences. This study uses a normative legal method by relying on secondary data. All collected data were analyzed by using qualitative analysis. The results show that there has been a shifting norm from "open space" to "prison space" in the application of the caning sentences in Aceh. This shift starts from the open area in the courtyard of the mosque to the prison area as a place to execute a caning sentence. This shifting also allows the people who meet certain criteria to witness the execution of a caning sentence. In addition, there is also a disparity among the sharia courts due to the lack of facilities available in certain the sharia courts in Aceh. Hence, the Aceh government needs to improve the facilities of the sharia courts to be able to execute caning sentences.

**Keywords:**

Caning; Islamic Law; Sharia; Open Space;  
Shifting Norms

**Abstrak:**

Pelaksanaan hukum cambuk di Provinsi Aceh masih bersifat sporadis karena kurangnya koordinasi antar instansi pemerintah yang terlibat dalam pelaksanaan hukum cambuk. Kemudian, infrastruktur penjara untuk melaksanakan hukum cambuk juga tidak cukup memadai, dan sosialisasi juga belum sepenuhnya dilakukan. Selain itu, dalam penentuan lokasi pencambukan, syariat Islam mensyaratkan terpenuhinya dua prinsip yaitu "ruang terbuka" dan "dapat disaksikan" oleh publik. Selanjutnya, undang-undang yang menjadi pedoman penerapan syariah di Aceh tidak mengatur secara rinci di mana hukuman cambuk dapat dilakukan. Oleh karena itu, permasalahan yang perlu dikritisi dalam penelitian ini adalah tentang pergeseran norma dari "ruang terbuka" ke "ruang penjara" dan mengapa terjadi disparitas dalam penentuan tempat hukuman cambuk. Penelitian ini menggunakan metode hukum normatif dengan menggunakan data sekunder. Semua data yang terkumpul dianalisis dengan menggunakan analisis kualitatif. Hasil penelitian menunjukkan bahwa telah terjadi pergeseran norma dari "ruang terbuka" ke "ruang penjara" dalam penerapan hukuman cambuk di Aceh. Pergeseran ini dari ruang terbuka di pelataran masjid ke area penjara sebagai

tempat pelaksanaan hukuman cambuk. Pergeseran ini juga memungkinkan orang-orang yang memenuhi kriteria tertentu untuk menyaksikan eksekusi hukuman cambuk tersebut. Selain itu, juga terdapat disparitas antar Mahkamah Syar'iyah karena kurangnya fasilitas yang tersedia di beberapa Mahkamah Syar'iyah di Aceh. Oleh karena itu, pemerintah Aceh perlu meningkatkan fasilitas Mahkamah Syar'iyah untuk dapat mengeksekusi hukuman cambuk.

**Kata Kunci:**

Hukum Cambuk; Hukum Islam; Syariah; Ruang Terbuka; Pergeseran Norma

**Introduction**

The application of Islamic Sharia in Aceh has a legal basis through Law Number 44 of 1999 concerning the Privileges of Aceh Province. Since then, the "specialty of Aceh" which has been given since 1959 through the Prime Minister's Decree No. 1/Missi/1959 or known as the "Missi Hardi Decision" began to be given an adequate legal norm<sup>1</sup>. The performance of sharia law in Aceh is increasingly gaining legitimacy with the issuance of Law Number 18 of 2001 concerning Peculiar Autonomy for Aceh Province followed by Law Number 11 of 2006 concerning the Aceh Government Law known as UUPA<sup>2</sup>.

Recent laws have given the Aceh Government broad authority to make special regional regulations known as *Qanun* which were imposed in 2006. Article 1 point 21 of UUPA stated that Aceh *Qanun* is similar to a provincial regional regulation that regulates the administration of provincial government and the lives of the Acehnese people. Among the most important *qanuns* that have been issued by the Government of Aceh are *Qanun* Number 7 of 2013

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<sup>1</sup> Henri Chambert-Loir, *Islamic Law in 17th Century Aceh, Archipel*, 2017, <https://doi.org/10.4000/archipel.444>.

<sup>2</sup> Moch Nur Ichwan et al., "Islam and Dormant Citizenship: Soft Religious Ethno-Nationalism and Minorities in Aceh, Indonesia," *Islam and Christian-Muslim Relations* 0, no. 0 (2020): 1-26, <https://doi.org/10.1080/09596410.2020.1780407>.

regarding the Sharia *Jinayat* Procedural Law and *Qanun* Number 6 of 2014 regarding Sharia *Jinayat* Law. These two *qanuns* had caused a conflict between the executive and legislative bodies when they were still in the form of a draft of *qanuns*. The Governor of Aceh at that time refused to approve the *qanun* on *jinayat* law<sup>3</sup>. That is why *Qanun* on the *Jinayat* Procedural Law was passed earlier than *Qanun* on *Jinayat* Law.

In addition to the polemic on the passing of the *qanun* mentioned above, the *Qanun* on *Jinayat* Procedural Law has also attracted the attention of the wider community.<sup>4</sup> This is inseparable from several contradictory provisions. Article 262 Paragraph 1 of *Qanun* Number 7 of 2013 stated that "*Uqūbat* (sentence) is executed in an open public space and possible to be observed by people who attend that execution". In practice, the phrase "open space" in this provision is translated into the courtyard or courtyard of the mosque. Therefore, almost all executions of caning sentences since the issuance of the *qanun* have been carried out in the courtyard of the mosque<sup>5</sup>.

However, in paragraph 2 of the article, is also stated that "The implementation of caning sentences as referred to in paragraph (1) is forbidden to be attended by children under 18 (eighteen) years old". Then, Paragraph 4 mentioned that "the distance between the place of the standing of the convicted person and the witness community no less than 12 (twelve) meters." In fact, the implementation of the caning sentences as executed in Banda Aceh, Meulaboh, and Tapaktuan occurred in the courtyard of the mosque and this execution were also attended by children which hard to be avoided. From a practical point of view, it is stated that the execution of the caning sentences which takes place in an open location often violates

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<sup>3</sup> Tim Maan and Dina Afrianty, "Aceh's Islamic Criminal Code Formalising Discrimination," in *Crime and Punishment in Indonesia*, vol. 1 (Routledge, 2020), 135–80, <https://doi.org/10.15642/JIIS.2007.1.1.135-180>.

<sup>4</sup> Yogi Febriandi, Muhammad Ansor, and Nursiti Nursiti, "Seeking Justice Through Qanun Jinayat: The Narratives of Female Victims of Sexual Violence in Aceh, Indonesia," *QIJIS (Qudus International Journal of Islamic Studies)* 9, no. 1 (2021): 103, <https://doi.org/10.21043/qijis.v9i1.8029>.

<sup>5</sup> Muhammad Siddiq Armia, "Public Caning: Should It Be Maintained Or Eliminated? (A Reflection of Implementation Sharia Law In Indonesia)," *QIJIS: Qudus International Journal of Islamic Studies* 7, no. 2 (2019): 301–28.

the provisions contained in Article 262 paragraphs 2 and 4 of the *qanun* mentioned above.

This condition prompted the Aceh's governor to issue a Governor Regulation (*Pergub*) Number 5 of 2018 concerning the Enactment of the Sharia *Jinayat* Law. This *Pergub* furthermore regulates the implementation of the caning sentences in Aceh. In Article 30 Paragraph 3 of this *Pergub* is stated that "The open place as referred to in point 1 is located in the community institution/detention center/detention branch." This *Pergub* at the same time limits the meaning of "open space" as stated in paragraph 1 of Article 262 of the *Qanun* Number 7 of 2013 to "open space" which takes place at the Community Institution/Detention Center/Detention Branch. In other words, there is a shift in the meaning of "open space" which was previously carried out in the courtyard of the mosque to a detention center or branch of the detention center.

After this *Pergub* has been applied suddenly causing a polemic in the community. Some elements of society suspect that there are hidden agendas behind the issuance of the *Pergub*. There are some elements of society who think that this *Pergub* is a form of foreign intervention to weaken the implementation of sharia law in Aceh Province<sup>6</sup>. This polemic became more and more massive in the community when leaders in districts and cities throughout Aceh fight against that *Pergub*<sup>7</sup>.

Even though this *Pergub* Number 5 of 2018 has been passed to be implemented some caning sentences were still executed in the mosque's courtyard. For example, Banda Aceh City Government continues to execute caning sentences for online prostitutes on April 20, 2018, in the courtyard of the Jami' Mosque, Lueng Bata Village. Whereas previously on April 12, 2018, the Governor of Aceh signed a cooperation agreement with the Head of the Regional Office of Law

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<sup>6</sup> Maan and Afrianty, "Aceh's Islamic Criminal Code Formalising Discrimination."

<sup>7</sup> Fajri Matahati Muhammadin et al., "Lashing in Qanun Aceh and The Convention Against Torture: A Critical Appraisal," *Malaysian Journal of Syariah and Law* 7, no. 1 (2019): 11-24.

and Human Rights Ministry in Aceh to implement caning sentences in prisons.<sup>8</sup>

After signing the cooperation document between the Aceh Government and the Head of Law and Human Rights Ministry in Aceh, no longer caning sentences are allowed to be executed in the mosque's courtyard. This condition is in line with the provisions of Paragraph 4 Article 30 of *Pergub* Number 5 of 2018 which states that "the enforcement of caning sentences in the prison/Detention Center/Branch of Detention as referred to in paragraph (3) is carried out after the existence of a cooperation document between the Aceh Government and the Regional Office of the Law and Human Rights Ministry.

Even though *Pergub* Number 5 of 2018 has been issued many District Governments refuse to implement it. Not only in Banda Aceh, but opposition to the governor's regulation above also occurred in several other areas. In Central Aceh, the caning of five perpetrators of *ikhtilat* (mixed) and *khamar* (wine) on 9<sup>th</sup> May 2018 was still carried out outside prisons. The same thing also happened in Lhoksuewawe, where two residents who were involved in adultery were lashed 100 times in the courtyard of the Great Mosque of the Islamic Center on 26 April 2018. Moreover, the Vice Head District of Aceh Besar had issued a strong statement refusing the implementation of the caning law in the prison.

From several initial observations that have been made, the execution of the caning sentences in the first prison was carried out in Meulaboh on 15<sup>th</sup> May 2018 against a perpetrator of the crime of *Jarimah khamr* (sins in drinking wine).<sup>9</sup> Of course, the discrepancy between regulation and the implementation in determining the place of execution of the caning creates legal uncertainty in the enforcement of Islamic law in Aceh.

Several previous studies have highlighted the implementation of caning in public. One of which is a research conducted by Cesar J. Rebellon and Murray Straus<sup>10</sup> as random sampling. This study found

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<sup>8</sup> Serambi Indonesia Newspaper, "Serambi Indonesia," April 21, 2018.

<sup>9</sup> Serambi Indonesia Newspaper, "Serambi Indonesia," April 16, 2018.

<sup>10</sup> Cesar J. Rebellon and Murray Straus, "Corporal Punishment and Adult Antisocial Behavior: A Comparison of Dyadic Concordance Types and

that exposure to caning can cause children and adolescents to experience acute antisocial behavior which is difficult to cure, especially if the victim is their parents. The caning punishment is also still being debated by Farrel<sup>11</sup>. He explained that the implementation of caning in Singapore, Brunei Darussalam, Malaysia, and Aceh-Indonesia is justified by local law. Although constitutional, the application of the law in these countries has received widespread criticism from the global world because the imposition of caning punishment is considered contrary to human rights.

Next is Fonseca's research which explains the sociological impact of caning in the post-colonial period. He explained that colonized countries are trying to revolutionize their criminal justice system by removing the caning punishment from their legal system. This effort was born from the realization that caning is a way for Western countries to stick to the grip of colonialism in colonized countries by treating inhumane corporal punishment to indigenous people in their colonized countries<sup>12</sup>. In the context of implementing the caning punishment in Aceh, Armia<sup>13</sup> found that the execution of caning in a public space did not guarantee a deterrent effect for the accused. In addition, children who are exposed to see the whipping process, have the potential to imitate the whipping process in their lives.

All studies mentioned above do not address the topic highlighted in this study. Therefore, it is highly urgent to conduct a study explaining the shift of the norm of "open space" to "prison space" both in the *Qanun on Jinayat Procedures* and the Governor's

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an Evaluation of Mediating Mechanisms in Asia, Europe, and North America," *International Journal of Behavioral Development* 41, no. 4 (2017): 503–13, <https://doi.org/10.1177/0165025417708342>.

<sup>11</sup> Farrel, "Judicial Corporal Punishment Picture: Judicial and Prison Punishment Pictures From Various Countries," *Journal of Social Sciences* 7, no. 11 (2018).

<sup>12</sup> David S. Fonseca, "Reimagining the Sociology of Punishment through the Global-South: Postcolonial Social Control and Modernization Discontents," *Punishment and Society* 20, no. 1 (2018): 54–72, <https://doi.org/10.1177/1462474517740888>.

<sup>13</sup> Armia, "Public Caning: Should It Be Maintained Or Eliminated? (A Reflection of Implementation Sharia Law In Indonesia)."

Regulation about the Implementation of *Jinayat* Procedural Law in Aceh. In addition, this study also examined to reveal why there is a disparity in determining the place of the caning sentences in Aceh.

### Method

This research employs qualitative research by using data from 23 districts/cities, namely Aceh Barat District, Aceh Barat Daya District, Aceh Besar District, Aceh Jaya District, Aceh Selatan District, Aceh Singkil District, Aceh Tamiang District, Aceh Tengah District, Aceh Tenggara District, Aceh Timur District, Aceh Utara District, Bener Meriah District, Bireuen District, Gayo Lues District, Nagan Raya District, Pidie District, Pidie Jaya District, Simeulue District, Banda Aceh City, Langsa City, Lhokseumawe City, Sabang City, and Subulussalam City.

All data and information were collected by conducting library research, and in-depth interviews with some resources person. The data were then analyzed using the policy content analysis method<sup>14</sup>. The data that has been analyzed were then documented in a descriptive-narrative form.

### Discussion and Result

#### Places of Execution of Whips Under Various Regulations

In the *Qanun* of the *Jinayat* Law, ten acts of *jarimah* are regulated which can be punished by canning. The ten *jarimah* are *khamr*, *maisir* (game of chance), seclusion, *ikhtilāt*, adultery, sexual harassment, rape, *qadzāf* (accusing adultery), *liwāt* (sodomy), and *musāḥaqah* (lesbian).<sup>15</sup> However, the determination of the place of execution of the caning is not regulated in the *Qanun* on *Jinayat* Law. Rather, it is regulated in the *Qanun* on *Jinayat* Procedural Law.

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<sup>14</sup> Damon M. Hall and Rebecca Steiner, "Policy Content Analysis: Qualitative Method For Analyzing Sub-National Insect Pollinator Legislation," *MethodsX* 7 (2020): 100787, <https://doi.org/10.1016/j.mex.2020.100787>.

<sup>15</sup> Government of Aceh, "Qanun Aceh No. 12 of 2003 Concerning Alcoholic," 2003.

In the Qanun on *Jinayat* Law, the provision for the spot of lashing sentences is stated in Article 262 Paragraph (1) "caning sentences is conducted in an open public space and visible by those in attendance". There are two norms governing the execution of canings in this article. The first is "open space" and the second is "viewable to those who present". This provision requires the execution of the caning to be conducted in an open public space which is possible to be witnessed by those who attend the punishment. However, this provision as well as other related provisions is not explained what is meant by "open space" and "number of people attending". So that the determination of the place of execution of the caning is vulnerable to the practice of legal uncertainty and abuse of power.

Since the caning punishment was first introduced in Aceh through Qanun Number 12 of 2003 regarding Alcoholic Liquor (*Khamr*), Qanun Number 13 of 2003 regarding Gambling (*Maisir*), Qanun Number 14 of 2003 concerning adultery until the issuance of Qanun on the *Jinayat* Procedure Code<sup>16</sup> found some variation in the determination of the location of the caning; although generally carried out in front of the mosque which is classified as a crowded area. This execution happened in the districts of Gayo Lues, Southwest Aceh, West Aceh, Pidie Jaya, and Bireuen. In the Nagan Raya district, executions were carried out in the city square, namely in the district office complex. In the district of Central Aceh, the execution of the caning was carried out in the field next to the Art Sports Building (GOS). In the Bener Meriah district, the execution of the caning was carried out in several different places. The main standard for choosing the place of execution in Bener Meriah is the sub-

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<sup>16</sup> R. Michael Feener, "Engineering Transformations in the 'Religion-Development Nexus': Islamic Law, Reform, and Reconstruction in Aceh," *Religion* 51, no. 1 (2021): 40-57, <https://doi.org/10.1080/0048721X.2020.1792051>.

district mosque where the caning convict lives. However, if the convict's domicile is too far away, it will be carried out at the district mosque. The execution was also carried out once in front of the Bener Meriah District Attorney's Office for more practical reasons.

The norms of “open space” and “can be seen by those present” are intended so that caning has a preventive effect on those who witness the punishment. However, this does not happen. Some of the caning convicts were recidivists of the same sentence before. The data of recidivists of *Jinayat* law violators started from 2016 to 2020 can be seen in Table 1 below.

**Table 1. Recidivists of *Jinayat* Law Violators**

No	Year	Number of Cases	Number of Recidivist	Percent (%)
1	2016	279	75	26.8
2	2017	314	93	29.6
3	2018	301	75	26.8
4	2019	256	68	26.5
5	2020	281	71	25.2

Source: Aceh Syar'iyah Court (2020).

Table 1 above indicates that an average 26.98% of perpetrators of *jinayat* violations in Aceh from 2016 until 2020 were recidivists who had committed the same cases before. In terms of criminal law perspective, this percentage is very high<sup>17</sup>. In addition, the data above also show the ineffectiveness of the implementation of whipping in the open space. The presence of several people who witnessed the caning and convicts being

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<sup>17</sup> Seena Fazel and Achim Wolf, “A Systematic Review of Criminal Recidivism Rates Worldwide: Current Difficulties and Recommendations for Best Practice,” *PLoS ONE* 10, no. 6 (2015): 1–8, <https://doi.org/10.1371/journal.pone.0130390>.

shown in public could not provide a maximum deterrent effect to the convicts.

Numerous expressions that are nearly identical to the definition of "open space" in the *Qanun* on the *Jinayat* Procedural Legislation can be found in national law. The term is "public space". In some regulations, it is stated that "public space" does not include presidential institutions, hospitals, military headquarters, bus terminals, train stations, ports, national companies, and houses of worship<sup>18</sup>. To interpret the norms of "public space" as described in the above regulation, the Head of the Indonesian Police issued a Regulation regarding the Enactment of Public Space. In the regulation, public space is described as a free space where everyone can access, visit, and see the space. Almost the same explanation can also be found in the Criminal Code<sup>19</sup>

From the explanation above, it appears that the norm of "public space" in national law is deciphered through certain laws, not merely through the discernment of stakeholders as frequently occurred in the determination of "open place" in caning executions. A regulation-based interpretation system can prevent legal uncertainty and arbitrary actions by state officials in law enforcement. Unfortunately, such a regulation-based interpretation has not been found in the *Qanun* on the *Jinayat* Law, especially in determining the "open space" and "number of people present" in the execution of the flogging.

The corporal punishment governed in the *Qanun* on *Jinayat* is a derivative of Islamic law which is summarized in fiqh. In fiqh itself, whipping is a form of sanction for violators of

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<sup>18</sup> Rika Kurniaty, "Local Elites and Public Space Sustainability: The Local Elite Roles in the Presence and Usage of Public Space in Malang Raya, Indonesia," *Procedia Environmental Sciences* 20 (2014): 506-15, <https://doi.org/10.1016/j.proenv.2014.03.063>.

<sup>19</sup> Efrizal Harun Sharief, Wika Hawasara, and Ramlani Lina Sinaulan, "Hate Speech Through Social Media in Indonesia: Based on Space Transition Theory in Cyber Criminology," in *International Seminar Welcoming The Society 5.0 With Writing Literacy Acceleration*, 2021, 337-45.

sharia law <sup>20</sup>. In fiqh five things need to be considered in the execution of caning. First, *al-jālid* (executor). Second, *al-majlūd* (convicted), third, *al-jild* (a measure of whipf), fourth, *al-sauṭ* (whip tool), and fifth, *al-makān li iqāmat al-jild* (place of execution) <sup>21</sup>.

There is no definite provision in *fiqh* regarding the place of execution of the caning. The fiqh of jinayah gives law enforcement officers the freedom to choose the place of execution anywhere by considering two principles. First, consideration of the benefit, both benefit of the executor and the condemned. Second, there is access to be seen by a group of people <sup>22</sup>.

Likewise, there is no definite provision in fiqh regarding the number of groups of people who are required to witness the caning. Al-Nawāwī requires a minimum of 2 people because the witnesses required in the sale and purchase transaction are two people as stated in Surah Al-Baqarah 282<sup>23</sup>. Meanwhile, Al-Zuhr argues that the minimum number is 3 people because the smallest plural number in Arabic is three<sup>24</sup>. Meanwhile, Hasan al-Baṣrī argues that the minimum number of witnesses to the caning is ten people. The number ten is understood from Surah Al-Nūr verse 2, “*ṭā'ifatun minna al-mu'minīn*” (the whipping sentence should be witnessed by a group of believers). In the

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<sup>20</sup> Wahbah Al-Zuhaili, *Al-Fiqh Al-Islami Wa Adillatuhu*, Dar Al-Fikr, VII, vol. 8 (Damaskus: Dar al-Fikr, 2007).

<sup>21</sup> 'Abd al-Qadir Audah, *Al-Tasyri' Al-Jina'i Al-Islami Muqarinan Bi Al-Qanun Al-Wad'i*, IV (Cairo: Maktabah al-Urah, 2011).

<sup>22</sup> Mansuri Muhammad, “Daur Al-Siyasah Al-Jina'iyah Fi Tahqiq Al-'Adalah Al-Jina'iyah (Dirasah Syar'iyah Maqasidiyah),” *Majalah Al-Buhuts Wa Al-Dirasat* 1, no. 17 (2020).

<sup>23</sup> Mahyuddin bin Syaraf Al-Nawawi, *Majmu' Syarah Al-Muhazzab*, IV (Beirut: Maktabah al-'Alamiyah, 2017).

<sup>24</sup> Audah, *Al-Tasyri' Al-Jina'i Al-Islami Muqarinan Bi Al-Qanun Al-Wad'i*.

understanding of the Arabs, it is only called *āifatun* (a group) if the minimum number is ten people<sup>25</sup>.

In the absence of definite rules in the Qur'an, Sunnah, and *ijtihād* of previous scholars in *fiqh* books, it provides an opportunity for policymakers in Aceh to rearrange the norm of "open space" by considering two principles, namely: (1) benefit executors and convicts and (2) can be seen by those present.

In addition to Aceh, the caning penalty is also applied in several countries in the Southeast Asia Region. These countries are Singapore, Brunei Darussalam, and Malaysia<sup>26</sup>. The application of caning in these countries is more a legacy of British colonial law. Meanwhile, the caning punishment that applies in Aceh is purely adopted from Islamic law<sup>27</sup>. The acts that are subject to caning are also different. In Malaysia and Brunei Darussalam, caning is imposed for violators of sharia law<sup>28</sup>. Meanwhile, in Singapore, the punishment of caning is applied to certain crimes regulated in the Singapore Criminal Procedure Code. In addition, Singapore also uses caning to discipline prison inmates<sup>29</sup>. In addition to Southeast Asia, several countries with Muslim majority populations also apply caning in their legal systems. Among these countries are Qatar, Yemen, Iran, United Arab Emirates, Saudi Arabia, Sudan, and

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<sup>25</sup> Al-Zuhaili, *Al-Fiqh Al-Islami Wa Adillatuhu*.

<sup>26</sup> Farrel, "Judicial Corporal Punishment Picture: Judicial and Prison Punishment Pictures From Various Countries," *Journal of Social Sciences* 7, no. 11 (2018).

<sup>27</sup> Chuanyu Luo, "Brunei's Islamic Law: Introduction and Comments. In China-ASEAN Relations: Cooperation and Development," *Series on China-ASEAN Relations* 1 (2018).

<sup>28</sup> Farrel, "Judicial Corporal Punishment Picture: Judicial and Prison Punishment Pictures From Various Countries," 2018.

<sup>29</sup> Benjamin Joshua Ong, "The Doctrine of Severability In Constitutional Review: A Perspective From Singapore," *Statute Law Review* 40, no. 2 (2019): 150-74, <https://doi.org/10.1093/slr/hmx030>.

the Northern Territory of Nigeria <sup>30</sup>. These countries apply the punishment of caning in almost all criminal acts<sup>31</sup>. More details about the country, source of whip punishments, and the scope of action is shown in table 2 below.

**Table 2.** The Differences in the Source and Scope of the Punishment of Caning

No	Country/Territory	Source of Whip Punishment	Scope of Action
1	Aceh	Islamic law	<i>khalwat, maisir, seclusion, ikhtilat, adultery, sexual harassment, rape, qadzaf, liwath, and musahaqah</i>
2	Malaysia	British colonial law	All sharia violations
3	Brunei Darussalam	British colonial law	All violations of the Shari'a
4	Singapore	British colonial law	Certain criminal acts and disciplinary punishments for prisoners
5	Saudi Arabia, Qatar, United Arab Emirates, Yemen, Sudan, Iran, Northern Nigeria	Islamic law	Almost all crimes

<sup>30</sup> Elizabeth T. Gershoff, "School Corporal Punishment in Global Perspective: Prevalence, Outcomes, and Efforts at Intervention," *Psychology, Health and Medicine* 22 (2017): 224-39, <https://doi.org/10.1080/13548506.2016.1271955>.

<sup>31</sup> Rebellon and Straus, "Corporal Punishment and Adult Antisocial Behavior: A Comparison of Dyadic Concordance Types and an Evaluation of Mediating Mechanisms in Asia, Europe, and North America."

In the nations utilized as comparisons for the implementation of the corporal penalty in this study, as shown in Table 2 above, the caning sentences are carried out in a closed space or a location away from public access. Like a public prison, as it is in Singapore, or a special prison, which is used in Malaysia, it also has a high level of secrecy and security.<sup>32</sup> In these countries, the execution of caning is very close to the public spotlight. Access to the place of execution was only granted to officers authorized to handle canings such as prison wardens, executioners, security, and health teams<sup>33</sup>.

After the issuance of Aceh's Governor Regulation on the Enactment of the Sharia *Jinayat* Law, the wide "open space" norm in the *Qanun* on Sharia *Jinayat* Law is narrowed down to an "open space" within the Penitentiary/Detention Center/Branch of prison". This is as regulated in Article 30 Paragraph (3) of the Governor's Regulation on the Implementation of *Jinayat* Procedural Law. This change in norms gives the impression that the regulations for the implementation of canings in Aceh are influenced by the regulations for the implementation of canings in other countries. However, this study found that these changes were not at all influenced by similar regulations in force in Malaysia, Singapore, or Brunei Darussalam.

This study found three reasons that caused the Governor of Aceh at that time to issue a Governor Regulation for the Implementation of the *Jinayat* Procedural Law. The first is the juridical reason. Both the *Qanun* on *Jinayat* Procedural Law and Governor Regulation on the implementation of *Jinayat* Procedural Law require that children under 18 years of age cannot participate in flogging.

Meanwhile, the practice of caning in an open place was attended by many people, including children under 18 years of age. The second is political reason. The implementation of lashing in the

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<sup>32</sup> Farrel, "Judicial Corporal Punishment Picture: Judicial and Prison Punishment Pictures From Various Countries," 2018.

<sup>33</sup> Chee Huay Chong and Kee Jiar Yeo, "The Residue Effects of Parental Corporal Punishment on Young Adults' Psychological Adjustment: Evidence From Malaysia," *SAGE Open* 8, no. 1 (2018), <https://doi.org/10.1177/2158244018757287>.

open space further increased the Islamophobic sentiment which affected investors' distrust of the investment climate in Aceh, as acknowledged by the Governor of Aceh at the time<sup>34</sup>. Whereas, Aceh as the only region in the archipelago where sharia law is officially implemented needs to prove that the implementation of Islamic law will not hamper economic growth and investment climate as many parties have feared.

The third is the sociological reason. The execution of caning which was carried out in the courtyard of the mosque made a bad image of the enforcement of Islamic law in Aceh. Because apart from being a spectacle, visitors are also free to capture the whip procession with a camera which is then disseminated to various media. Moreover, in Acehnese culture, showing people's mistakes in public is seen as an unethical act (Aceh: *seumaloe*)<sup>35</sup>. Even more embarrassing, the implementation of whipping in the open has been used as a new tourist destination, both by local, national, and even international tourists<sup>36</sup>.

### **Disparities in the Enforcement of the Corporal Punishment in Aceh**

The implementation of the caning sentences in Aceh involves four government institutions. The first institution is the Municipal Police – Sharia Guardian Police (*Satpol PP –WH*) which is responsible for disseminating, supervising, and enforcing sharia law throughout Aceh<sup>37</sup>. *Satpol PP-WH* is one of the popular institutions in Aceh due to the routine patrols carried out by this institution. In addition to routine patrols, these institutions usually work based on reports they

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<sup>34</sup> Armia, "Public Caning: Should It Be Maintained Or Eliminated? (A Reflection of Implementation Sharia Law In Indonesia)."

<sup>35</sup> Reza Idria, "Tales of The Unexpected : Contesting Syari'ah Law in Aceh, Indonesia" (Harvard, 2020).

<sup>36</sup> Reza Indria, "Provisional Notes on How 'Hilarious' Living Under Sharia Law (The Case of Aceh)," *Kawula: Journal of Local Culture* 5, no. 2 (2018).

<sup>37</sup> Khairul Hasni, "Sharia Police: Gender Discrimination and Elite Politics in Aceh," *Al\_Hayat: Journal of Islamic Education* 4, no. 1 (2020): 7728.

receive regarding various types of sharia violations that occur<sup>38</sup>. In addition, the incorporation of Wilayatul Hisbah into the Civil Service Police also has an impact on decreasing the effectiveness of the work of this institution in the enforcement of Islamic law. Considering that Wilayatul Hisbah and the Civil Service Police have different duties and functions<sup>39</sup>.

The second institution is the Prosecutor's Office. In addition to having the authority to enforce national law, the Aceh Prosecutor's Office is also given additional authority to enforce the law in Aceh's *Qanun*. This additional authority gives strength and weakness to the Prosecutor's Office in Aceh<sup>40</sup>. With this additional authority, the Prosecutor's Office in Aceh is the only public prosecutor's office in Indonesia with the authority to handle cases of violations of the Shari'a<sup>41</sup>.

In addition, the prosecutor's biggest challenge in enforcing sharia law in Aceh lies in the source of funding.<sup>42</sup> As a vertical institution, the Aceh Prosecutor's Office obtains direct budget sources from the central government related to the prosecution and execution of criminal acts regulated in the Criminal Code. As for sharia cases, all financing is charged to the Aceh Expenditure Budget (*APBA*). This is because the enforcement of Islamic law is seen as part of the implementation of regional autonomy. If the Aceh government does

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<sup>38</sup> Benjamin Otto and Jan Michiel Otto, "Shari'a Police in Banda Aceh: Enforcement of Islam-Based Regulations and People's Perceptions," in *Islam and The Limits of the State Reconfigurations of Practice, Community and Authority in Contemporary Aceh* (Leiden: Brill, 2016).

<sup>39</sup> Ahmad Fuad Fanani, "The Implementation of Sharia Bylaws and Its Negative Social Outcome For Indonesian Women," *Indonesian Journal of Islam and Muslim Societies* 7, no. 2 (2017): 153-74, <https://doi.org/10.18326/ijims.v7i2.153-174>.

<sup>40</sup> Armia, "Public Caning: Should It Be Maintained Or Eliminated? (A Reflection of Implementation Sharia Law In Indonesia)."

<sup>41</sup> A G Berutu, "Peran Polri, Kejaksaan Dan Mahkamah Adat Aceh Dalam Penegakan Syariat Islam Di Aceh," *Ahkam: Jurnal Hukum Islam* 7, no. 2 (2019), <https://doi.org/10.21274/ahkam.2019.7.2.CITATIONS>.

<sup>42</sup> Febriandi, Ansor, and Nursiti, "Seeking Justice Through Qanun Jinayat: The Narratives of Female Victims of Sexual Violence in Aceh, Indonesia."

not have enough budget or does not budget for the prosecutor's office at all, it will be difficult for the prosecutor's office to carry out its duties and functions in the implementation of sharia law in Aceh.

This situation becomes a barrier in the execution of the whip. Often the prosecutor's office delays the execution of the caning to the following year or replaces it with a sentence of imprisonment due to running out of the budget that year. Even in several districts/cities such as Southeast Aceh and Gayo Lues Districts, the prosecuting attorney compromised with the Judges of the Sharia Court not to impose caning sentences on the defendants. Because of the judge has decided the defendant to be sentenced to lashes, but the prosecutor's office does not carry out the caning, it becomes a new legal issue in the enforcement of sharia law in Indonesia's westernmost province<sup>43</sup>.

The third institution is the Islamic Shari'a Service. This institution has the most strategic role compared to other institutions in the implementation of sharia law in the region. The main task and function of this institution are to draft the rules that will be legislated, to make revisions, and ensure the enforcement of these rules<sup>44</sup>. More than that, the Islamic Shari'a Service is also given the responsibility to ensure that all government agencies run the wheels of government following Islamic values<sup>45</sup>. This authority has become the biggest obstacle for the Islamic Sharia Service in carrying out its duties and functions. It is impossible to impose the entire responsibility for implementing such a broad Islamic law on one government agency's shoulders.

The fourth is the institution of the Sharia Court. This institution has a significant role in the implementation of sharia law in the province. Outside of Aceh, this institution is called the Religious

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<sup>43</sup> Serambi Indonesia Newspaper, "Serambi Indonesia," April 13, 2013.

<sup>44</sup> Ade Irma, Mohd Hatta, and Syukur Kholil, "Communication Management of Islamic Sharia Agency in Applying Women's Islamic Fashion in Banda Aceh," in *Budapest International Research and Critics Institute (BIRCI-Journal): Humanities and Social Sciences*, ed. Norshahril Saat and Ahmad Najib Burhani, vol. 3 (Singapore: ISEAS Publishing, 2020), 576-87, <https://doi.org/10.33258/birci.v3i1.808>.

<sup>45</sup> R. Michael Feener, *Shari'a and Social Engineering: The Implementation of Islamic Law in Contemporary Aceh, Indonesia*, ed. Anver M. Emon, I (Oxford, United Kingdom: Oxford University Press, 2013).

Court. Similar to the prosecutor's office, the Syariah Court exercises additional powers to try *jinayat* cases as regulated in Aceh *Qanun* that The Religious Courts in other provinces do not have the authority<sup>46</sup>. Just like the prosecutor's office, the issue of funding is also the main problem of the Sharia Court in the enforcement of Islamic law. In addition, often violations of the sharia are resolved through the customary court, not through the Sharia Court, which also poses a challenge for the Sharia Court in the enforcement of Islamic law.

In addition to the four institutions above, the *Jinayat* even *Qanun* also mandates the Aceh Prosecutor's Office as the executor of the caning to coordinate with the Health Office to check the health condition of the convicted person. Thus, the Health Service becomes the fifth institution whose duties and functions are related to the execution of caning. However, because it is not the main institution, the role of the Health Service in enforcing the caning punishment is not very significant. After the issuance of the Governor Regulation for the Implementation of Canning Sentence, the Provincial Office of the Justice and Human Rights Ministry become the sixth institution related to the enforcement of corporal sentences. Considering Aceh's Governor Regulation ordered that the execution of the caning can be carried out at the Correctional Institution, Detention Center, or Detention Center Branch.

Practically, the existence of various institutions in dealing with the execution process leads to a lack of good coordination among one another. It has, among others, resulted in a various decision for determining the location of caning in all districts/cities in Aceh. In Nagan Raya and Subulussulam, for example, canings have been carried out in prisons. This is because the two regencies/cities have prisons that meet eligibility standards to be used as places for caning executions. For violations of the shari'a that occurred in Nagan Raya, the execution of the whip was carried out in Class II prisons. While in Meulaboh, Subulussalam, and Singkil District, execution of caning sentence takes place in prison.

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<sup>46</sup> Sufiarina, "The Position and Competence of The Shariah Court of Nanggroe Aceh Darussalam in Indonesia Justice System," *Indonesia Law Review* 5, no. 2 (2015): 165-86.

Conversely, in Southwest Aceh, the caning was carried out in the courtyard of the Class III Blang Pidie Prison, not inside it. The same thing happens in the East Aceh in which the caning execution was carried out in the courtyard of the local Islamic Shari'a Office and in Bener Meriah and Bireuen District which choose the courtyard of the local Prosecutor's Office. In Takengon, meanwhile, the caning process is executed in front of the Arts Building. Meanwhile, Banda Aceh, Aceh Besar, and Lhokseumawe choose the courtyard of the mosques as the spot.

The spots for caning punishment which varies greatly show that the coordination among related government agencies is not simultaneous yet. Therefore, to overcome this problem, the Aceh Government should have included an article in the Governor's Regulation on the Implementation of Shari'a Law which regulates the coordination among these institutions, according to determining the location of the caning. Doing so, it will create a good understanding so that the expected coordination can be realized.

In addition to coordination problems that are still partial-casuistic in nature, this study also found infrastructure problems as one of the causes beyond disparity in the rules and implementation of the caning law in Aceh. Among 23 regencies/cities in Aceh, it turns out that not all prisons meet the requirements for caning executions. According to Aceh's Provincial Office of Justice and Human Rights Ministry, only seven prisons meet the criteria and requirements to be used as places for caning executions.<sup>47</sup> They are Class II.A Penitentiary in Banda Aceh, Class II.A Penitentiary Meulaboh, Class III Penitentiary Blang Pidie, Langsa Narcotics Class III Penitentiary, Class III Women's Correctional Institution Sigli, Bener Meriah State Prison, and Aceh Singkil State Detention Center

This condition makes it difficult to implement the provisions for the implementation of caning in prisons/prisons/detention houses because detainees must be transferred from districts/cities to other districts/cities. As a result, a lot of time, funds and personnel

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<sup>47</sup> Faisal A Rani, "Islam and National Law: A Formal Legal Review on Sharia Laws in Aceh," *Al-Risalah: Forum Kajian Hukum Dan Sosial Kemasyarakatan* 20, no. 1 (2020): 47-57, <https://doi.org/10.30631/al-risalah.v20i1.521>.

will be involved in the relocation. For example, it took more than ten hours to transfer a prisoner in Simeulue Regency to Meulaboh. This is not comparable to the whipping process which only takes less than 30 (thirty) minutes.

The same condition also occurred in the Nagan Raya Regency area, where the prison did not meet the requirements and criteria for being used as a place for whipping. Therefore, the Nagan Raya State Prosecutor's Office on August 12, 2018, when he was about to execute the whip, had to move the execution to the nearest prison that met the requirements and criteria of the Provincial Office of Justice and Human Rights Ministry in Aceh, namely Class II Prison Meulaboh, West Aceh.

In some cases, the disparity in the rules and implementation of caning occurs due to a lack of socialization between the government and the community at the district/city level. Lack of socialization causes non-uniform understanding between policymakers in each district/city. It is not surprising that until 2021 there are still regional heads (regents) who still insist on refusing to carry out canings in prisons. Even though the prison infrastructure in the area has met the requirements and criteria given by the Provincial Office of Justice and Human Rights Ministry in Aceh. As the refusal made by the Deputy Regent of Aceh Besar. In his view, the execution of caning in prisons is not following the spirit of Islamic law.

### **Conclusion**

The shift in the "open space" norms is supported by political and sociological reasons. As it is known, the implementation of caning in the open increases the sentiment of Islamophobia which has an impact on the investment climate and economic growth in Aceh. Sociologically, the implementation of caning in the open space worsens the image of Islamic law in Aceh. Although the shift in "open space" norm is possible for juridical, political, and sociological reasons cannot be accepted. However, in its application, there is a disparity between rules and practices. The disparity is caused by three factors, namely Partial-casuistic coordination, inadequate prison infrastructure, and inadequate socialization. The lack of understanding and perception of leaders in 23 districts/cities shows that the socialization carried out so far has not been maximized. This

has resulted in some regencies/cities carrying out canings in prisons as regulated in the Governor's Regulation on the Implementation of the *Jinayat* Procedural Law. However, there are still many regencies/cities that carry out caning in the open as regulated in the *Qanun* on the *Jinayat* Procedural Law. Some other regencies/cities took a compromising stance by carrying out canings in the prison yard, the prosecutor's office, or the local Islamic law office.

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## The Digitalized Zakat Management System in Malaysia and the Way Forward

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### **Abstract:**

The development of technology and innovation has a significant influence on the current financial markets. Introducing new business models and transferring from traditional markets to the digital markets through those technologies are some ways of digital transformation. Zakat system has been a great part of Islamic economics and the financial system which has to embrace digitalization to be compatible with the current digital era. This research aims to address the current status of digitalization about the zakat

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management system in Malaysia and to explore the necessary improvement in embracing the digitalization by the zakat institutions. The research adopts a qualitative research approach where it collects the data from various sources such as books, journals, conference papers, and other relevant websites. To analyze the data, the research employs a descriptive and exploratory research technique. This study finds that despite having websites by the zakat institutions in Malaysia, the zakat system has a lack of data set of *aṣnāf* and proper data for the collected and distributed funds. Digital transformation is needed to observe the check and balance of the zakat funds' collection and distribution. In addition, human development through zakat funds needs to embrace more development through digitalization. Moreover, the zakat institutions are encouraged to advance their readiness and understanding of technologies and innovation to embrace digital assets and their zakat-ability.

**Keywords:**

Zakat; Digitalization; Management; *Aṣnāf*;  
Financial Technologies

**Abstrak:**

Perkembangan teknologi dan inovasi memiliki pengaruh yang signifikan terhadap pasar keuangan saat ini. Memperkenalkan model bisnis baru dan berpindah dari pasar tradisional ke pasar digital melalui teknologi tersebut adalah beberapa pendekatan transformasi digital. Sistem zakat yang merupakan instrumen penting dalam perekonomian dan sistem keuangan Islam dipandang perlu menerima digitalisasi agar dapat bergerak sejalan dengan perkembangan era digital. Penelitian ini bertujuan untuk menjelaskan posisi digitalisasi saat ini dalam sistem pengelolaan zakat di Malaysia dan untuk mengeksplorasi perbaikan yang perlu dilakukan dalam rangka penerapan digitalisasi oleh lembaga zakat. Penelitian ini menggunakan pendekatan kualitatif dimana data dari berbagai sumber seperti buku, jurnal, makalah konferensi dan website lain yang relevan dikumpulkan. Sedangkan analisis data dilakukan secara deskriptif dan eksploratif. Penelitian ini menemukan bahwa meskipun lembaga zakat di Malaysia memiliki website, sistem pengelolaan zakat masih memiliki

kekurangan seperti pencatatan *aṣnāf* dan pencatatan dana zakat yang terkumpul dan disalurkan yang masih perlu ditingkatkan. Transformasi digital diperlukan sebagai media check and balance dalam penghimpunan dan penyaluran dana zakat. Selain itu, pembangunan manusia melalui dana zakat dapat dikembangkan dan diperbaharui melalui digitalisasi ini. Selain itu, lembaga zakat didorong untuk meningkatkan kesiapan dan pemahaman teknologi dan inovasi untuk mengeksplorasi aset digital dan kemampuan zakatnya.

**Kata Kunci:**

Zakat; Pendigitalan; Pengelolaan; *Aṣnāf*;  
Teknologi Keuangan

**Introduction**

The growth of technology and innovation is inevitable as evidenced by the world embracing the advantages of technology and innovation at various levels and purposes. Artificial intelligence, big data, data analytics, cloud computing, and so on are some drivers of digital transformation. Financial technologies (fintech) also play a great role in promoting financial facilities and providing ease of access to financial matters. Fintech does not only assist the banking, *takaful* (sharia assurance), and capital markets but also expands the Islamic social finance such as *zakat* (compulsory alm), *ṣadaqah* (not a compulsory charity), and *waqf* (endowment) to a better level.

The conversion of analog signals into a digital form is considered digitalization. It is also a phenomenon of socio-technology and the embracement of digital technologies by an individual or a company.<sup>1</sup> In another word, digital transformation is the way of evolving businesses and societies through modern technology.<sup>2</sup>

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<sup>1</sup> Nils Urbach and Maximilian Röglinger, "Introduction to Digitalization Cases: How Organizations Rethink Their Business for the Digital Age," in *Digitalization Cases*, ed. Nils Urbach and Maximilian Röglinger (Cham, Switzerland: Springer, 2019).

<sup>2</sup> Abdulazeez Abdulquadri et al., "Digital Transformation in Financial Services Provision: A Nigerian Perspective to the Adoption of Chatbot," *Journal of Enterprising Communities: People and Places in the Global Economy* 15, no. 2 (2021): 259.

Digital transformation is unavoidable since it improves the business and companies' processes and lets the business evolve and remain competitive with the current digital era and the markets.<sup>3</sup> Moreover, the digital transformation improves the productivity of a business by cutting the cost of labor and making it attractive to the *tech-savvy* customers by providing the business at their convenience. At the same time, the business will not be left behind in the competition while other businesses are embracing digital transformation.<sup>4</sup>

Since fintech and innovations have rapidly grown and social finance has to be compatible with such growth, the zakat system must also fit into this trend. The collection and distribution of zakat through fintech will likely assist to fulfill the objectives of zakat more broadly. Similarly, the management of zakat will find a better way to embrace the changes and provide better alternatives in the digital era. In this regard, Fahmi Ali Hudaefi<sup>5</sup> notices that embracing the digitalization of zakat through fintech is growing significantly and has a bigger potential. Furthermore, many studies<sup>6</sup> claim that the efficient management of zakat can lead to its success in eliminating poverty and establishing socio-economics justice while fulfilling the objectives of shari'ah in circulating the wealth among people.

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<sup>3</sup> Ibid.

<sup>4</sup> Inese Mavlutova and Tatjana Volkova, "Digital Transformation of Financial Sector and Challenges for Competencies Development," in *the 7th International Conference on Modeling, Development and Strategic Management of Economic System (MDSMES 2019)*, Ivano-Frankivsk, Ukraine, 2019.

<sup>5</sup> Fahmi Ali Hudaefi, "How Does Islamic Fintech Promote the Sdgs? Qualitative Evidence from Indonesia," *Qualitative Research in Financial Markets* 12, no. 4 (2020): 364.

<sup>6</sup> Mohd Shahril Ahmad Razimi, Abd Rahim Romle, and Muhammad Farid Muhamad Erdris, "Zakat Management in Malaysia: A Review," *American-Eurasian Journal of Scientific Research* 11, no. 6 (2016): 453-457.; Muharman Lubis, Arif Ridho Lubis, and Ahmad Almaarif, "Comparison of the Approach in the Zakat Management System," in *the Journal of Physics: Conference Series*, 2019.; Muhammad Faris Zulkifli et al., "Combating Poverty in Malaysia: The Role of Zakat," *The Journal of Asian Finance, Economics and Business* 8, no. 5 (2021): 505-513.

In the context of Malaysia, Ebtehal Atta Elsayed and Yuserrie Zainuddin<sup>7</sup> find that Malaysian zakat institutions need to improve their Zakat Information System Technology (ZIST) which will consequently increase the zakat performance. Moreover, the adoption of technology and innovation is necessary for the zakat institutions in Malaysia to be effective in distributing zakat to *aṣnāf* (eligible recipients of zakat), managing the funds, and garnering the confidence of the public. This will in turn significantly change the concept of zakat among the public.<sup>8</sup>

Practically, Malaysia manages zakat under the state law in which the State Islamic Religious Council (SIRC) is the responsible authority to control the management of zakat throughout the country.<sup>9</sup> However, to provide better services and facilities through zakat, some states privatize the management of zakat bypassing the authority to a certain individual company/institution to perform the duties of collecting and distributing the zakat.<sup>10</sup> They are responsible

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<sup>7</sup> Ebtehal Atta Elsayed and Yuserrie Zainuddin, "Zakat Information Technology System Design, Zakat Culture, and Zakat Performance – Conceptual Model," *International Journal of Advanced Science and Technology* 29, no. 9s (2020): 1824.

<sup>8</sup> Marhanum Che Mohd Salleh and Muhamad Abdul Matin Chowdhury, "Technology Adoption among Zakat Institutions in Malaysia," in *the 4th International Conference of Zakat (ICONZ)*, Surabaya, Indonesia, 2020.

<sup>9</sup> Norazlina Abd. Wahab and Abdul Rahim Abdul Rahman, "A Framework to Analyse the Efficiency and Governance of Zakat Institutions," *Journal of Islamic Accounting and Business Research* 2, no. 1 (2011): 47.; Azman Ab Rahman, Mohammad Haji Alias, and Syed Mohd Najib Syed Omar, "Zakat Institution in Malaysia: Problems and Issues," *Global Journal of Al Thaqafah* 2, no. 1 (2012): 35.

<sup>10</sup> Muharman Lubis et al., "Enhancement of Zakat Distribution Management System: Case Study in Malaysia," in *International Management Conference 2011* (Terengganu, Malaysia 2011).; Rahman, Alias, and Omar, "Zakat Institution in Malaysia: Problems and Issues," 38.; Norazlina Abd. Wahab and Abdul Rahim Abdul Rahman, "Efficiency of Zakat Institutions and Its Determinants," in *Access to Finance and Human Development – Essays on Zakah, Awaqaf and Microfinance*, ed. Hatem A. El-Karanshawy, et al. (Doha, Qatar: Bloomsbury Qatar Foundation, 2015), 34.; Muhamad Hasif Yahaya and Khaliq Ahmad, "Factors Affecting the Acceptance of Financial

to collect the zakat from eligible Muslims who fulfill the requirements of obligation to pay zakat through several available means. They range from physical booths in mosques, online payments from bank accounts, and deduction from salaries, to the likes. In addition, zakat institutions also take the responsibility of identifying *aṣnāf* and distributing zakat based on their needs. The institutions also support *aṣnāf* in educating, training, and developing their skills and experiences for sustainability purposes. Therefore, it makes sense for Abdalrahman Migdad<sup>11</sup> to consider that Malaysia is among the Muslim countries to establish such proper management of zakat which is regarded as the pioneer in this matter.

Despite having such an exemplary zakat management system, there are some pitfalls that some studies have highlighted for further consideration by the zakat management for their betterment. According to Hairunnizam Wahid et al.<sup>12</sup> Abdullah Al-Mamun, and Ahasanul Haque,<sup>13</sup> the management of zakat in Malaysia requires improvement in the efficiency and transparency since many zakat payers find a lack in both factors among zakat institutions. The study of Ram Al Jaffri Saad et al.,<sup>14</sup> meanwhile, shows that many of their

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Technology among Asnaf for the Distribution of Zakat in Selangor-a Study Using Utaut," *Journal of Islamic Finance* 8, no. S.I. (2019): 036.

<sup>11</sup> Abdalrahman Migdad, "Managing Zakat through Institutions: Case of Malaysia," *International Journal of Islamic Economics and Finance Studies* 5, no. 3 (2019): 29.

<sup>12</sup> Hairunnizam Wahid, Radiah Abdul Kader, and Sanep Ahmad, "Localization of Zakat Distribution, Religiosity, Quality of Life and Attitude Change (Perceptions of Zakat Recipients in Malaysia)," in *the 13th Malaysia Indonesia Conference on Economics, Management and Accounting (MIICEMA)*, Palembang, Indonesia, 2012.

<sup>13</sup> Abdullah Al-Mamun and Ahasanul Haque, "Perception of Muslim Consumers Towards Tax Deduction through Zakat in Malaysia: An Empirical Investigation on Muslims in Malaysia," in *the First International Conference on Shari'ah Oriented Public Policy in Islamic Economic System (ICOSOPP 2015)*, Banda Aceh, Indonesia, 2015.

<sup>14</sup> Ram Al Jaffri Saad, Muhammad Syahir Abdul Wahab, and Md Hairi Md Hussain, "Perceived Service Quality of Zakat Institution among Muslim Businessmen in Malaysia," in *the 3rd International Conference on Applied Science and Technology (ICAST'18)*, Penang, Malaysia, 2018.

respondents find competence, responsibility, access, and communication are not at a satisfactory level for zakat management.

Several relevant studies<sup>15</sup> also find that the distribution of zakat to eligible *aṣṇāf* takes almost one to two weeks from the time of application until the distribution. This indicates that the bureaucracy is quite slow in distributing the zakat. Regarding the report on the collection and distribution of zakat, Shamharir Abidin et al.<sup>16</sup> and Roshaliza Taha et al.<sup>17</sup> find that there is a lack of transparency in providing the details of the collection of zakat and distribution from the zakat institutions. Additionally, some institutions do not disclose the surplus amount of zakat which results in reducing the trust level among the zakat payers towards the zakat institutions.

The current zakat management system in Malaysia is still developing and requires further improvement in many aspects.<sup>18</sup> For instance, the Malaysian zakat institutions have websites that provide basic information and show the recent activities of the contribution.<sup>19</sup> Additionally, the websites give zakat payers access to information and options for zakat payment, such as a zakat institution where they can apply for zakat funds and details on the fund's eligibility requirements. Therefore, the objectives of this study are to answer the questions: (1) where does the zakat management system in Malaysia

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<sup>15</sup> Raja Adzrin Raja Ahmad, Ahmad Marzuki Amiruddin Othman, and Muhammad Sufiyudin Salleh, "Assessing the Satisfaction Level of Zakat Recipients Towards Zakat Management," *Procedia Economics and Finance* 31 (2015): 146.; Razimi, Romle, and Erdris, "Zakat Management in Malaysia: A Review," 456. ; Roshaliza Taha et al., "Zakat Distribution in the East Coast: Recipients' View," *Pertanika Journal Of Social Science And Humanities* 25, no. S (2017): 263.

<sup>16</sup> Shamharir Abidin, Ram Al Jaffri Saad, and Nikmal Muzal Mohd Muhaiyuddin, "Evaluating Corporate Reporting on the Internet: The Case of Zakat Institutions in Malaysia," *Jurnal Pengurusan* 42 (2014): 20.

<sup>17</sup> Roshaliza Taha et al., "Zakat Fund in Malaysia: Where Does It All Go?" *Management & Accounting Review (MAR)* 16, no. 1 (2017): 141.

<sup>18</sup> M. Ashraf Al Haq and Norazlina Binti Abd. Wahab, "Effective Zakat Distribution: Highlighting Few Issues and Gaps in Kedah, Malaysia," *Al-Iqtishad: Journal of Islamic Economics* 9, no. 2 (2017): 259-288.

<sup>19</sup> Salleh and Chowdhury, "Technology Adoption among Zakat Institutions in Malaysia."

stand in embracing digitalization? and (2) what are the possible improvements that the zakat management system in Malaysia is required to do through digitalization? The novelty of this research relies on the issues and solutions discussed herein intensely regarding the digitalized zakat management system which has not been much done previously.

### Method

The study employs a qualitative research approach to have an in-depth understanding of the current zakat management system in Malaysia while looking for the inevitability of the development of innovation and technologies for zakat management. The qualitative research approach is useful in research because it examines a subject matter with careful consideration of numerous factors and interprets it with a broader perspective and clearer understanding.<sup>20</sup> This approach suits the current study since its objectives are to review the current progress of zakat management in Malaysia and to explore the necessity of adopting more technology-based services to manage the zakat system in Malaysia.

The research studies available literature through books, articles, conference papers, websites of zakat institutions, and other relevant online resources. Additionally, to fulfill the objectives of this research, the researchers engage in descriptive and exploratory approaches. A descriptive approach helps a researcher to discuss a service, situation, problem, or phenomena systematically and to provide an accurate representation of the subject matter.<sup>21</sup> This research uses the descriptive method by providing an overview of the current status of the zakat management system in Malaysia. The exploratory approach, meanwhile, is used to have a better understanding of a problem that has not been well defined. In such a situation, a researcher starts the study with general ideas which leads

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<sup>20</sup> Patrik Aspers and Ugo Corte, "What Is Qualitative in Qualitative Research," *Qualitative sociology* 42, no. 2 (2019): 142.

<sup>21</sup> Nicholas Walliman, *Research Methods: The Basics* (New York: Routledge, 2011), 10.; Mark Saunders, Philip Lewis, and Adrian Thornhill, *Research Methods for Business Students*, 7<sup>th</sup> ed. (Harlow: Pearson Education Limited, 2016), 175.

to identifying some issues that future studies need to carry out.<sup>22</sup> This study attempts to find out general ideas of the zakat management system in Malaysia while exploring the current issues and finding out new insights as well as the potential development of zakat management through digitalization.

## Discussion and Result

### Some Issues to Consider by Zakat Institutions for Digitalization

Zakat management in Malaysia encounters some challenges in fulfilling the responsibility of collection and distribution in terms of efficiency, transparency, and digitalization. Therefore, this study highlights some following issues that zakat management should consider to improve and develop to cater to the needs of digitalization while realizing the objectives of zakat in this modern era using modern tools.

#### a. Unavailability of Data of *Aṣnāf*

The digital transformation of *aṣnāf* data is promising for the betterment of zakat management all around the world including Malaysia. The data of *aṣnāf* can track the current situation of the recipients, their current needs, and whether zakat has any advantages in their socioeconomic life. The data might also help to track the effectiveness and the development of the zakat distribution.<sup>23</sup> Similarly, it will help zakat institutions to provide the data for zakat payers to educate, encourage and remind them of their annual payments.

However, it has been noticed that an organized data set of *aṣnāf* is missing except for some basic information like name and address that were recorded by institutions' personnel for their references. Proper and detailed data is yet to be set by the zakat

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<sup>22</sup> *The Sage Encyclopedia of Qualitative Research Methods*, ed. Lisa M. Given (Sage publications, 2008), 325-326.; Earl Babbie, *The Basics of Social Research*, 4<sup>th</sup> ed. (California: Thomson Wadsworth, 2008), 98.

<sup>23</sup> Rahman, Alias, and Omar, "Zakat Institution in Malaysia: Problems and Issues," 35.; Taha et al., "Zakat Fund in Malaysia: Where Does It All Go?" 141.

authorities. This research thus urges the zakat authorities to consider arranging such facilities and make it possible for their personnel to compile the data of the *aṣṇāf*. Without having such a data set, many of those needy will be left out and will not get the zakat that they deserve for.<sup>24</sup>

To collect the data of *aṣṇāf*, the zakat institutions might consider several steps such as allowing *aṣṇāf* to register themselves through mobile phone applications or the website of zakat institutions. However, since many *aṣṇāf* might not be able to reach those facilities to register, the zakat institutions might appoint some staff to open booths nearby residential areas where *aṣṇāf* can come and get themselves registered with the staff. The data of *aṣṇāf* can include their name, address, contact number, kin, current financial status, and skills that can be enhanced through the zakat fund. All those information should be kept under the supervision of zakat institutions on their respective websites. Meanwhile, some necessary information should be available for other zakat institutions to cooperate in the collection and distribution of zakat. The zakat institutions must also uphold the privacy and confidentiality of *aṣṇāf* information.<sup>25</sup> They should first get consent from *aṣṇāf* to use their data for research and development of zakat management and other purposes. Moreover, the zakat institutions could use the data to track the progress of *aṣṇāf* receiving the zakat fund and to improve the effectiveness of zakat distribution.

Additionally, the compiled data might also help the zakat institutions to compare and contrast the area/state of *aṣṇāf* and the need for distribution of zakat for that area/state. This is particularly because the current practice does not channel the surplus zakat amount from one state to another. Therefore, the data could provide the necessary information to the authority for transferring the zakat fund to other states with the higher number of *aṣṇāf* who are in dire

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<sup>24</sup> Lubis et al., "Enhancement of Zakat Distribution Management System: Case Study in Malaysia."; Yahaya and Ahmad, "Factors Affecting the Acceptance of Financial Technology among Asnaf for the Distribution of Zakat in Selangor-a Study Using Utaut," 035-046.

<sup>25</sup> Ahmad, Othman, and Salleh, "Assessing the Satisfaction Level of Zakat Recipients Towards Zakat Management," 140-151.

need of financial aid instead of bringing forward the surplus to next year.<sup>26</sup>

**b. Inadequate Zakat Funds for Human Development**

Zakat aims to assist the needy and other categories of *aṣnāf* to develop and balance the socio-economic status of the community. It helps the needy to fulfill his/her necessities and to be an essential part of society. It is therefore important to highlight that human development through zakat has immense potential.<sup>27</sup> The efficient distribution of zakat by the learned organization can confirm that zakat is utilized by providing *aṣnāf* with some basic skills of entrepreneurship, business, and knowledge.<sup>28</sup> Based on those skills and their previous expertise, *aṣnāf* could find ways to meet the basic needs of their lives and fulfill their socioeconomic responsibilities in the community.

Ik Balyanda Akmal et al.<sup>29</sup> highlight that the zakat distribution can be categorized into two; consumptive and productive. The consumptive zakat can cover foods, health, and clothes. Meanwhile, the productive zakat includes all other types of skills and tasks that help *aṣnāf* to produce something new or help them to utilize zakat for something beneficial in a long run. However, the current practice of zakat institutions or individual zakat donation shows that a bigger portion of zakat goes to the first type while the second receives minimal allocation. It can be one of the reasons that hinder the benefit of zakat realized. Allocating higher amounts and providing more

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<sup>26</sup> Lubis et al., "Enhancement of Zakat Distribution Management System: Case Study in Malaysia."; Anita Md. Shariff et al., "A Robust Zakah System Towards a Progressive Socio-Economic Development in Malaysia," *Middle-East Journal of Scientific Research* 7, no. 4 (2011): 035-046.

<sup>27</sup> Eko Suprayitno, Mohamed Aslam, and Azhar Harun, "Zakat and Sdgs: Impact Zakat on Human Development in the Five States of Malaysia," *International Journal of Zakat* 2, no. 1 (2017): 67.

<sup>28</sup> Tengku Mohd Azizuddin Tuan Mahmood et al., "Issues and Challenges of Zakat Institutions Achieving Maqasid Syariah in Malaysia," *AZKA International Journal of Zakat & Social Finance* 2, no. 1 (2021): 121.

<sup>29</sup> Ik Balyanda Akmal, M Shabri Abd Majid, and Eddy Gunawan, "Does Zakat Matter for Human Development? An Empirical Evidence from Indonesia," *Regional Science Inquiry* 12, no. 2 (2020): 198.

helpful stuff to *aṣnāf*, especially in the productive schemes will hopefully lead them to be zakat payers in the future. This will then fulfill the objectives of shari‘ah for zakat in establishing justice and balance in the socioeconomic nature.

Human development includes educational, economic, and social development. Regarding educational development, the zakat funds can focus on the development of the education sector by providing scholarships or free access to educational materials. The zakat institutions might consider the education of elderly people, orphans, street children, and refugees as a part of *aṣnāf* (as long as they fall under any categories of *aṣnāf*). In such a case, they will be able to learn and find their way to enhance and improve their lives without receiving zakat anymore. Moreover, educational development is necessary since it shapes the brain and way of thinking while helping people to know how to deal with their wealth, earn halal income, and spend it effectively and righteously.<sup>30</sup>

As highlighted earlier, zakat is one of the potential economic support to uphold socio-economic justice. Therefore, it should be utilized for the betterment of people in need. Zakat might also help them to fulfill their daily necessities like food, clothes, and a shelter/house. Additionally, it can provide support to perform their duties as a part of the community such as being an educated person to teach others and being financially able to develop the public infrastructures like mosques, schools, playgrounds, and so on.<sup>31</sup> More

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<sup>30</sup> Wahid, Kader, and Ahmad, "Localization of Zakat Distribution, Religiosity, Quality of Life and Attitude Change (Perceptions of Zakat Recipients in Malaysia)."; Suprayitno, Aslam, and Harun, "Zakat and Sdgs: Impact Zakat on Human Development in the Five States of Malaysia," 63.; Khairul Azhar Meerangani, "The Effectiveness of Zakat in Developing Muslims in Malaysia," *Insaniyat: Journal of Islam and Humanities* 3, no. 2 (2019): 135-136.

<sup>31</sup> Mahyuddin Abu Bakar and Abdullah Abdul Ghani, "Towards Achieving the Quality of Life in the Management of Zakat Distribution to the Rightful Recipients (the Poor and Needy)," *International Journal of Business and Social Science* 2, no. 4 (2011): 237-245.; Wahid, Kader, and Ahmad, "Localization of Zakat Distribution, Religiosity, Quality of Life and Attitude Change (Perceptions of Zakat Recipients in Malaysia)."; Meerangani, "The Effectiveness of Zakat in Developing Muslims in Malaysia," 127-138.

importantly, once *aṣṇāf* can take care of themselves, they might not get involved in any illegal activities such as thievery, unethical earnings, and so on. Moreover, it will give them the confidence to stay viable in the community with their little contribution and services that they might be able to perform. In short word, zakat plays an important role in social development<sup>32</sup>.

The digital transformation is necessary for such development to allocate and provide a sufficient funds to *aṣṇāf* while observing their knowledge, expertise, and skill to improve all these. Due to the high dependency on smart devices like mobile phones, computers, and other devices used in industries, a person must adopt all these devices to better survive in this digital era. In such a case, the zakat institutions might consider giving intensive training to *aṣṇāf* to make them competent to cope with any current era's challenge. More particularly, special crowdfunding can be introduced to the zakat institutions for *aṣṇāf* with basic skills and expertise to be entrepreneurs. The zakat fund, for instance, can establish training centers for the *aṣṇāf* to build new skills so that they could be entrepreneurs. Otherwise, the training can be about services like cleaning, washing, and fixing stuff. *Aṣṇāf* might get a certain zakat amount to open their shops for food or any other things that ease their livelihood with close monitoring so that the money is not wasted or wrongly utilized.

### c. The Inefficiency of Zakat Collection and Distribution

The benefits of zakat mostly depend on how zakat is managed and distributed among *aṣṇāf*. The proper management of zakat will help the country in creating a balanced economy between the rich and the poor. In simpler words, when zakat is collected from the rich and properly distributed to the poor, the poor will have better purchasing

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<sup>32</sup> Abdul Quddus Suhaib, "Contribution of Zakat in the Social Development of Pakistan," *Pakistan Journal of Social Sciences (PJSS)* 29, no. 2 (2009): 316.; Muhammad Abdullah and Abdul Quddus Suhaib, "The Impact of Zakat on Social Life of Muslim Society," *Pakistan Journal of Islamic Research* 8, no. 1 (2011).; Suprayitno, Aslam, and Harun, "Zakat and Sdgs: Impact Zakat on Human Development in the Five States of Malaysia," 67.

power and subsequently contribute to national economic growth.<sup>33</sup> Malaysia has been developing all possible ways to properly manage and utilize the zakat funds. Moreover, the establishment of SIRC as responsible authority to control the matters on zakat has made zakat more viable and beneficial to Malaysian society, especially the poor.<sup>34</sup>

Regarding the collection and distribution of zakat, Saad and Abdullah<sup>35</sup> highlight that there was an irregular amount of collection and distribution of zakat in several states. For example, the total amount of zakat distribution in Selangor for 1994, 1995, and 2005 was higher than the zakat collection of other states in the corresponding years. On the other hand, Pahang and Johor distributed the zakat funds at a lower percentage than 100% which were 43.9-78.6% and 81%, respectively. Meanwhile, the data on the amount of zakat collection and zakat distribution in Malaysia, from 2016 to 2020, can be seen in Table 1, and Table 2, respectively.

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<sup>33</sup> Meerangani, "The Effectiveness of Zakat in Developing Muslims in Malaysia," 131.

<sup>34</sup> Shariff et al., "A Robust Zakah System Towards a Progressive Socio-Economic Development in Malaysia," 551.; Razimi, Romle, and Erdris, "Zakat Management in Malaysia: A Review," 454.

<sup>35</sup> Norma Saad and Naziruddin Abdullah, "Is Zakat Capable of Alleviating Poverty? An Analysis on the Distribution of Zakat Fund in Malaysia," *Journal of Islamic Economics, Banking and Finance* 10, no. 1 (2014): 79-80.

**Table 1.** The Total amount of Zakat Collection by Zakat Institutions in Malaysia

STATE	2020	2019	2018	2017	2016
JOHOR	300,855,626.51	311,727,367.23	285,784,094.35	260,671,607.01	250,436,479.20
KEDAH	217,913,020.82	206,055,559.61	183,556,547.63	170,030,088.00	140,448,128.00
KELANTAN	202,654,987.00	195,138,060.00	183,034,916.35	179,303,841.00	162,678,760.00
MALACCA	100,720,991.88	98,838,098.55	87,815,011.74	85,598,531.92	70,537,675.73
NEGERI SEMBILAN	144,088,231.79	141,521,193.35	131,116,487.35	124,495,635.43	104,760,388.36
PAHANG	165,260,316.30	167,220,290.72	138,696,397.46	133,655,623.03	122,248,982.33
PENANG	130,875,632.57	121,432,704.21	119,734,212.91	101,454,432.72	96,781,464.11
PERAK	191,633,580.59	207,187,053.49	176,246,175.19	170,804,837.16	151,181,069.12
PERLIS	-	-	-	-	-
SELANGOR	912,956,543.00	855,137,860.00	793,679,701.00	757,112,779.00	673,736,282.00
TERENGGANU	185,104,612.29	178,654,905.67	160,718,725.50	137,949,523.03	133,360,064.38
SABAH	101,788,328.22	88,997,519.92	79,661,792.60	88,318,640.61	63,704,056.64
SARAWAK	110,374,938.58	105,963,561.49	-	92,301,440.00	72,082,740.00
FEDERAL TERRITORY	761,851,601.45	688,405,441.00	657,428,211.00	621,414,431.00	589,296,523.84

Source: *Zakat Collection Statistics throughout Malaysia*<sup>36</sup>.  
[https://baitulmal.jawhar.gov.my/zkt\\_statistik\\_stat.php](https://baitulmal.jawhar.gov.my/zkt_statistik_stat.php)

**Table 2.** The Total amount of Zakat Distribution by Zakat Institutions in Malaysia

STATE	2020	2019	2018	2017	2016
JOHOR	299,837,853.40	299,809,512.74	261,310,155.66	293,178,449.62	296,999,713.65
KEDAH	195,698,217.47	192,622,521.12	178,463,803.20	152,039,740.44	162,732,368.00
KELANTAN	185,584,047.39	189,017,291.00	181,936,430.62	185,027,240.00	173,148,849.00
MELAKA	80,269,854.00	96,620,295.08	87,073,849.00	-	75,367,964.80
NEGERI SEMBILAN	114,237,224.28	123,406,206.16	127,748,585.30	-	102,867,136.92
PAHANG	134,991,563.56	146,767,912.17	141,910,722.23	-	134,066,490.00
PENANG	126,581,574.21	111,384,871.79	101,010,171.69	99,782,721.01	100,962,507.09
PERAK	165,047,590.88	196,836,278.44	171,489,516.00	171,048,075.59	143,832,214.00
PERLIS	-	-	-	-	-
SELANGOR	867,227,310.00	868,263,524.00	829,878,020.00	616,526,812.00	697,494,013.00
TERENGGANU	171,122,295.83	191,240,463.33	163,138,683.29	183,760,534.93	165,894,689.77
SABAH	88,575,346.45	71,621,952.82	68,268,316.44	62,747,937.69	64,957,773.60
SARAWAK	71,597,655.81	68,143,055.82	-	42,059,912.00	48,363,149.00
FEDERAL TERRITORY	526,470,916.70	445,352,346.00	550,231,376.46	502,022,102.00	444,719,832.00

Source: *Zakat Distribution Statistics by State*<sup>37</sup>.  
[https://baitulmal.jawhar.gov.my/zkt\\_agihan\\_stat.php](https://baitulmal.jawhar.gov.my/zkt_agihan_stat.php)

<sup>36</sup> Jabatan Wakaf Zakat dan Haji (JAWHAR), "Statistik Kutipan Zakat Seluruh Malaysia (Zakat Collection Statistics for the Whole of Malaysia)," Portal Pengurusan Maklumat Zakat dan Baitulmal Malaysia, [https://baitulmal.jawhar.gov.my/zkt\\_statistik\\_stat.php](https://baitulmal.jawhar.gov.my/zkt_statistik_stat.php).

Comparing the recent zakat collection, table 1, and the recent zakat distribution, table 2 above, it can be seen that many of the states did not distribute almost 3% to 5% of the collection for that period. For example, Kedah collected MYR 217,913,020.82 in 2020 while it only distributed MYR 195,698,217.47 in the same year. It reveals that more than 5% of the collection has been forwarded and undistributed. This generally shows the irregular and ineffective distribution of zakat funds in Malaysia. Lubis et al.<sup>38</sup> reveal that in certain cases, the distribution does not reach its expected targets. Their study finds that every year, the percentage of the recipients is increasing which shows that zakat was not properly distributed among the recipients. The study also finds that every year, 15% of the zakat fund is left undistributed.

The study of Shah and Hassan<sup>39</sup> shows that the contribution of Zakat Collection Centres (also known as *Pusat Pungutan Zakat*; PPZ) and several banks (Bank Islam Malaysia Berhad, Bank Rakyat, and Maybank) focused on giving more allocation to the *fi sabilillah* (for the cause of Allah) group of *aṣṇāf* which consists of medical aid, scholarship, marriage aid, and hire purchase deposit for a taxicab. However, inconsistency in the total collection and distribution for several years is also reported based on the data of the banks. Ali et al.<sup>40</sup> note that the current zakat distribution in Kelantan focuses on shelter, food, cloth, medical, education, and traveling *fi sabilillah*. However, other necessities such as medical *takaful*, expenses for pregnant women and nursing mothers, advancement of knowledge

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<sup>37</sup> Jabatan Wakaf Zakat dan Haji (JAWHAR), "Statistik Agihan Zakat Mengikut Negeri (Zakat Distribution Statistics by State)," Portal Pengurusan Maklumat Zakat dan Baitulmal Malaysia, [https://baitulmal.jawhar.gov.my/zkt\\_agihan\\_stat.php](https://baitulmal.jawhar.gov.my/zkt_agihan_stat.php).

<sup>38</sup> Lubis et al., "Enhancement of Zakat Distribution Management System: Case Study in Malaysia."

<sup>39</sup> Raja Norhanani Raja Norabidin Shah and Rusni Hassan, "Zakāh Collection and Distribution Framework in Federal Territory of Kuala Lumpur: A Study on Selected Islamic Banking Institutions," *International Journal Of Management and Applied Research* 4, no. 1 (2017): 11.

<sup>40</sup> Mohd Asri Mohd Ali et al., "Factors That Influence the Zakat Collection Funds: A Case in Kuantan," *South East Asia Journal of Contemporary Business, Economics and Law* 13, no. 1 (2017): 30-37.

for the household head, and fulfillment of religious and spiritual activities are also important aspects that can help *aṣnāf* do not have a specific allocation yet.

Many studies have discussed the current efficiency and the performance of the zakat management system. Razimi et al.,<sup>41</sup> for example, highlight that the inefficiency of the zakat management system would be evidenced by the increase in the number of the poor in the country. They assumed that misuse of the zakat fund will tarnish the reputation and image of the zakat management authority. Moreover, the study also notes that the zakat funds were not utilized to build the capacity of *aṣnāf* to be self-sufficient. On the other hand, eligible zakat payers are not properly aware of their zakat obligation which leads to an imbalance between the increase in the number of the poor and the total number of eligible zakat payers. The capacity-building approach may very well turn *aṣnāf* of today into zakat payer of tomorrow.<sup>42</sup> Similarly, Taha et al.<sup>43</sup> highlight that despite Malaysia being one of the excellent countries to manage the zakat funds, the management system of zakat is still inefficient. The study shows that though zakat is supportive in reducing poverty, it is still unable to increase the monthly income of *aṣnāf*.

Despite having many studies criticizing the efficiency of the zakat management system in Malaysia, the study of Jaapar and Kamarulzaman<sup>44</sup> sheds a positive light on the development and improvement of the efficiency level of the zakat management system. The study reports that the zakat collection and distribution in Perak is improving from year to year through the efforts undertaken by Perak SIRC. The year 2017 recorded the highest efficiency level in zakat

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<sup>41</sup> Razimi, Romle, and Erdris, "Zakat Management in Malaysia: A Review," 453-457.

<sup>42</sup> Rahman, Alias, and Omar, "Zakat Institution in Malaysia: Problems and Issues," 35-41.

<sup>43</sup> Taha et al., "Zakat Distribution in the East Coast: Recipients' View," 255-266.

<sup>44</sup> Asmah Mohd Jaapar and Nur Husnina Kamarulzaman, "The Efficiency of Zakat Collection and Zakat Distribution of Islamic Religious Council Perak (Maipk) Malaysia," in *4th International Conference of Zakat (ICONZ)* (Surabaya, Indonesia 2020).

collection, while 2015 recorded the highest efficiency level in zakat distribution.

Regarding the satisfaction of *aṣṇāf*, the zakat management system in Malaysia constantly strives to fulfill their basic and vital needs. Many *aṣṇāf* are happy to receive the zakat fund from the SIRC's although in many cases, the amount of the zakat fund is insufficient.<sup>45</sup> Apart from basic help, there are also some capital assistances drawn from the zakat collection to help *aṣṇāf* establish a business. This is very supportive and effective as evidenced by their business success stories and the fact that they then stopped being *aṣṇāf*.<sup>46</sup>

According to the researchers, zakat management in Malaysia can improve the efficiency level and better performance through the digitalization of the entire process from the collection of zakat from the payers to the distribution of zakat to *aṣṇāf*. In such a case, the payment channel of the zakat should provide more options to the payers so that no one finds any difficulties paying their zakat and he/she can pay zakat at their fingertips.<sup>47</sup> In doing so, it will boost the zakat collection from various levels of zakat payers. Electronic wallet (e-wallet), digital money, online banking, payment terminal, online commercial platforms such as Shopee and Lazada, and other modern ways can be used as payment channels of zakat besides having the physical booth in mosques. Regarding the distribution of zakat, the fund can be channeled to bank accounts of *aṣṇāf* (if available), or a digital card can be produced for *aṣṇāf* which allows them to withdraw money from certain bank's ATM (Automated Teller Machine) or distribution centre. Digital coupons can also be provided to *aṣṇāf* on special occasions like Eid which allows them to purchase necessary items.

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<sup>45</sup> Taha et al., "Zakat Distribution in the East Coast: Recipients' View," 255-266.; Meerangani, "The Effectiveness of Zakat in Developing Muslims in Malaysia," 127-138.; Ahmad, Othman, and Salleh, "Assessing the Satisfaction Level of Zakat Recipients Towards Zakat Management," 140-151.

<sup>46</sup> Raudha Md Ramli et al., "Understanding Asnaf Attitude: Malaysia's Experience in Quest for an Effective Zakat Distribution Programme," in *the International Zakat Conference*, Bogor, Indonesia 2011.

<sup>47</sup> Nur Asiah Yaakub et al., "Application of Online Payment at Pusat Zakat Negeri Sembilan," *Jurnal ILMU* 7, no. 1 (2017): 106.; Salleh and Chowdhury, "Technology Adoption among Zakat Institutions in Malaysia."

**d. Delay in Distributing Zakat to *Aṣṇāf***

Zakat is collected in Malaysia through several channels such as physical booths in mosques, by post, salary deduction, and payment through bank transfer facilities.<sup>48</sup> However, some people like to give the money directly to *aṣṇāf* which gives them more satisfaction in fulfilling a religious obligation.<sup>49</sup> Receiving zakat at a right time or when it is needed by *aṣṇāf* could help them cater to their basic needs and avoid any type of problem arising from delayed access to financial aid. Therefore, it is necessary to hand over zakat to *aṣṇāf* as soon as it is paid by the zakat payers. Some studies found that the main shortcoming in the zakat management system according to *aṣṇāf* is that it is taking quite some time for the application and disbursement of the zakat fund.<sup>50</sup> A certain state like Melaka even takes approximately two to three weeks from application to disbursement of the zakat fund.<sup>51</sup>

Some other studies<sup>52</sup> highlights that there are some states in Malaysia where the zakat amount collected in a year has a balance till the next year. It means that the full amount of zakat is not distributed to *aṣṇāf* in the collection year and an amount of money is taken forward for the next year. The practice of saving the zakat fund can be beneficial in a sense when it can be proved that *aṣṇāf* are fully satisfied

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<sup>48</sup> Yaakub et al., "Application of Online Payment at Pusat Zakat Negeri Sembilan," 104.

<sup>49</sup> Lubis et al., "Enhancement of Zakat Distribution Management System: Case Study in Malaysia."; Hafizah Zainal, Azizi Abu Bakar, and Ram Al Jaffri Saad, "Reputation, Satisfaction of Zakat Distribution, and Service Quality as Determinant of Stakeholder Trust in Zakat Institutions," *International Journal of Economics and Financial Issues* 6, no. S7 (2016): 72.

<sup>50</sup> Ahmad, Othman, and Salleh, "Assessing the Satisfaction Level of Zakat Recipients Towards Zakat Management," 146.; Razimi, Romle, and Erdris, "Zakat Management in Malaysia: A Review," 456.; Taha et al., "Zakat Distribution in the East Coast: Recipients' View," 263.

<sup>51</sup> Ahmad, Othman, and Salleh, "Assessing the Satisfaction Level of Zakat Recipients Towards Zakat Management," 146.

<sup>52</sup> Taha et al., "Zakat Fund in Malaysia: Where Does It All Go?" 137-166.; Taha et al., "Zakat Distribution in the East Coast: Recipients' View," 255-266.

with the zakat distribution and the poverty level has been lifted through the proper distribution. However, the current poverty level or the status of *aṣṇāf* does not show that it has covered all the necessities of the needy people<sup>53</sup> while a portion of zakat has been taken forward to next year's portfolio. In such a case, the digital transformation is needed to evaluate the current practice of keeping forward to the next year by looking at the necessities and interests of *aṣṇāf* and the fund that has been forwarded.

The digital zakat system might indicate a better solution and proper distribution of zakat surplus in various ways: (a) the zakat institutions can calculate the total amount that has been collected from the zakat payers and the estimated amount that *aṣṇāf* might need in a certain state for their daily necessities. Therefore, they can decide whether they can cater to the needs of *aṣṇāf* or bring forward a certain amount to the next year; (b) in the case of the significant amount of surplus from a state, a certain amount can be considered to transfer to another state. This might happen where the collection amount is not enough to cater to the needs of their *aṣṇāf* or any emergencies that occurs by natural disasters where people unusually require more financial assistance. This scheme can be done professionally once the zakat institutions adopt a digital medium to control the collection and distribution measure; (c) the zakat institutions can make registration and other necessary documentation through the digital system that will enable them to pay zakat to *aṣṇāf* upon application. This scheme will reduce the time period time application to the disbursement of zakat; (d) the zakat institutions can distribute zakat through e-wallet and other relevant means to make the process of distribution much faster and convenient to *aṣṇāf* who have access to the platform.

#### e. Digital Awareness and Promotion of Zakat

Since the current era is getting into the digital transformation rapidly, it is of vital need to educate the rich to perform their

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<sup>53</sup> Farah Aida Ahmad Nadzri, Rashidah Abd Rahman, and Normah Omar, "Zakat and Poverty Alleviation: Roles of Zakat Institutions in Malaysia," *International Journal of Arts and Commerce* 1, no. 7 (2012): 61-72.; Mohd Rodzi Embong, Roshaliza Taha, and Mohd Nazli Mohd Nor, "Role of Zakat to Eradicate Poverty in Malaysia," *Jurnal Pengurusan* 39 (2013): 141-150.

obligation toward the poor and to know the necessary information of zakat such as which wealth/property is *zakatable* (things that eligible to be paid as zakat), including how much to pay zakat, when and whom to pay zakat. The awareness and promotion of zakat can be done through social media such as Facebook, Instagram, Twitter, WhatsApp, WeChat, YouTube, TikTok, and so on.

To ease the calculation of zakat and to estimate the amount, the electronic calculator and *robo-advisory* (a type of brokerage account that automates the process of zakat) might help. Artificial intelligence (AI) can also help immensely in providing the basic information about zakat, the wealth that can be *zakatable*, and the method of calculation of the total zakat.<sup>54</sup> AI might show the list of the property that are *zakatable* and once there are new types of assets or business, AI might update the information and suggests whether to include those new types of assets or business in the zakat list. Moreover, it might also suggest unlisted *aṣnāf* categories while their existing profile might be useful to determine which need urgent support based on the necessary level. To sum up, such practice and transparency might help the zakat institutions to have a higher efficiency level in their performance.<sup>55</sup>

The zakat institutions might also consider giving more updates through social media on the collection of zakat throughout the year to provide a transparent report to the public. This might help people to know and be encouraged to add an extra amount for their next payment. Moreover, the zakat payers might be interested to know whether their zakat has been utilized properly or not and whether it has been distributed among the needy or not. In such a case, the social media updates and data provided by the zakat institutions might help to satisfy and impress the zakat payers and motivate them to comply with their zakat payment.

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<sup>54</sup> Anis Shakirah, "The Need to Adopt Technology in Zakat Administration," *Global Sadaqah*, <https://www.globalsadaqah.com/blog/technology-zakat-administration/>.

<sup>55</sup> Taha et al., "Zakat Fund in Malaysia: Where Does It All Go?" 141.; Taha et al., "Zakat Distribution in the East Coast: Recipients' View," 260.

#### f. New Potentials for Zakatable Assets

The current development of technology and innovation results in the initiation of digitalization of business and financial facilities as well as the creation of many digitalized assets and properties. A digital asset is referred to an asset or property that is in electronic form with value such as the logo of a company, software, data, images, audio, videos, designs, electronic documents, entertainment and educational media contents, electronic money, and digital currency. More interestingly, the current digitalization of businesses and financial facilities is shaping the financial market's viewpoint to a new level.<sup>56</sup> Moreover, digital assets such as online content i.e. YouTube videos, and social media accounts are considered to have extensive value in the current socio-economic markets.

In such a case, a Muslim account holder of those digital assets should consider paying zakat once his / her wealth reaches the *niṣāb*. The zakat institutions should explore those digital assets and describe the shari'ah ruling of those assets in terms of paying zakat through digital assets as well as any possible uses of digital assets for *aṣnāf* to access zakat fund. Having some guidelines on digital assets and imposing zakat on them will ease the zakat payers to understand their duty of paying zakat and consequently, it will boost the zakat collection from various financial markets. It is worthy to note here that cryptocurrencies are booming all around the world. Bitcoin, Ethereum, and Litecoin are some of the outputs of cryptocurrency that are the talking point of financial matters around the globe.<sup>57</sup>

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<sup>56</sup> Saul J. Berman, "Digital Transformation: Opportunities to Create New Business Models," *Strategy & Leadership* 40, no. 2 (2012): 16.; Carmen Cuesta et al., "The Digital Transformation of the Banking Industry," BBVA research, <https://www.bbva.com/en/publicaciones/the-digital-transformation-of-the-banking-industry/>.; Kanchan Rauniyar, Komal Rauniyar, and Deependra Kumar Sah, "Role of Fintech and Innovations for Improvising Digital Financial Inclusion," *International Journal of Innovative Science and Research Technology* 6, no. 5 (2021): 1423.

<sup>57</sup> Andrew Meegan et al., "Does Cryptocurrency Pricing Response to Regulatory Intervention Depend on Underlying Blockchain Architecture?" *Journal of International Financial Markets, Institutions and Money* 70 (101280) (2021): 22.; Rong Li et al., "Investor Attention and Cryptocurrency: Evidence

The Shari'ah ruling on cryptocurrency is still a questionable matter among Islamic scholars. Some of them consider it permissible with some strict rules, while others still view cryptocurrency as impermissible<sup>58</sup>. Despite the conflict of scholars regarding its permissibility, since cryptocurrency is one of the digital assets in some countries, it is a vital issue to consider whether it will be a *zakatable* asset or not.

It should also be highlighted that since cryptocurrency is booming everywhere, the consideration of the zakat-ability of cryptocurrency will open a new portfolio of *zakatable* assets in this digital era. Consequently, zakat will be collected accordingly from the cryptocurrency holders/owners based on the ruling of zakat and its standard.<sup>59</sup> Zakat collection and distribution from cryptocurrency should be carried out by the zakat institutions. This thus requires them to advance their level of understanding of the technologies and innovations to effectively perform their role.

### Conclusion

This research finds that to materialize and concretize the benefits of zakat, Malaysia has been taking several actions and steps by providing all facilities and services. The current zakat management of Malaysia is considered one of the pioneers in providing various

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from Wavelet-Based Quantile Granger Causality Analysis," *Research in International Business and Finance* 56 (101389) (2021): 03.

<sup>58</sup> 'Abd Sattār Abū Ghuddah, "Al-Nuqūd Al-Raqmiyyah Al-Ru'yah Al-Shar'iyyah Wa Al-'āthār Al-Iqtisādiyyah," in *Mu'tamar al-Dūḥah al-Rābi' Lil Māl al-Islāmī* (Dūḥah, Qaṭar 2018); 'Alī Muḥyī al-Dīn Al-Qarahdāghī, "Bitkoin Laisa Muḥarraman Bi Dhātih," *Mawqī' faḍīlah al-shayekh 'Alī Muḥyī al-Dīn Al-Qarahdāghī*, <https://alqaradaghi.com/10425/>; Mohd Daud Bakar, "Cryptocurrency: An Holistic and Contemporary Syariah Analysis (Part V)," *Coin.my* <https://coin.my/op-ed/cryptocurrency-an-holistic-and-contemporary-syariah-analysis-part-v/>; Faraz Adam, "The Shariah Factor in Cryptocurrencies and Tokens," *Shariyah Review Bureau* <https://shariyah.com/wp-content/uploads/2019/05/The-Shariah-factors-in-Cryptocurrencies-and-Tokens.pdf>.

<sup>59</sup> Faraz Adam, "Do We Pay Zakat on Cryptocurrencies?" *National Zakat Foundation* <https://nzf.org.uk/knowledge/zakat-on-cryptocurrencies/>.

facilities through zakat funds and at the same time, the zakat payers are also having good facilities to carry out their duty as Muslims. Although it has implemented certain rules in managing zakat and the needs of *aṣnāf*, the researchers found that there is room to enhance and improve the current system by adopting more digitalized systems and facilities. We believe that the digital transformation of the zakat management system will benefit not only *aṣnāf* but also the zakat institutions and zakat payers as well. On a broader level, it has a higher possibility to tackle the poverty issues of the society and help the economic growth. The zakat institutions are therefore required to have a proper data set of *aṣnāf* in the country while providing better access, convenient facilities, and sufficient funds that can assist *aṣnāf* to fulfill their daily needs, develop their lifestyle, and contribute to the society by their skills and expertise in the future. Moreover, the zakat institution should consider the digital assets and the possibilities of imposing zakat on them. In short, having digitalized system for zakat management will enable zakat institutions to distribute zakat properly and efficiently hence the confidence and trust of zakat payers towards the zakat institutions will be strengthened.

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## Judges' Legal Culture in Dealing with High Number of Applications for Child Marriage Dispensation during Covid-19 Pandemic at the Kudus Religious Court

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### **Abstract:**

This study aims to explore the judges' legal culture in the Kudus Religious Courts in dealing with the high number of applications for marriage dispensation during the Covid-19 pandemic. Making a decision on a case becomes problematic for judges because they have to make it on their personal considerations. This research was analyzed qualitatively using a constructivism paradigm with a socio-legal research approach based on primary data by interviewing 2 (two) judges, 3 (three) advocates, and 3 (three) applicants for a marriage dispensation. Moreover, it also employed secondary data, including the marriage law, marriage regulation and its implementation, relevant literature, and academic journals. The research findings are: First, the high number was caused by Kudus people's perception of the minimum legal age of marriage which is based on customary belief, which is maturity in social life, rather than legal regulation which is numerical age. Second, in making a decision about the case, the judges make considerations based on legal facts in the trial court and the values of justice living in the society while paying attention to the Supreme Court rules. Third, the legal culture of judges in

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deciding the application is making dialogue with some fellow judges while advising applicants to revoke their application.

**Keywords:**

Legal Culture; Judge; Marriage Dispensation; Kudus Religious Cour; Covid-19 Pandemic

**Abstrak:**

Penelitian ini bertujuan mengeksplorasi budaya hukum hakim di Pengadilan Agama Kudus dalam menghadapi tingginya permohonan dispensasi nikah di era pandemi Covid-19. Memutus kasus-kasus demikian menjadi problematis karena hakim harus memutuskan apakah permohonan harus dikabulkan atau tidak berdasarkan pertimbangan pribadi masing-masing. Penelitian ini menggunakan paradigma konstruktivisme dengan pendekatan socio legal research yang dianalisis secara kualitatif berdasarkan data primer berupa wawancara terhadap 2 (dua) hakim, 3 (tiga) advokat dan 3 (tiga) orang pemohon dispensasi nikah sementara data sekunder meliputi undang-undang perkawinan dengan peraturan pelaksanaannya, literatur terkait dan jurnal ilmiah. Temuan penelitian ini adalah: Pertama, tingginya angka pengajuan dispensasi nikah di Kudus disebabkan anggapan umum masyarakat Kudus bahwa batas usia untuk menikah adalah berdasarkan kepercayaan tradisional dan bukan menurut peraturan pemerintah. Kadar kedewasaan diukur dari kemampuan dalam kehidupan sosial dan bukan dari angka usia. Kedua, pertimbangan hakim dalam memutus pengajuan dispensasi nikah adalah berdasarkan fakta hukum serta nilai-nilai keadilan yang dipercaya masyarakat dengan berpedoman pada peraturan Mahkamah Agung. Ketiga, budaya hukum hakim dalam menyelesaikan permohonan dispensasi nikah adalah berdialog dengan sesama hakim lain sementara kepada pemohon, mereka biasanya menyarankan pembatalan permohonan.

**Kata Kunci:**

Budaya Hukum; Hakim; Dispensasi Nikah; Pengadilan Agama Kudus; Pandemi Covid-19

## Introduction

The hit of Covid-19 affects several aspects such as health, economic, psychological, and socio-cultural aspects. It has created a new culture in society, starting from the systems of social relations and values to the systems of carrying out economic activities. Therefore, the government has issued several policies to prevent people from being infected with the Covid-19. These policies are in the form of regulations that can manage public behavior. The community in the pandemic era is expected to obey all regulations related to preventing the Covid-19 spread. Theoretically, law must be able to regulate human behavior to follow the rules that have been set because it constructs community behavior.<sup>1</sup>

In the Covid-19 era, community's behavior is strictly regulated, such as implementing physical or social distancing, restricting outdoor activities, and carrying out activities from home or via virtual online platforms. Online activities have, among others, implications for teaching and learning activities in schools which oblige school-age children to take online learning.<sup>2</sup> Ineffective online learning becomes the cause of promiscuity for teenagers.<sup>3</sup> This promiscuity phenomenon can potentially affect children under the minimum legal age of marriage to get pregnant before marriage (married by accident).<sup>4</sup>

Consequently, the submission for marriage dispensation is getting higher due to the legal alteration of the minimum marriage age to 19 years based on Article 7 of the Marriage Law (UUP; *Undang-Undang Perkawinan*) Number 16 the year 2019. This regulation applies

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<sup>1</sup> Harry C. Bredemeier, "Law as Integrative Mechanism, Dalam Vilhelm Aubert, (Ed) *Sociology of Law*," (New York: The Free Press of Glenco, 1962), 37-38.

<sup>2</sup> Ni Nyoman Serma Adi, Dewa Nyoman Oka, and Ni Made Serma Wati, "Dampak Positif Dan Negatif Pembelajaran Jarak Jauh Di Masa Pandemi COVID-19," [Positive and Negative Impacts of Distance Learning During the COVID-19 Pandemic] *Jurnal Imiah Pendidikan Dan Pembelajaran*, 2021, <https://doi.org/10.23887/jipp.v5i1.32803>.

<sup>3</sup> Hendi Kusnandar Asep Deni Adnan Bumaeri, Hisam Ahyani, Ahmad Hapidin, "Fenomena Pernikahan Dibawah Umum Oleh Masyarakat 5.0," *Angewandte Chemie International Edition*, 6(11), 951-952., 2021, 2013-15.

<sup>4</sup> Hendi Kusnandar Asep Deni Adnan Bumaeri, Hisam Ahyani, Ahmad Hapidin, "Fenomena Pernikahan Dibawah Umum Oleh Masyarakat 5.0," *Angewandte Chemie International Edition*, 6(11), 951-952., 2021, 2013-15.

to every citizen in order to provide legal certainty relating to aspects of family law, assets, and marriage consequences.<sup>5</sup> The current regulation is actually appropriate because 19 years old persons are psychologically considered capable of getting married both physically and spiritually. It means that they can independently overcome the problems in their marriage. The regulation is expected to minimize the divorce rate and reduce negative social impacts that might happen because the former Law Number 1 the year 1974 which only set 16 years as the minimum legal age for women and 19 years for men<sup>6</sup> which is prone to lead to child marriage.

It, therefore, invalidates the previous regulation (Law 1 of 1974) which allowed children who are 16 (or under 19 years old for men) to get married without having to apply for a marriage dispensation. With the current enactment of Law Number 16 the year 2019, they are required to apply for a marriage dispensation in a Religious Court. As a result, the number of applications for marriage dispensation in Religious Courts has significantly increased.

This increment can be seen from the statistical data in Tulung Agung Religious Court. From 2019 until February 2020, 308 applicants applied for marriage dispensation, and it rapidly increased to 547 applicants from March 2020 until 2021 after the government officially announced the existence of Covid-19.<sup>7</sup> Meanwhile, in Bondowoso Religious Court, there were 299 applicants for marriage dispensation in 2019, 1.077 applicants in 2020, and 802 applicants in September 2021.<sup>8</sup> It means that there was an increase of 400% in marriage dispensation applications during the pandemic. Data from the Religious Courts of the Supreme Court recorded applications for marriage dispensation as many as 23.100 applicants in 2019 and 64.200 applicants in 2020.<sup>9</sup>

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<sup>5</sup> K. Wajik Saleh, "Hukum Perkawinan Indonesia."

<sup>6</sup> Heryanti, "Implementasi Perubahan Kebijakan Batas Usia Perkawinan."

<sup>7</sup> Mayangkara, "Permohonan Dispensasi Pernikahan Di Pengadilan Agama Tulungagung Meningkatkan 200%," *MayangkaraNews.com*, 2020. (Diakses Pada 28 April 2022)

<sup>8</sup> Helmi Supriyatno, "Pandemi Covid-19, Permohonan Dispensasi Nikah Meningkat Di Kabupaten Bondowoso," *harianbhirawa.co.id*, 2021. (Diakses Pada 28 April 2022)

<sup>9</sup> Dwi Hadya Jayani, "Dispensasi Perkawinan Anak Meningkatkan 3 Kali Lipat Pada 2020," *databoks.katadata.co.id*, 2021. (Diakses Pada 28 April 2022).

Specifically, this study focuses on the cases in the Kudus Religious Court because it statistically shows a significant increase in the number of applications for marriage age dispensation. In 2017 and 2018, before the Covid-19 pandemic, applications for marriage dispensation were still low. However, the significant increment began at around 30% starting in 2019. From 2020 to 2021, it indicated that applications for marriage dispensation have increased by 300%. This seems to be one of the impacts of the official announcement of Covid-19's coming to Indonesia on Monday, March 2, 2020, by the Indonesian government.<sup>10</sup> This significant increase inevitably contributed to the burden on the court in resolving such cases.

The launching of the current regulation, which was followed by the pandemic, made the situation worse. This data is supported by several research results which show a high number of applications for marriage dispensation during the pandemic. For instance, Rini Heriyanti pointed out the increasing application for marriage dispensation over the regulation of the minimum legal age of marriage<sup>11</sup> and the increasing number of child marriages.<sup>12</sup> Accordingly, research conducted by UIN Mataram, which was published on the website of the Religious Courts (*Badilag; Badan Jenderal Badan Peradilan Agama*) of the Supreme Court website also indicated significant increases in marriage dispensation applications in this pandemic era.<sup>13</sup>

Apart from the pandemic factor, regulation of the minimum legal age of marriage has led people to apply for marriage dispensation in the pandemic era. Theoretically, the purpose of changing the minimum age limit for marriage from 16 years to 19 years for women is to prevent child marriage. Indeed, this change has triggered higher application requests for marriage dispensation. This

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<sup>10</sup> Gloria Styvani Putri, "Kilas Balik Setahun Covid-19 Di Indonesia, Pengumuman Hingga Vaksinasi," *Kompas*, 2021. Diakses tanggal 20 januari 2022

<sup>11</sup> Rini Heryanti, "Implementasi Perubahan Kebijakan Batas Usia Perkawinan," [Implementation of Changes in Marriage Age Limit Policy] *Jurnal Ius Constituendum*, 2021, <https://doi.org/10.26623/jic.v6i1.3190>.

<sup>12</sup> Khoirudin, "Perkawinan Di Bawah Umur Di Masa Pandemic," *Signifikansi Humaniora* Vol. 2, no. 3 (2021): 3-5.

<sup>13</sup> Tim IT PA Praya, "Peningkatan Permohonan Dispensasi Nikah Di PA Praya Pasca Perubahan Undang-Undang Perkawinan," <https://badilag.mahkamahagung.go.id/>, 2021.

increment is caused by the currently existing legal regulations that seemed not to consider community life situations, as explained by Brian Z. Tamanaha, who is famous for his "Mirror Thesis" theory. He stated that law is the reflection of a certain community from the ideas, traditions, values, and goals that exist in that society.<sup>14</sup>

Accordingly, an ideal law is said to be able to predict society's development as Von Savigny argued that law emerges from within society. Therefore, the law will always exist as long as the people still exist. It will also develop or disappear along with either existence or extinction of living society. The law becomes powerless if its regulatory nature is contrary to the will and the soul (*volkgeist*) of society<sup>15</sup> like what seemingly happens in the context of the current regulation of the minimum legal age for marriage. In fact, the law is supposed to be responsive to the will of the community<sup>16</sup> to lead them to obey it well, especially in the case of minimum legal age for marriage.

As mentioned earlier, the purpose of age restriction in marriage is to prevent child marriage and minimize any probable risks after marriage. The risks might impact domestic life, health, and psychology because children typically have not possessed emotional maturity yet. The lack of emotional maturity is worried to be prone to divorce in addition to the reproductive organs of women who are not ready to get pregnant.<sup>17</sup> However, this regulation becomes powerless when there are many requests for marriage dispensation which are

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<sup>14</sup> Brian Z. Tamanaha, *A General Jurisprudence of Law and Society, A General Jurisprudence of Law and Society*, 2010, <https://doi.org/10.1093/acprof:oso/9780199244676.001.0001>.

<sup>15</sup> Satjipto Rahardjo, *Hukum Dan Perilaku* (penebit buku Kompas, PT Kompas Media Nusantara, 2009).

<sup>16</sup> Philippe Nonet and Philip Selznick, *Law and Society in Transition: Toward Responsive Law, Law and Society in Transition: Toward Responsive Law*, 2017, <https://doi.org/10.4324/9780203787540>.

<sup>17</sup> Andi Marlah Susyanti and Halim Halim, "Strategi Pencegahan Pernikahan Usia Dini Melalui Penerapan Pusat Informasi Dan Konseling Remaja (Pik-R) Di Smk Negeri 1 Bulukumba," *Jurnal Administrasi Negara* 26, no. 2 (2020): 114-37, <https://doi.org/10.33509/jan.v26i2.1249>.

influenced by customary law, marriage at the parent's decision, and lack of religious literacy.<sup>18</sup>

On the one hand, interestingly, the current regulation aims to prevent child marriage so that people can be more prosperous. On the other hand, customary law traditions make people want their children to get married at an early age even though they have not reached the minimum legal age of marriage based on the Law. Therefore, this study will reveal the cause beyond the high number of application and the judge's legal culture towards the unpredictable high number of applications regarding the current regulation about the minimum legal age for marriage during the Covid-19 pandemic in the Kudus Religious Court.

### Method

This study uses a constructivist paradigm that perceives law as a social reality that subjectively produces judges' mentality. Their decision is considered a symbol<sup>19</sup> which is full of meaning and belief in values. We observed judges' behavior, attitudes, and culture through triangulation techniques using interviews and reading relevant documents in the form of court decisions so that they could comprehend the social context. Ontologically, this study is relativism<sup>20</sup> which involves community behavior. In this case, we examine the reality of living society which is constructed locally and specifically become the cause beyond the high number of application. Epistemologically, it reveals empirical truth from the subjectivity of the research findings. Methodologically, it uses hermeneutics or dialectics method of interpreting judges' behavior as a culture.

This research belongs to the non-doctrinal legal research tradition using a socio-legal approach.<sup>21</sup> The object of the study is the

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<sup>18</sup> Syarifah Rahmatillah and Nurlina, "Pencegahan Perkawinan Di Bawah Umur (Analisis Terhadap Lembaga Pelaksana Instrumen Hukum Di Kec. Blangkejeren Kab. Gayo Lues)," *Samarah*, 2018, <https://doi.org/10.22373/sjhk.v2i2.4748>.

<sup>19</sup> Soetandyo Wignjosubroto, *Hukum Paradigma, Metode, Dan Dinamika Masalahnya* (Elsam, 2002).

<sup>20</sup> Julie White, "Book Review: The SAGE Handbook of Qualitative Research," *Evaluation Journal of Australasia*, 2011, <https://doi.org/10.1177/1035719x1101100208>.

<sup>21</sup> Soetandyo Wignyosubroto, "Hukum Paradigma, Metode Dan Dinamika Masalahnya" (Jakarta: Huma, 2012), 148.

Law interpreted as an associated symbol from human mental construction putting the judge as a decision-maker on social facts related to the marriage dispensation application. Legal reality as a social fact will be reconstructed through qualitative methods.<sup>22</sup>

The data sources employed in this study are primary and secondary. The former was taken directly in the field, including 2 (two) religious court judges, 3 (three) advocates, and 3 (three) parents and children who applied for a marriage dispensation. The latter includes legal regulations, the Marriage Law (UUP) and its implemented regulations, documents, research results, and academic journals related to this study.

## **Discussion and Result**

### **The Common Cause beyond the High number of the Application for Marriage Dispensation at Kudus**

Kudus is a *pesantren*-based (Islamic values tradition) community which, uniquely, is also influenced by firm customs as clear in their people's way of life. The legal culture of Kudus community has emerged as a result of cultural acculturation between Islam and the customs of the local community. For example, in the area of Undaan, Kudus, there is still a local custom known as "*kawin hanging*," which allows the marriage of immature children because according to the customary law, this tradition aims to avoid adultery.

This customary order will likely continue to evolve time by time because its unwritten source is continuously developed and maintained by the community with legal awareness. Also, although it adheres much to the traditional regulations inherited from their ancestors, it will possibly change according to the changing events of life in society. This is mainly because of its existence in the unwritten form.<sup>23</sup>

Therefore, the customary law order, such as the customary marriage system, will continue to develop. Traditionally, customary marriages are not only related to the bride and groom but also to the

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<sup>22</sup> Esmi Warrasih, "Penelitian Sosio Legal Research, Pemutahiran Data Metodologi" (Semarang: UNDIP, 2016), 7.

<sup>23</sup> Ellyne Dwi Poespasari, "Pemahaman Seputar Hukum Waris Adat Di Indonesia" (Jakarta: Prenadamedia Group, 2018), 220.

kinship system of both, namely the bride and groom's family.<sup>24</sup> Moreover, in traditional communities, marriage is an important event not only for living persons but also for those who have passed away. As they have a big concern with the spirits of their ancestors,<sup>25</sup> they usually provide offerings (*sesajen*) to them in the midst of the wedding ceremony. The values of this tradition are broadly believed and continue to be followed from generation to generation.<sup>26</sup>

Similarly, the customary law has also influenced the belief in child marriages or the minimum legal age for marriage. In Kudus, child marriage is not a new case because it has been done since the days of yore indeed. It commonly occurs for various reasons, ranging from economic problems, lack of education, interpretation of certain religious values or text, cultural understanding,<sup>27</sup> to effort to avoid any adultery.

Generally, customary law does not recognize any general boundaries for conducting a marriage, unlike civil law which normatively states the minimum legal age for a person to come into marriage life. Customary law is more familiar with incidentally recognizing someone from the physical appearance to find out whether or not he/she is capable of getting married. The benchmark used by the local community is based on their daily actions that show maturity. Moreover, it is natural for men and women to like each other which eventually lead to marriage.<sup>28</sup>

In other words, customary law does not make any numerical age of the prospective brides as measurement because it considers the brides' maturity instead. A mature definition in customary law is "*kuat gawe*" (able to work). It means that a man or woman is already considered mature if he/she is able to do adults work, is able to take

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<sup>24</sup> Hilman Hadikusuma, "Hukum Perkawinan Adat" (Bandung: Mandar Maju, 1983), 22.

<sup>25</sup> Abd. Rahman Ghazaly, "Fiqh Munakahat" (Jakarta: Prenada Media Group, 2006), 7.

<sup>26</sup> Supriyadi Supriyadi, "Perkawinan Sirri Dalam Perspektif Hukum di Indonesia," *YUDISIA: Jurnal Pemikiran Hukum Dan Hukum Islam*, 2018, <https://doi.org/10.21043/yudisia.v8i1.3229>.

<sup>27</sup> K. Wajik Saleh, "Hukum Perkawinan Indonesia" (Jakarta: Ghalia Indonesia, 1982), 4.

<sup>28</sup> Mulyadi, "Hukum Perkawinan Indonesia" (Semarang: Universitas Diponegoro, 2011), 6.

care of his/her own property, and physically, economically, and socially independent.<sup>29</sup> The term "*kuat gawe*" is used as the basis for local people to decide whether a person is eligible for marriage.<sup>30</sup> Consequently, child marriage still occurs even though it violates Article 7 of Law Number 1 the year 1974 and Law Number 16 of 2019 concerning the marriage law.

In a broader scope, child marriage still becomes a national problem, particularly for the Ministry of Women's Empowerment and Child Protection (PPPA; *Pemberdayaan Perempuan dan Perlindungan Anak*) because Indonesia is in 7<sup>th</sup> place on the world ranking even after the ratification of the current regulation.<sup>31</sup> Actually, child marriage is not only a problem in Indonesia but also a serious problem in some poor countries. It directly affects girls or young women who are made as bait by their parents to get economic interest. Those parents typically want to be free from any burden of raising children, so they choose to marry off their daughters as soon as possible. Another reason is for social stratification or social status interests to ensure their children get a good social position and strengthen their offspring lineage.<sup>32</sup>

In the context of the current regulation, interestingly, although marriage before 19 years old is a sort of rule violation, those who do it are allowed to apply for a marriage dispensation to the religious court. Accordingly, the Marriage Law (UUP) does not stipulate any sanctions against someone who gets married before turning 19. It is deemed, therefore, that one of the reasons for not regulating the legal sanction is because the marriage is theologically permissible.<sup>33</sup>

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<sup>29</sup> Ade Maman Suherman dan J. Satrio, "Penjelasan Hukum Tentang Batasan Umur" (Jakarta: Nasional Legal Reform Program, 2010), 2.

<sup>30</sup> Supriyadi Supriyadi, "Rekonstruksi Hukum Kewarisan Anak Dari Perkawinan Sirri Di Pengadilan Agama," *IJTIHAD Jurnal Wacana Hukum Islam Dan Kemanusiaan*, 2016, <https://doi.org/10.18326/ijtihad.v16i1.27-42>.

<sup>31</sup> Lenny Nurhayati Rosalina, "Mengawal Kedaulatan Bangsa" (Jakarta: Kementerian Pemberdayaan Perempuan dan Anak, 2020), 46.

<sup>32</sup> Saraswati Rika, "Hukum Perlindungan Anak Di Indonesia" (Bandung: PT Citra Aditya Bakti, 2015), 50.

<sup>33</sup> Dilema Perkawinan et al., "Dilema Perkawinan Usia Dini: Antara Tradisi Dan Regulasi," *Jurnal Dakwah Dan Sosial* 2, no. 2 (2019): 137-49, <https://doi.org/https://doi.org/10.5281/zenodo.3544214>.

Moreover, socio-cultural and moral reasons do exist beyond the decision for child marriage, namely, to prevent immoral acts of immature children and avoid negative promiscuity impacts. Among others, this is mentioned by one of the informants as follows:<sup>34</sup> "Even though my child is less than 19 years old, I still manage her to get married to avoid promiscuity. Besides that, it does not violate any religious values and local people are also used to getting married at the age of fewer than 19 years." It is also believed that if the prospective brides get a blessing from their parents to get married, they will get happiness in their household.<sup>35</sup>

Besides, the lack of literacy towards the minimum legal age for marriage according to the current law has caused Kudus society to apply for a marriage dispensation. They have just found out about the regulation when registering their marriage in the Religious Affairs Office (KUA; *Kantor Urusan Agama*) and the KUA officer advised them to apply for a marriage dispensation. On the one hand, this lack of literacy for local people becomes one of the causes of the community's ignorance and unpreparedness for marriage regulations.<sup>36</sup> On the other hand, this shows that existing regulations should have very well considered the principles of customary law that the community has believed to be true.

Theoretically, regulation as a legal norm must be responsive to social interests and the government has to understand the social context very well.<sup>37</sup> This is mainly because humans are deemed to be principally kind so that they are able to determine how to treat the law (how to obey the law) themselves.<sup>38</sup> Therefore, the law must be able to integrate cultural sub-systems into the legal system and its

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<sup>34</sup> Budiyo, the parent who apply for marriage dispensation, on January 20, 2022

<sup>35</sup> Dewi Wulansari, "Hukum Adat Indonesia" (Bandung: Reflika Aditama, 2009), 48.

<sup>36</sup> Siti Hapsah Isfardiyana, "Hukum Adat" (Yogyakarta: UII Press, 2018), 80.

<sup>37</sup> Teguh Prasetyo dan Abdul Halim Barkatullah, "Ilmu Hukum Dan Filsafat Hukum: Studi Pemikiran Ahli Hukum Sepanjang Zaman" (Yogyakarta: Pustaka Pelajar, 2009), 52-46.

<sup>38</sup> Satjipto Rahardjo, "Membedah Hukum Progresif" (Jakarta: Buku Kompas, 2008), 151.

outputs should provide justice.<sup>39</sup> Relating to this, Eugen Ehrlich said that a good and effective law must be in accordance with the living law which is a reflection of the living values in the society.<sup>40</sup> Basically, the application of customary law into positive law is divided into two concepts. The first puts the positive law that contradicts the customary law and the second believes that the law will develop following public awareness<sup>41</sup>

In this study, there found different perceptions in responding to current marriage regulations between the policymaker and the local community who are subject to regulation. In Kudus, local communities put tradition as a means of regulating people, which is a progressive legal perspective. At the same time, the government should anticipate future developments in order to overcome the change in cultural groups and public awareness that tends to be traditional and conservative.<sup>42</sup> The government tends to apply legal politics that have been determined by the state to be implemented in regulating policies. On the contrary, the government has consistently recognized and protected customary law and traditional rights.<sup>43</sup>

### **Judges' Legal Considerations in Deciding Application for Marriage Dispensation in the Covid-19 Pandemic**

Judges have the freedom to decide any cases of marriage dispensation on the basis of obvious legal considerations (*ratio decidendi*). The obviousness of the judge's legal considerations in deciding cases has been regulated in Article 50 of Law Number 48 the

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<sup>39</sup> Harry C. Bredemeier, "Law As Integrative Mechanism, Dalam Vilhelm Aubert, (Ed) Sociology Of Law" (New York: The Free Press of Glenco, 1962), 68.

<sup>40</sup> Erwan Baharudin and Universitas Esa Unggul, "Dalam Sistem Ketatanegaraan Di Indonesia Ernawati , Erwan Baharudin Masyarakat Hukum Adat Merupakan Subyek Hukum Khusus Yang Keberadaannya Diakui Oleh Peraturan Perundang-Undangan Baik Oleh Undang- Undang Dasar Negara Republik Indonesia Tahun 1945 ( Selan" 6, no. September (2019): 53-67.

<sup>41</sup> Moh. Mahfud MD, "Membangun Politik Hukum, Menegakkan Konstitusi" (Jakarta: Pustaka LP3ES Indonesia, 2006), 76.

<sup>42</sup> Maria Rita Ruwastuti, "Sesat Pikir Politik Hukum Agraria Membongkar Alas Penguasaan Negara Atas Tanah-Tanah Adat" (Yogyakarta: Insist Press, KPA Dan Pustaka Pelajar, 2000), 110.

<sup>43</sup> Made Oka Cahyadi Wiguna, "Pemikiran Hukum Progresif Untuk Perlindungan Hukum Dan Kesejahteraan Masyarakat Hukum Adat," *Jurnal Konstitusi* Vol. 18, no. 1 (2021): 114.

year 2009 concerning judicial power.<sup>44</sup> In deciding the cases, judges are practically influenced by at least two aspects, namely constitutional regulation or the law and the judge's belief. It is mainly because the judge's freedom in interpreting the law is an individual matter.<sup>45</sup>

The granting of a marriage dispensation aims to validate the marriage of prospective bride and groom according to the Law. The technical implementation of granting marriage dispensation applications is regulated in the Supreme Court Regulation (*Perma*) Number 5 the year 2019 on guidelines for adjudicating marriage dispensation applications. According to this regulation, the judge must consider the readiness of the bride and groom based on their age. In addition to it, the judge is also required to consider the impact and risks due to marriage in term of education, reproductive health, psychology, physical, sociology, culture, potential economic disputes, domestic squabbles, and violence that might occur in the household.

This guideline is used as the basis to give marriage dispensation to the early-age people under the minimum legal age of marriage by the court.<sup>46</sup> It aims to manage judges so that they can be more careful in examining and deciding marriage dispensations for each applicant based on the law.<sup>47</sup> This circumspection is coming from the fact that child marriage has more disadvantages than benefits. Therefore, it is considered better to prevent child marriage than burden its possible impact namely divorce. Legal strengthening of child marriage prevention must therefore be increased to improve the quality of human resources, prevent pregnancy out of wedlock, and save

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<sup>44</sup> Puji Lestari, "Ratio Decidendi Putusan Hakim Pengadilan Negeri Blitar Mengenai Perjanjian Jual Beli Tanah Yang Berkeadilan" 3, no. 2 (2020): 1-10.

<sup>45</sup> Luhut M. P. Pandsgaribuan, *Lay Judges Dan Hakim Ad Hoc Suatu Studi Teoritis Mengenai Sistem Peradilan Pidana Indonesia* (Universitas Indonesia, Fakultas Hukum, Pascasarjana, 2009).

<sup>46</sup> Titing Sugiarti, Putri Ayu Maharani, Chika Agishintya, "Penelitian Internal, Analisis Perkawinan Di Bawah Umur Tanpa Dispensasi (Studi Kasus Kawin Bawah Umur Yang Terjadi Di Desa Cipenjo, Kecamatan Cileungsi, Kabupaten Bogor)" (Jakarta: Fakultas Hukum Universitas Pancasila, n.d.), 24.

<sup>47</sup> Mughniatul Ilma, "Regulasi Dispensasi Dalam Penguatan Aturan Batas Usia Kawin Bagi Anak Pasca Lahirnya UU No. 16 Tahun 2019," *AL-MANHAJ: Jurnal Hukum Dan Pranata Sosial Islam*, 2020, <https://doi.org/10.37680/almanhaj.v2i2.478>.

children who have dropped out of school.<sup>48</sup> Actually, the mechanism for granting marriage dispensation to young people is a reasonable action, but the fact that application requests for marriage dispensation significantly continue to increase during the Covid-19 pandemic era sets a different situation.

The high number of applications for marriage dispensation in the last five years (before and after the Covid-19 pandemic at the Kudus Religious Court) can be seen in table 1 below:

**Table 1:**  
**Kudus Religious Court Application of Marriage Dispensation**

No	Year	Number of Dispensation
1	2017	73 Applications
2	2018	66 Applications
3	2019	90 Applications
4	2020	270 Applications
5	2021	270 Applications

*Source: Interview with Secretary of the Kudus Religious Court*

It can be seen from table 1 above that, practically, the court does not invariably grant the whole applications of marriage dispensation in the last five years. Based on data at the Kudus Religious Courts, during 2020, 262 out of 270 or 97% applications were granted and 8 or 3% of applications were rejected or revoked. In 2021, 265 out of 270 or 98% of applications were granted, and 5 or 2% of applications were rejected. This data indicates that the judges' legal practice in adjudicating marriage dispensation applications is about 97.5% granted while 2.5% of it is declared rejected or revoked.

Theoretically, judges should be able to reconstruct the fundamental values of law from the aspect of legal certainty, benefit, or justice for the community. When there found any conflict among

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<sup>48</sup> Titing Sugiarti and Kunthi Tridewiyanti, "Implikasi Dan Implementasi Pencegahan Perkawinan Anak [Implication and Implementation Against of Child Marriage]," *Jurnal LLegal Reasoning Fakultas Hukum Universitas Pancasila* 4, no. 1 (2021): 81-95, <https://doi.org/https://doi.org/10.35814/jlr.v4i1.2968>.

these three values, the justice of society will determine the results.<sup>49</sup> Justice here means fairness for the marriage dispensation applicant according to their best interests in order to provide benefits and prevent harm. This is what the judges of the Kudus Religious Courts take in examining and deciding applications for marriage dispensation.

One of Kudus Religious Court judges, for instance, mentioned as follows: "Deciding on the application for a marriage dispensation does not only consider the legal aspect or the aspect of mere proof but also consider whether the decision brings benefits or otherwise." This shows how the tradition of Kudus religious court judges is different from those of other courts who tend to decide cases only based on facts revealed in court.<sup>50</sup>

In other words, judges are required to uphold the "out of box" law which is not merely based on textual or words from the law (according to the letter) but also an effort to understand the spirit of the deeper meaning (to very meaning) of it. Law enforcement does not only come from the judges' intellectual intelligence but also spiritual intelligence, empathy, dedication, and commitment along with the courage to find other ways.<sup>51</sup>

Therefore, in several cases of marriage dispensation, the judge emphasized the psychological, sociological, and cultural aspects in his/her consideration. This can be seen in cases No. 116/Pdt. P/2021/PA.Kds, No. 130/ Rev. P/2021/PA.Kds, No. 182/ Rev. P/2021/PA.Kds, No. 288/ Rev. P/2021/PA.Kds, No. 308/ Rev. P/2021/PA.Kds. In these cases, the marriage dispensation applications were granted because it was revealed through the evidence that the future brides were pregnant (pregnancy out of wedlock). The above cases typically occurred as a result of promiscuity and lack of parents' supervision of their children. Parents admitted that their children have "close friends" but are powerless to

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<sup>49</sup> Esmi Warasih, *Pranata Hukum Sebuah Telaah Sosiologis* (Malang: PT. Suryandaru Utama, 2005). 67.

<sup>50</sup> Marihot Hutajulu, "Filsafat Hukum Dalam Putusan Pengadilan/Hakim," *Refleksi Hukum: Jurnal Ilmu Hukum* 9, no. 1 SE-Articles (April 2015): 91, <https://doi.org/https://doi.org/10.24246/jrh.2015.v9.i1.p91-100>.

<sup>51</sup> Satjipto Rahardjo, "Penegaka Hutajulun Hukum Suatu Tinjauan Sosiologis" (Yogyakarta: Genta Publishing, 2009), xiii.

prevent promiscuity that led to pregnancy out of wedlock. After pregnancy was identified, the parents applied for a marriage dispensation and the court granted it. One of the applicants' parent confessed as follow:<sup>52</sup> "I am very grateful to find the judge grant my child's marriage dispensation application because she is in three months pregnant."

Other same cases show various ages of pregnancy ranging from two, three, four, to six months. There was once a dialogue between the judge and the applicant who showed her sadness at the trial. The judge seemed to really consider possible consequences if the dispensation request was not granted. Therefore, the judge finally granted the couple's marriage dispensation application for avoiding any losses to the pregnant woman as well as the reveal of disgrace to both families of the prospective couple. Even further, rejection of the application will give no protection over the legal status of the fetus in the womb.

Understanding the values of truth and justice will quite much determine whether a judge's decision can be accepted by the community or not. These values are very decisive for judges in making quality decisions that are considered valid, fair, and beneficial. Therefore, the judge does not only rely on the law or jurisprudence but also explores living values to be able to formulate a fair decision in deciding a case.<sup>53</sup>

Careful examination of the document of marriage dispensation stipulation finds that the judges like to mention the common consideration as follows: "it is urgent to marry them off immediately to avoid any more harm ". This sort of emergency condition seems to 'force' the judge to grant the application even though the decision is still supposed to be guided by evidence according to the procedural law applicable in the religious court. The word "urgent" certainly requires judges to reconstruct the law by exploring the living values in society.

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<sup>52</sup> Interview with the applicant (P) of marriage dispensation at the Kudus Religious Court on January 18, 2022

<sup>53</sup> Edi Riadi, "Dinamika Putusan Mahkamah Agung Dalam Bidang Perdata Islam [Dynamics of Supreme Court Decisions in the Islamic Civil Sector]" (Jakarta: Gramata Publishing, 2017), 1.

On the one hand, the judge must consider the aspect of readiness or maturity of the children who will marry because he/she is under the minimum legal age of marriage. On the other hand, the condition of the applicant's pregnancy becomes an urgent factor to get her marriage immediately. For urgent conditions, it is not regulated by the Supreme Court Regulation (*Perma*) Number 5 the year 2019. However, Article 17 of the *Perma* stipulates that judges must consider the best interests of children and unwritten laws extracted from legal values, local wisdom, and a sense of justice for the community. The judges' legal culture in exploring the values of truth to realize justice is, therefore, a necessity.

Basically, whether the application for a marriage dispensation is granted is way casuistic in nature. An application might be rejected for less than one month in which the applicant is advised to withdraw the application. However, other applications are perhaps granted even though the wedding date is still long ahead depending on the examination results in the court.<sup>54</sup> It shows how the judges do scrutinize the legal aspect of relevant proof and local belief in community values in deciding the case.

Judges have their own reasons for rejecting the applications as explained by one of the judges<sup>55</sup> as follow:

"The common reason for rejection was usually because the applicant is still too young and under the minimum legal age for marriage, such as 14 years. In such a case, the judge was worried that the grant would easily lead to the family's breakdown. "

Interestingly, some cases of rejection come from application revocation based on the judge's advice. In fact, normatively, based on the principles in civil procedural law, judges must be passive towards the lawsuit or application. Judges are not allowed to intervene against the lawsuit because all they have to do is decide any cases, including

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<sup>54</sup> Interview with Azizah Dwi H, Judge of the Kudus Religious Court, on January 18, 2022

<sup>55</sup> Interview with Ah. Sholeh, a judge of the Kudus Religious Court on January 25, 2022

the application of marriage dispensation, as fair and wise as possible. Another reason for rejection of the application is insufficient witnesses and doubtful evidence to reveal the legal facts at the trial. With insufficient evidence, the judges typically suggest that the marriage dispensation application be revoked.

The judge's legal considerations either for granting or rejecting the applications are not only based on the facts at trial but also on the living values in society. In most cases, judges' will tend to reject the marriage dispensation applications by giving advice to the applicants first. Then, the applications will remain rejected if it is still demanded to be proceeded at the trial. This refusal will result in the permanent rejection of the applicant's subsequent application in the future unless there is a new legal case as the basis for applying for marriage dispensation again. In contrast, the result will be probably different if the applicants directly re-apply the marriage dispensation application without having a new legal case if the applicant withdraws the previous application after getting advice from the judges.

Other than that, judges have always considered the reasons of the bride or groom's parents for initiating the early marriage. This consideration can be seen in one of the judge's decisions which were based on parents' concerns that their children would possibly violate religious norms and morality due to their close relationship with their intimate friends. As a consequence, the family burden is deemed to be reduced with the application grants because the children will merely belong to the partner's responsibility.<sup>56</sup> This obviously shows how in deciding a marriage dispensation application, judges do not only consider the facts revealed in the court, but also the living values of the community.

This is in line with the statement of a judge, one of the respondents of this research, as follows: "the consideration in deciding marriage dispensation is not only based on the facts brought up in the court but also a belief that decision is supposed to be in accordance

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<sup>56</sup> Rani Dewi Kurniawati, "Efektifitas Perubahan UU No 16 Tahun 2019 Tentang Perubahan Atas UU No 1 Tahun 1974 Tentang Perkawinan Terhadap Penetapan Dispensasi Kawin (Studi Kasus Di Pengadilan Agama Majalengka Kelas IA)," *Journal Presumption of Law*, 2021, <https://doi.org/10.31949/jpl.v3i2.1505>.

with the community's sense of justice.<sup>57</sup> The community's sense of justice is known as juridical justice values of customary law. This is a legal breakthrough by judges through their belief in giving a sense of justice-to-justice seekers, especially the applicants for marriage dispensation at the Kudus Religious Court.

### **The Legal Culture of Judges in Deciding the Marriage Dispensation Application**

Legal cultures of judges are the values that surround the judge's belief as a guide for examining and deciding any legal cases submitted to the court. These values are the truth that is believed to be true so that they affect the attitude or behavior of judges in deciding a case, including for a marriage dispensation application. Gustav Radbruch explained that culture is the embodiment of values to enforce in reality and is reflected in human behavior and law. Law, meanwhile, is a cultural reflection that becomes a bridge so that values can be enforced in guiding human desires for avoiding any conflict with the law. The law value itself aims to realize justice through formulated regulations.<sup>58</sup> This is what Lawrence M. Friedman called the legal culture which is included in one of the values of the legal system.<sup>59</sup>

This legal system contributes to law enforcement and legal substance as well as structure. Law enforcement, meanwhile, is influenced by both legal factors and examination of the facts revealed in court. The assessment of each judge is certainly different from the other because the judges' legal culture shapes this difference in examining and deciding any case. This indicates that factors outside the law also influence the judge in deciding cases.<sup>60</sup>

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<sup>57</sup> Interview with Ah. Sholeh, a judge of the Kudus Religious Court on January 25, 2022

<sup>58</sup> FX. Adji Samekto, "Hukum Dalam Lintasan Sejarah" (Bandar Lampung: Indepth Publishing, 2013), 48-49.

<sup>59</sup> Achmad Ali, "Menguak Teori Hukum (Legal Theory) Dan Teori Peradilan (Judicial Prudence) Termasuk Interpretasi Undang-Undang (Legis Prudence)" (Jakarta: Kencana Prenada Media Group, 2009), 225.

<sup>60</sup> M. Syamsudin, "Konstruksi Baru Budaya Hukum Hakim Berbasis Hukum Progresif" (Jakarta: Kencana, 2012), 289-292.

Judges basically have juridical freedom that comes from human rights and is guaranteed by law.<sup>61</sup> Freedom, meanwhile, is a basic value of human dignity which leads to any responsible actions.<sup>62</sup> This is the basis for the judge to play the role so that every decision he/she hands down should provide justice. However, the judge's freedom does not mean that she/he can immediately decide on the application for a marriage dispensation without referring to the law and complying with applicable legal norms.

Before deciding on a marriage dispensation application, judges at the Kudus Religious Court usually offer a rejection so that the applicants will postpone the marriage. Technically, they suggest applicants withdraw the request at the time of the application examination. The same suggestion, particularly to revoke the application, is delivered when the judge is not sure whether he/she will grant the application. Normatively, revoking an application is a part of the applicant's right, but the judge's advice in the examination process does affect the revocation.

The principle of civil procedural law puts the judge in the passive position toward the material of the lawsuit or requests. It means that he/she can only wait for the submitted application. They should not interfere with the application. However, this passive principle seems to have shifted based on Article Paragraph (1) of Law Number 48 the Year 2009 concerning judicial power which states as follows: "Judges and constitutional judges are obliged to explore, follow, and understand legal values and a sense of justice that lives in society." These values are thus used as the basis for the judge to provide advice or suggestions to the applicant to withdraw the application.

Additionally, in Kudus Religious Court, although the judges hold the authority to decide a legal case, they likely make a dialogue with fellow judges in examining the case to ensure their decision is in

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<sup>61</sup> K. Bertens, "Etika" (Jakarta: Gramedia Pustaka Utama, 2000), 102-104. Sedangkan Frans Magnis - Suseno Menggunakan Istilah Kebebasan Normatif, Yaitu Keadaan Yang Dialami Manusia Tidak Berada Dalam Paksaan. Lihat Frans Magnis dan Suseno, "Etika Dasar, Masalah-Masalah Pokok Dalam Filsafat Moral" (Yogyakarta: Penerbit Kanisius, 1985), 30.

<sup>62</sup> Andre Atta Ujan, "Filsafat Hukum, Membangun Hukum, Membela Keadilan" (Yogyakarta: Pustaka Filsafat. Kanisius, 2009), 126.

line with the government regulations and living values of the local community. This dialogue is needed to prevent any injustice decisions on the requested applications for marriage age dispensation. Therefore, when a judge deviates from how they have to, he/she will encounter guilt and social punishment. However, this will only matter for those with conscience, social, and moral sensitivity. In contrast, judges who do not have such senses will do otherwise.<sup>63</sup>

### Conclusion

The findings of this study are significantly different from previous research studies. Previous studies discussed the high number of applications for marriage dispensation due to the Covid-19 pandemic. Meanwhile, this study found that the high number was due to the pandemic situation and triggered by the Marriage Law (UUP) regulation regarding the minimum legal age for marriage. It also found that Kudus people's perception of maturity really matters in triggering the high number of marriage dispensation applications. Additionally, the Kudus judges are also known to consider many things in deciding the case ranging from legal facts at the trial court, values of justice living in the society, to Supreme Court rules. Meanwhile, in making a decision on the case, the judges consult with fellow judges, and then they mostly advise applicants to revoke the application first. This research finally uncovers the urgent need to integrate any decision of the court and any rule or law of the government with living values in the society.

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<sup>63</sup> M. Syamsudin, "Konstruksi Baru Budaya Hukum Hakim Berbasis Hukum Progresif [New Construction of Judge Legal Culture Based on Progressive Law]." 47.

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## **Creating Family Resilience in Indonesia: A Study of “Marriage Guidance” Program in Aceh and South Sumatera**

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### **Abstract:**

Indonesia still experiences the increasing of divorce rates. To address this issue, the government through the Ministry of Religious Affairs has carried out several strategic programs, including Bimbingan Perkawinan (Marriage Guidance). The

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study of this paper examines the influence of the program on family resilience in the provinces of Aceh and South Sumatra. It used the normative approach in sociological studies. Data were collected by means of interviews, document studies, and questionnaires. The results of the study by referring to the questionnaire and interview show that the program in Aceh and South Sumatra has been running well. However, it has not been able to create family resilience and the divorce rate still keeps increasing. It is expected that post-marriage counseling should also be conducted so that married couples can establish family resilience as aspired within the community and country.

**Keywords:**

Marriage Guidance; Family Resilience; Legal Sociology;  
Aceh and South Sumatra

**Abstrak:**

Indonesia terus mengalami kenaikan angka perceraian. Untuk mengatasinya, pemerintah melalui Kementerian Agama meluncurkan beberapa program strategis, salah satunya adalah Program Bimbingan Perkawinan. Artikel ini membahas pengaruh program Bimbingan Perkawinan terhadap ketahanan keluarga di Aceh dan Sumatera Selatan. Metode penelitian yang digunakan adalah pendekatan normatif sosiologis dengan menggunakan teknik pengumpulan data wawancara, studi dokumentasi dan angket. Hasil penelitian berdasarkan angket dan wawancara menunjukkan bahwa program Bimbingan Perkawinan di Aceh dan Sumatera Selatan telah terlaksana dengan baik. Akan tetapi, program tersebut belum dapat memberikan kontribusi secara signifikan pada ketahanan keluarga sehingga tingkat perceraian masih tinggi. Oleh sebab itu, program semacam ini seharusnya juga dilaksanakan sesudah pernikahan sehingga ketahanan keluarga akan terwujud sebagaimana diinginkan oleh masyarakat dan negara.

**Kata Kunci:**

Bimbingan Perkawinan; Ketahanan Keluarga; Sosiologi  
Hukum; Aceh dan Sumatera Selatan

## Introduction

Family resilience is a central theme not only in Indonesia but also in other Muslim countries. It has been pursued by reforming the family law acts in several countries such as Egypt in 1929, Syria in 1953, Tunisia in 1957, Morocco in 1959, and Iraq in 1959. These acts primarily aim to reflect benefit and justice in the forms of the regulation of minimum marriage age, marriage registration, divorce, *iddah* (waiting period for widow) maintenance, women's rights and protection, child care, mediation of family conflicts, and *waqf* (endowments).<sup>12</sup>

According to Islamic law, child care is known as *hadhanah*, which is later called *kafalah*. In Morocco, Egypt, and the United Arab Emirates, *kafalah* is the care and raising of children as a measure not to legalize adoption. *Kafalah* becomes a legal alternative in maintaining a biological lineage to continue the family line.<sup>3</sup> In Pakistan, meanwhile, the government's efforts to strengthen family resilience included the enactment of the Muslim Family Law Ordinance in 1961. Through this regulation, the divorce procedure and guarantees for women after divorce were made stricter as an effort to protect women.<sup>45</sup> In Malaysia, the Act of the Islamic Family Law in Federal Territories was enacted in 1984. The Act, implemented by the Sharia Court, regulates the age limit for marriage, divorce, polygamy, *hadhanah* rights, and mediation in court. The Act is applied in the Federal Territories and

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<sup>1</sup> Tahir Mahmood, *Family Law Reform in The Muslim World* (Bombay: Tripathi PVD LTD, 1972).

<sup>2</sup> Nur Taufiq Sanusi, "Diversity in Muslim State Legislation (Comparative Study of Islamic Family Law Pakistan, Egypt and Indonesia)," *Jurnal Al-Qadau* 4, no. 2 (2017): 331-34.

<sup>3</sup> Andrea Büchler and Eveline Schneider Kayasseh, "Fostering and Adoption in Islamic Law-Under Consideration of the Laws of Morocco, Egypt and the United Arab Emirates," *Electronic Journal of Islamic and Middle Eastern Law (EJIMEL)* 6 (2018): 31, <http://www.ejimel.uzh.ch>.

<sup>4</sup> Anderson JND, *Islamic Law in Modern World* (London: Oxford University Press, 1959).

<sup>5</sup> Fatum Abubakar, "Islamic Family Law Reform: Early Marriage and Criminalization (A Comparative Study of Legal Law in Indonesia and Pakistan)," *Ahkam: Jurnal Syari'ah Dan Hukum* 4, no. 2 (2019): 97-118.

States in Malaysia with slight differences.<sup>67</sup>

In Indonesia, efforts to create family resilience began with the enactment of Law No. 1 of 1974 concerning Marriage and then proceeded with Presidential Instruction No. 1 of 1991 known as the Compilation of Islamic Law (KHI; *Kompilasi Hukum Islam*). The two regulations basically regulate marriage registration, marriageable age, dowry, divorce, maintenance provided by the husband after divorce, child guardianship, and all issues related to marriage and divorce as well as their legal consequences. Bowen, Hooker, and Salim consider that KHI is one of the steps for codifying contemporary Islamic law in Indonesia which mostly refers to the Shafi'i school as well as three other schools (Maliki, Hanafi, and Hanbali) and also the *fatwas* (rulings) or *ijma'* (consensus) of Indonesian *ulemas* (Islamic scholars).<sup>891011</sup>

Meanwhile, studies on the high divorce rates in Aceh and South Sulawesi have found the causes beyond the rate which range from economic factors, education, and lack of religious understanding, social media, and early marriage, to lack of empathy for husband/wife obligations. Such high divorce rates have led to negative impacts on children, families, and the nation. To overcome

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<sup>6</sup> Muslim Ibrahim and Muhammad Safiq Imran bin Samsudin, "Prosedur Poligami Di Malaysia (Analisis Undang-Undang Keluarga Islam Wilayah Persekutuan)," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 2, no. 1 (2018): 1-26.

<sup>7</sup> Tarmizi M. Jakfar and Nur Azizah Fayyadhah Binti Baharuddin, "Peran Majelis Sulh Dalam Penyelesaian Hak Hadhanah Pasca Perceraian (Studi Kasus Mahkamah Syariah Kabupaten Tawau, Provinsi Sabah, Negara Malaysia)," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 2, no. 1 (2018): 195-125.

<sup>8</sup> John R Bowen, *Islam, Law, and Equality in Indonesia: An Anthropology of Public Reasoning* (Cambridge: University Press, 2003).

<sup>9</sup> MB Hooker, "Southeast Asian Shari'ahs," *Studia Islamika* 20, no. 2 (2013): 206-8.

<sup>10</sup> Arskal Salim, *Contemporary Islamic Law in Indonesia: Sharia and Legal Pluralism* (Edinburgh UK: Edinburgh University Press, 2015).

<sup>11</sup> Ahmad Khoirul Anam, "Penerapan Hukum Keluarga Muslim Di Asia Tenggara: Sebuah Perbandingan," *Jurnal Bimas Islam* 10, no. 1 (2017): 129-145.

this issue, the government has made several efforts including organizing pre-wedding courses, providing marriage sermons to strengthen families and prevent divorce, organizing happy family competitions, and designing marriage guide modules for prospective brides and grooms.<sup>12</sup>

The study of family resilience in Indonesia is important to particularly examine how effective the program in maintaining the marriage bond and eradicating the high divorce rate. The selection of Aceh and South Sumatra as research locations is because of divorce rates in both areas. South Sumatra is one of the ten areas with the highest divorce rate in Indonesia. Meanwhile, although Aceh is excluded from the top ten, its rate is categorized as high. In 2022, the divorce rate (filed by wives) in South Sumatra is 2,473 while the divorced divorce (filed by husbands) is 8,719 making 11,192 the total number. Meanwhile, Aceh numbered 4,532 divorced and 1,558 divorced divorces, 6,090 divorce cases in 2020.<sup>13 14</sup>

More importantly, even though government programs have been implemented, the divorce rate continues to increase. This implies that things have not been running effectively. Therefore, this study will discuss one of the government's programs to enforce family resilience and its impact on reducing the divorce rate ranging from the definition and coverage of family resilience, the urgency of the program, to its effect on the divorce rate in the context of Aceh and South Sumatra.

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<sup>12</sup> Mursyid Djawas and et.al, "The Government's Role in Decreasing Divorce Rates in Indonesia: The Case of Aceh and South Sulawesi," *Ahkam: Jurnal Ilmu Syariah* 21, no. 1 (2021): 163-188.

<sup>13</sup> Ahmad Naufal Dzulfaroh, "10 Daerah Dengan Angka Perceraian Tertinggi Di Indonesia", in <https://www.kompas.com/tren/read/2022/03/09/062500765/10-daerah-dengan-angka-perceraian-tertinggi-di-indonesia?page=all>, Accessed on May 22, 2022.," n.d.

<sup>14</sup> Khalis Sury, "Angka Perceraian Di Aceh Capai 6 Ribu Lebih Pada 2020, [www.Antarane.ws.com](http://www.antarane.ws.com), Accessed on May 22, 2022.," n.d.

## **Method**

This study used the normative approach in sociological studies or empirical law.<sup>15 16</sup> It utilized the theory of law as a means of social engineering that helps shape society. It believes that the law's function to create an ordered society can be seen in legal relations and social change.<sup>171819</sup> While the data collection techniques used were interviews, documentation studies such as relevant laws and legal regulations, marriage modules, and distributed questionnaires to religious educators, Offices of Religious Affairs (*Kantor Urusan Agama*) staff, and the public in general. The informants interviewed were the Head of the District Ministry of Religion (1 person), the Head of the Religious Affairs office (3 people), and 1 person from the Religious Counselor in Aceh and South Sumatra.

## **Discussion and Result**

### **Definition and Coverage of Family Resilience and the Indonesian Government's Effort to Create It**

Creating and developing family resilience is not only the responsibility of the government but also role of society. Village officials can partake in helping to resolve family disputes through customary or *'urf* mechanisms so that disputes can be avoided.<sup>20</sup> Various efforts have been made by the Indonesian government to create family resilience while suppressing high divorce rates.

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<sup>15</sup> Salim HS and Erlies Septianan Nurbani, *Penerapan Teori Hukum Pada Penelitian Disertasi Dan Tesis (Buku Kedua)* (Jakarta: Rajawali Persada, 2017).

<sup>16</sup> Munir Fuady, *Metode Riset Hukum: Pendekatan Teori Dan Konsep* (Jakarta: Rajawali Press, 2018).

<sup>17</sup> Munir Fuady, *Teori-Teori Besar (Grand Theory) Dalam Hukum* (Jakarta: Kencana, 2020).

<sup>18</sup> Satjipto Rahardjo, *Hukum Dan Masyarakat* (Bandung: Angkasa, 1980).

<sup>19</sup> Sri Astuti A Samad, "Kajian Hukum Keluarga Islam Dalam Perspektif Sosiologis Di Indonesia," *El-Ussrah: Jurnal Hukum Keluarga* 4, no. 1 (2021): 138-52.

<sup>20</sup> Mursyid Djawas and Sri Astuti A Samad, "Conflict, Tradition and Family Resistance: The Pattern of Dispute Resolution in Acehnese Community According to Islamic Law," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 4, no. 1 (2020): 65-84.

They include making legal regulations that tighten the rules taken on by the husband to divorce his wife. The government, for instance, enacted the 1974 Marriage Law and 1991 KHI which stipulate that divorce can only be done before a court. This state rule is a formulation of Islamic law derived from *fiqh* (Islamic jurisprudence) rules and the opinions of Islamic scholars.<sup>21,22</sup> The attempt aims to help create family resilience.

Families, which consist of fathers, mothers, and children, play a crucial function for each of them. The functions of a family have been described in the Government Regulation No. 21 of 1994 concerning the Implementation of Prosperous Family Development in paragraph (1). They discuss (a) religious function, (b) socio-cultural function, (c) love function, (d) protection function, (e) reproductive function, (f) socialization and education functions, (g) economic function, and (h) environmental development function.

In addition, experts also explain that there are eight family functions consisting of reproduction (for the preservation of the social system), maintenance (care and child care), placement (giving social positions to family members), socialization (embedment of social values so that children can socially be acceptable), economics (sufficient for the needs of family members), care of the ages (care for elderly family members), political center (providing a political position in the community they live in), and physical protection (physical protection, especially clothing, food, and housing).<sup>23</sup>

In the Law No. 52 of 2009 concerning Population and Family Development (abbreviated as Law on PKPK; *Perkembangan Kependudukan dan Pengembangan Keluarga*), as a complement to the Law No. 10 of 1992, "family resilience" and "prosperous family" are mentioned in one article, namely Article 1 paragraph (11). Family

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<sup>21</sup> Mark Cammack and et.al., "An Empirical Assesment of Divorce Law in Indonesia," *Studia Islamika* 4, no. 4 (1997): 93-108.

<sup>22</sup> Maimun and et.al., "The Development of Fiqh Munakahat Ini Madurese Islamic Universities and Its Relation to Gender Equality and Divorce Prevention," *Al-Ihkam: Jurnal Hukum Dan Pranata Sosial* 15, no. 2 (2020): 279-300, <https://doi.org/>. <https://doi.org/10.19105/al-ihkam.v15i2.2734>.

<sup>23</sup> Imam Barnadib, *Pemikiran Tentang Pendidikan Baru* (Yogyakarta: Andi Offset, 1983).

resilience and welfare are described as a dynamic condition in which families have tenacity and toughness as well as physical and material abilities to live independently and develop themselves and their family members to live harmoniously in increasing physical and spiritual well-being and happiness.

Meanwhile, according to the Ministry of Women's Empowerment and Child Protection, family strength or family resilience is a condition of adequacy and continuity of access to income and resources to meet various basic needs ranging from food, clean water, health services, opportunities, education, housing, time to participate in society, and social integration. Another view defines family resilience as a dynamic family condition that has the tenacity, toughness, and physical, material, and mental abilities to live independently. Family resilience also implies the ability of the family to develop itself to live in harmony, prosperity, and happiness both physically and mentally. It involves the ability of the family to manage resources and problems to achieve prosperity and the ability to survive and adapt to various conditions that are always changing. Further, family resilience is defined as the ability of the family to ward off or protect itself from various problems or life threats, either from within the family itself or from outside the family such as the environment, community, society, and the state.<sup>24</sup>

In other words, family resilience is the tenacity and resilience as well as the physical-material and psychological-mental spiritual abilities of a family in dynamic conditions to live independently and in harmony. There are three factors that support family resilience: 1) Physical endurance, which illustrates that the better the physical resources, the lower the physical problems will be and that better problem-solving in a family encourages better physical well-being; 2) Social resilience, which is described in the better non-physical resources, the lower handling of non-physical problems will be; and 3) Psychological resilience, illustrating that the lower the non-physical family problems experienced, the better the psychological well-being

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<sup>24</sup> M. Wardi et al., "Entrepreneurship and Financing in Islamic Educational Institution of Darul Ulum Banyuwanyar Pamekasan," *Academy of Entrepreneurship Journal* 25, no. Special Issue 2 (2019).

will be.<sup>25</sup>

There are at least, therefore, five aspects that indicate the level of resilience of a family: 1) the attitude of serving each other, 2) the existence of intimacy between husband and wife towards a good quality of marriage, 3) the availability of parents who teach and train their children with various creative challenges, consistent training, and skill development, 4) the existence of husband and wife who lead all members of their family with great affection, and 5) the presence of children who obey and respect their parents.<sup>26</sup>

Accordingly, Khoiruddin Nasution states that family resilience has several indicators as follows: first, the family has tenacity and resilience, and second, the family has the physical and material abilities to 1) live independently, 2) develop themselves, 3) live harmoniously and 4) increase the welfare of physical and spiritual happiness.<sup>27</sup>

Of the many functions of the family, there are three functions that are almost irreplaceable by institutions outside the family, namely:<sup>28</sup>

*First* is the biological function in the form of regeneration/continuation of offspring. It can be understood as the parents' function to regenerate and carry on offspring by which the parent (mother) gives birth to children who are the successors of the family (regeneration) and at the same time become the basis for the survival of society.<sup>29</sup>

In the Qur'an, there are several verses that explain this biological function, such as QS. ash-Shuraa (42): 11 which reads, "(He is) the Originator of the heavens and the earth. He has made for you

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<sup>25</sup> Valentina Siwi Saridewi, Armaidly Armawi, and Djoko Soerjo, "Penggunaan Teknologi Informasi Komunikasi Dalam Manajemen Asi Bagi Ibu Bekerja Guna Menjaga Ketahanan Keluarga (Studi Anggota Grup Facebook Asosiasi Ibu Menyusui Indonesia)," *Jurnal Ketahanan Nasional* 22, no. 1 (2016): 76-93.

<sup>26</sup> Ministry of Women's Empowerment and Child Protection, "Pembangunan Ketahanan Keluarga" (Jakarta, 2016).

<sup>27</sup> Khoiruddin Nasution, "Peran Kursus Nikah Membangun Keluarga Sejahtera," *Ahkam: Jurnal Ilmu Syariah* 15, no. 2 (2015): 183.

<sup>28</sup> Khairuddin, *Sosiologi Keluarga* (Yogyakarta: Nur Cahaya, 1985).

<sup>29</sup> Khairuddin.

spouses from among yourselves, and (made) mates for cattle (as well)-multiplying you (both). There is nothing like Him, for He (alone) is the All-Hearing, All-Seeing." Another one is the verse of QS. an-Nahl (16:72) that reads, "And Allah has made for you spouses of your own kind and given you through your spouses' children and grandchildren, and He has granted you good, lawful provisions."

*Second* is the affective function or feeling of love both by loving and being loved. It suggests that parents (father and mother) have a function to build the creation of a relationship of love and affection between family members; initially establishing love between spouses and then continuing with love among parents and children. From this loving relationship, a generation is born, and from this generation, fraternal relations, friendships, habits, identification, common views regarding values, views of life, attitudes, and character are also born. The basis of love and affection is an important factor in the personal development of children.

The function of love and affection is also described in QS. Ar-Rum (30:21) states that Allah has placed upon spouses the seeds of love and affection to be nurtured so that they will grow stronger. Such love and affection will then be passed on to their posterity.

*The Third* is the social function which is also known as the socialization function. In the family context, it is related to how family members socialize the living values in society with the children. This function shows the role of the family in shaping the children's personality (character) because, through social interaction in the family, children learn patterns of behavior, attitudes, beliefs, ideals, and values living within society. This function is performed to ensure good personality development for children. As such, the function of socialization is synonymous with the function and process of forming a child's character (morals). Morality is highly significant in Islam as the main mission of the Prophet Muhammad saw (peace be upon him) is, in fact, too perfect morals.<sup>30</sup>

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<sup>30</sup> Moh. Wardi and Ismail Ismail, "Following The Prophet Muhammad Character Through Ngabuleh Tradition in Pondok Pesantren Darul Ulum Banyuwangi Pamekasan," *EL HARAKAH (TERAKREDITASI)* 20, no. 1 (June 1, 2018): 49, <https://doi.org/10.18860/el.v20i1.4473>.

Additionally, Law No. 52 of 2009 stipulates that family resilience can be measured using a systems approach which includes input components (physical and non-physical resources), family management processes (family problems and coping mechanisms), and outputs (fulfillment of physical and psycho-social needs). This approach indicates that family resilience is a measure of the family's ability to manage its problems based on the available resources to meet the needs of its members. Thus, a family is said to have a high level of family resilience if it fulfills several aspects, comprising: 1) physical resilience, which refers to the fulfillment of food, clothing, housing, education, and health needs; 2) social resilience, which is oriented to religious values, effective communication, and high family commitment; 3) psychological resilience, which includes the ability to overcome non-physical problems, positive emotional control, positive self-concept, and husband's concern for his wife.<sup>31</sup>

In a short words, family resilience is considered one of factor of harmony that exists in the household with an implication for harmony in society. Therefore, the values of family resilience based upon religious values need to be understood as a shared need in the family in order for harmony and happiness as the ultimate goals of marriage can be realized.<sup>32</sup>

### **The Urgency of Marriage Guidance Program in Indonesia**

The Marriage Guidance program is considered an effective way to maintain the marriage bond through providing in-depth understanding and marital knowledge to the bride and groom. It is designed to facilitate both to know the world of marriage as an effort to make marriage bond tough passing through several problems and challenges ahead.

Etymologically, guidance is the process of providing assistance by an expert to any individual, such as children, adolescents, and adults so that the individual can develop his/her

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<sup>31</sup> Ministry of Women's Empowerment and Child Protection, "Pembangunan Ketahanan Keluarga."

<sup>32</sup> Rizqi Maulida Amalia, M. Yudi Ali Akbar, and Syariful, "Ketahanan Keluarga Dan Kontribusinya Bagi Penanggulangan Faktor Terjadinya Perceraian," *Jurnal Al-Azhar Indonesia Seri Humaniora* 4, no. 2 (2017): 134.

own abilities and be independent.<sup>33</sup> Guidance can utilize individual strengths and other suggestions to be developed based on applicable norms.

Meanwhile, according to the Compilation of Islamic Law, marriage is a strong solemn covenant or *mitaqan ghaliza* aiming to obey Allah's rules because carrying out marriage is an act of worship. Shafi'i scholars are of the view that the essence of the covenant is when it is related to the life of husband and wife that applies afterward, i.e., they are allowed to get along after marriage so that before the covenant takes place, the two of them are not allowed to get along.<sup>34</sup>

From the explanation above, it can be understood that marriage guidance means giving advice or guidance to prospective brides and grooms before carrying out the marriage contract. The legal basis for the Marriage Guidance is the Decree of the Director-General of Islamic Community Guidance No. 379 of 2018 concerning Instructions for Implementing Premarital Marriage Guidance for Prospective Brides and Grooms. The Decree states that the basis for implementing marriage guidance is as follows: the 1974 Marriage Law, the Government Regulation No. 45 of 2013 concerning Procedures for the Implementation of the State Revenue and Expenditure Budget, the Regulation of the Minister of Religious Affairs No. 34 of 2016 concerning the Organization and Work Procedure of the Subdistrict Office of Religious Affairs, and the Decree of the Director-General of Islamic Community Guidance No. DJ.III/600 of 2016 concerning Technical Guidelines for the Management of Non-Tax State Revenue for Marriage or Reconciliation Fees outside the Subdistrict Office of Religious Affairs.

The Marriage Guidance program covers the following objectives: 1) to provide teenagers of marriageable age, namely prospective brides and grooms, with sufficient knowledge prior to entering married life, 2) to establish a strong and sustainable household towards the creation of a *sakinah* (tranquil) family, and 3) to

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<sup>33</sup> Printo and Erman, *Dasar-Dasar Bimbingan Dan Konseling* (Jakarta: Rineka Cipta, 1999).

<sup>34</sup> Amir Syarifuddin, *Hukum Perkawinan Di Indonesia* (Jakarta: Kencana, 2011).

minimize the number of disputes, divorces, and domestic violence.<sup>35</sup>

The enactment of regulations and legal rules related to Marriage Guidance which then makes participation of the program one of the requirements for carrying out marriages shows that this program is considered very important. In reality, however, Marriage Guidance has not properly been conducted and it is still a formality. Therefore, this program should receive serious attention and be improved and developed according to the needs and developments of society. Further, the government should also pay considerable attention to this issue before it becomes a problem that may affect the quality of the next generation.<sup>36</sup>

Marriage Guidance is supposed to help to generate a prosperous family and family resilience which ultimately affect the welfare of the nation. To achieve this, prospective brides and grooms are required to possess sufficient competence and understanding of marriage before the marriage takes place. One of the efforts to obtain such knowledge and understanding of marriage is by participating in the Marriage Guidance program.<sup>37</sup>

Khoiruddin Nasution asserts that Marriage Guidance holds an important role in helping to achieve national development goals by creating a prosperous family. Thus, this program, according to him, should receive considerable attention from the government and all related institutions from the national to the village level. In addition, the financial support for the program should also be prioritized in the national and regional budget funds.<sup>38</sup> Additionally, cooperation at the lower level between families, communities, and the Offices of Religious Affairs is deemed essential to create *sakinah* families and family resilience.<sup>39</sup>

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<sup>35</sup> Achmad Muhlis et al., "Students' Destructive Behavior Towards The Teacher in The Teaching and Learning Process," *Cendekia: Jurnal Kependidikan Dan Kemasyarakatan* 1, no. 1 (2021): 21-46, <https://doi.org/10.21154/cendekia.v1i1.2392>.

<sup>36</sup> Nasution, "Peran Kursus Nikah Membangun Keluarga Sejahtera."

<sup>37</sup> Nasution.

<sup>38</sup> Nasution.

<sup>39</sup> Erie Hariyanto, Maimun, and Ainurrahman Hidayat, "Pencapaian Keluarga Sakinah Melalui Pemberdayaan Ekonomi Di Desa Buddagan

The Marriage Guidance program is one of the national strategic programs launched by the Ministry of Religious Affairs to respond to the high divorce rates in Indonesia.<sup>40</sup> However, the data shows that divorce rates are still increasing. Even, according to a report by the Religious Courts of the Supreme Court, there has been an increase every year since 2015 (394,246 cases), 2016 (401,717 cases), 2017 (415,510 cases), and 2018 (444,358 cases). In 2020, as of August, the number has reached 306,688 cases.<sup>41</sup>

As such, family resilience is highly necessary. In this context, it can be understood that family resilience is closely related to the high divorce rate. It means that the higher the level of family resilience, the lower the divorce rate that occurs in society.

### **The Impact of Marriage Guidance Program on Family Resilience in Aceh and South Sumatra**

Based on the questionnaires distributed in two provinces, namely Aceh and South Sumatra, the answers from respondents consisting of religious instructors, KUA (*Kantor Urusan Agama*; Office of Religious Affairs) staff, and the community in general can be explained as follows;

#### **1. The Government has Strived to Create Family Resilience**

The first notion of the questionnaire is whether the Indonesian government has made efforts to create family resilience in Indonesia by implementing a Marriage Guidance program. Relating to this, a questionnaire was distributed to check this program. The result of the questionnaire can be seen in Chart 1 below.

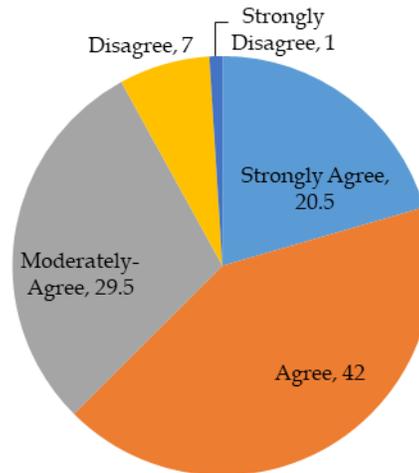
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Kecamatan Pademawu," *Pêrdikan: Journal of Comminuty Engagement* 2, no. 1 (2020): 1-9.

<sup>40</sup> Munawwarah Qatrunnada, Munawwarah Nur Rofiah, and I. Abdul Qadir, F., & Muzayyanah, "Modul Bimbingan Perkawinan Untuk Calon Pengantin" (Jakarta, 2017).

<sup>41</sup> Djawas and Samad, "Conflict, Tradition and Family Resistance: The Pattern of Dispute Resolution in Acehnese Community According to Islamic Law."

**Chart 1.** The Societies' Response to Government's Effort to Create Family Resilience



Based on Chart 1 above, the questionnaire showed that 27.5% of the respondents strongly agree with the notion. 56% agree, 12.5% moderately agree, 5% disagreed, and 3.5 % strongly disagreed. The findings here indicate that people generally believe that the Marriage Guidance conducted by the government through the Ministry of Religious Affairs can help to create family resilience for couples who are about to get married.

Fithria Mursyidah, a religious counselor of KUA Bukit Kecil, Palembang, described that the Marriage Guidance program, known as *sucatin* (*kursus calon pengantin*, a course for prospective bride and groom), is carried out regularly every week on Tuesday from 10.00 am to 12.00 pm. Before the marriage contract is held, the KUA will organize the program which every prospective bride and groom is obliged to follow regardless of whether the marriage is held at the KUA or at home. Religious counselors will also always recommend prospective brides and grooms participate in the program.<sup>42</sup>

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<sup>42</sup> "Interview with Fitria Mursyidah, Religious Counselor of Office of Religious Affairs (KUA) Bukit Kecil, Palembang, April 7, 2020," n.d.

## **2. Marriage Guidance Helps to Create Family Resilience**

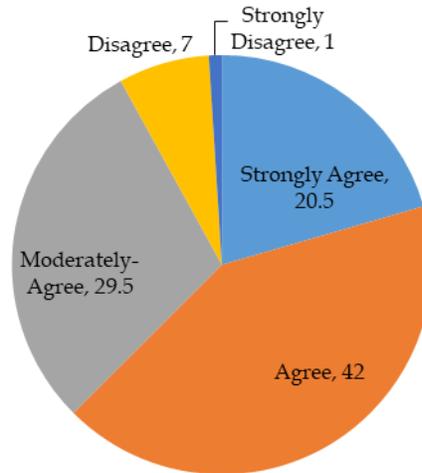
The statement that Marriage Guidance is able to help establish family resilience has been admitted by Daiyul Ma'ruf, a staff at KUA in Baiturrahman Subdistrict, Banda Aceh City. He argued that the program has been very good because it has provided adequate facilities and infrastructure. However, he added, Marriage Guidance would sometimes not be conducted regularly due to a time shift in any sudden change. It means that sometimes after the staff has set a day, the bride and groom don't come; they will move it to another day.

Nevertheless, according to him, the influence of the program has been highly influential on family resilience because of the wide range of knowledge it provides. The Marriage Guidance has greatly increased prospective brides' and grooms' knowledge, especially regarding the rights and obligations of the husband and wife. As such, this program can be useful in preventing divorce and building family resilience; In general, the program carried out by the Ministry of Religious Affairs plays an instrumental role in the resilience of marriages.<sup>43</sup> To ensure the argument, a question was specifically designed to check whether the program affects positively to family resilience. The result of the questionnaire can be seen in Chart 2 below

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<sup>43</sup> "Interview with Daiyul Ma'ruf, Staff of Office of Religious Affairs (KUA) in Baiturrahman Subdistrict, Banda Aceh, March 23, 2020," n.d.

**Chart 2.** Respondents' response to the notion that Marriage Guidance creates family resilience



Based on Chart 2 above, it can be known that 30.5% strongly agree, 60% agree, 6.5% moderately agree, 1% disagrees, and 2% strongly disagree. Chart above shows that most of the respondents agreed that the Marriage Guidance has a positive effect on family resilience.

### 3. Marriage Guidance Helps Increase Knowledge for Spouses

In response to whether Marriage Guidance program can increase knowledge about the rights and obligations of husband/ wife, a question was distributed to respondents. The result can be seen in Chart 3 below.

**Chart 3.** Respondents' response to notion that Marriage Guidance adds more marital knowledge

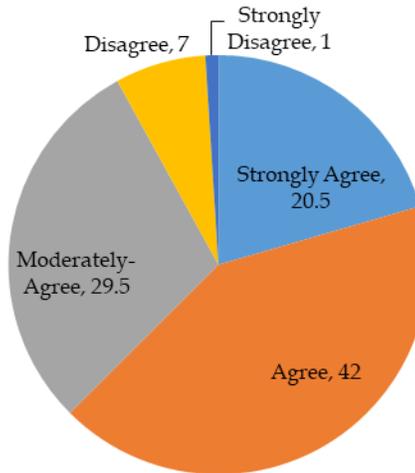


Chart 3 above shows the percentage of various answers on whether the Marriage Guidance adds more knowledge about the rights and responsibilities of wife and husband. It can be seen that 47.5% of the respondents strongly agreed with it. 50.5% agreed, 2% disagreed, while none disagreed nor strongly disagreed.

Regarding this matter, Saiful Bahri, The Head of KUA in Syiah Kuala Subdistrict, Banda Aceh, is of the view that the Marriage Guidance program organized by the Ministry of Religious Affairs has been running quite well as the Ministry has provided relevant facilities to conduct the program. Prospective brides and grooms are required to partake in the program because it is a requirement prior to marriage. However, the human resources (instructors and KUA staff) who carry out the program, for him, need capacity building, both regarding their performance and their knowledge. Also, the budget provided by the government in this program has been relatively low and thus, the facilities needed for prospective brides and grooms have not been met properly.

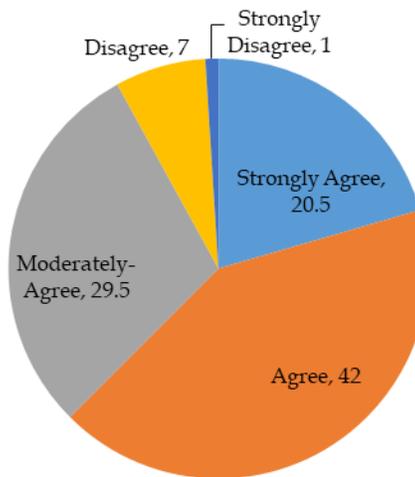
Nevertheless, the program was regarded to provide a number of effects, either directly or indirectly, on the resilience of the family. One important effect is that it adds significant knowledge about the rights and obligations of the husband and wife. Therefore, it can be

helpful in preventing divorce. Couples who do not follow the program may bear the possibility of divorce bigger than those who made it because they might not likely be able to distinguish between rights and obligations properly and correctly. The program conducted by the Ministry of Religious Affairs, above all, for him, is a great effort in preventing divorce among prospective married couples.<sup>44</sup>

#### 4. Marriage Guidance Helps to Prevent an Increase in Divorce

Another notion is that the program is very much useful for preventing the increase in divorce in Indonesia. To prove this, we distributed the questionnaires and it shows that most of the people agree that marriage guidance helps to prevent divorce. It is then presented in Chart 4 below:

**Chart 4.** Respondents' opinion that Marriage Guidance prevents divorce



From Chart 4 above, it can be seen that 41.5% respondents strongly agreed that the program is useful for preventing an increase in divorce. Other 50% agree, 6% moderately agree, 2% disagree, and 5% strongly disagree.

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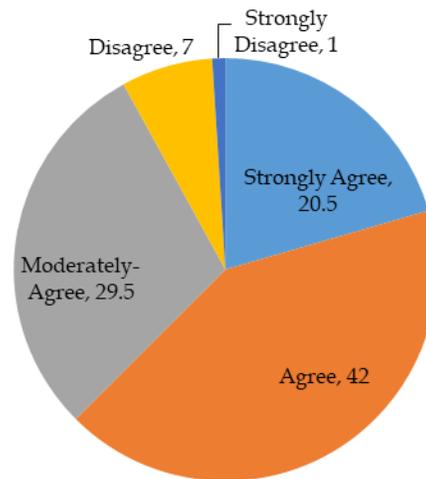
<sup>44</sup> "Interview with Saiful Bahri, Head of Office of Religious Affairs (KUA), Syiah Kuala Subdistrict, Banda Aceh, March 23, 2020," n.d.

Fithria Mursyidah explained that Marriage Guidance has been implemented for almost 12 years ever since she became a newcomer in 2008. It aims to provide prospective married couples knowledge and insight about household things so that they can avoid getting divorced.<sup>45</sup> It was also mentioned that prospective couples who follow the program will obtain more knowledge of marriage law and marriage issues.<sup>46</sup>

### 5. Likelihood of Divorce for Prospective Couples Not Attending Marriage Guidance

In regard to the possibility of prospective brides and grooms who do not take a part in Marriage Guidance program experience a divorce, the questionnaire was also distributed. The result can be seen in Chart 5 below.

**Chart 5.** Respondents' belief about the big chance of divorce for those who did not take the Marriage Guidance program



<sup>45</sup> "Interview with Fitria Mursyidah, Religious Counselor of Office of Religious Affairs (KUA) Bukit Kecil, Palembang, April 7, 2020."

<sup>46</sup> "Interview with Tgk. Ahmad Adami, Religious Counselor of Office of Religious Affairs (KUA), Muara Satu Subdistrict, Lhokseumawe, March 25, 2020," n.d.

It can be seen from Chart 5 above that there were 20.5% of people strongly agree, 42% agree, 29.5% moderately agree, 7% disagree, and 1% strongly disagree.

Toni Ariandi, the Head of KUA Hilir, Bukit Kecil, Palembang, said that the program has been applied since the Ministry issued the regulation as an attempt to prevent divorce. Marriage Guidance at KUA Hilir is a requirement that prospective married couples need to take. In the past, the program was used to be carried out by a *penghulu* (marriage registrar), but at present, it is scheduled to carry out at the KUA office in accordance with existing regulations. The activity has been organized for a number of couples and regularly conducted for two days, with each day running for eight hours.<sup>47</sup>

The findings from questionnaires here reveal that Marriage Guidance program has an effect on family resilience in Indonesia, especially in Aceh and South Sumatra. However, it is still difficult to accurately measure the level of influence of marriage guidance on family resilience, whether it is small, medium, or large, as the divorce rates in Indonesia, in general, remain considerably high.

To date, the Marriage Guidance programs have also been well implemented in Lhokseumawe and Central Aceh, as confirmed by the Head of KUA Banda Sakti Subdistrict, Lhokseumawe City. He described that the program has been a routine activity carried out by the KUA so that if prospective couples do not attend it, they cannot get married there. This activity has been properly organized by the government for prospective brides and grooms.<sup>48</sup>

Nevertheless, Ahmad Marjan, the Head of the Ministry of Religious Affairs of Central Aceh, is of the view that Marriage Guidance program has little effect on family resilience. He argued that family resilience is derived from within the married couple so the program has not served any influence on the resilience of a family. Still, Marriage Guidance has helped to increase the knowledge of couples regarding their rights and obligations since the program has provided explanations clearly and in detail. However, he added,

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<sup>47</sup> "Interview with Toni Ariandi, Head of Office of Religious Affairs (KUA) Hilir, Bukit Kecil, Palembang, April 9, 2020," n.d.

<sup>48</sup> "Interview with Ibnu Hasyim, Head of Office of Religious Affairs (KUA), Banda Sakti Subdistrict, Lhokseumawe, March 25, 2020," n.d.

Marriage Guidance has not been beneficial for the couples because the resilience of the family will depend on the couple themselves in carrying out the marriage. Thus, if a couple wants to get married without attending the program, it will not contribute to a divorce. As a program promoted by the Ministry, sometimes it has little effect in reducing divorce rates, and in principle, family resilience can be also achieved by couples without any marriage guidance or other same programs.<sup>49</sup>

Ahmad Marjan's opinion here indicates that one of the factors to promote family resilience relies on the way married couples manage their own family matters. Both spouses certainly play an influential role in creating family resilience. Nevertheless, divorce rates in Indonesia show an increasing trend and many divorce cases also come from couples with decent educational backgrounds.

The findings of the study have shown that Marriage Guidance has been well applied in Indonesia, especially in the provinces of Aceh and South Sumatra. In addition, as one of the government's efforts, it has also been recognized to have an impact on developing family resilience. Still, the ever-increasing divorce rates in Indonesia remain a huge concern. In this case, apart from conducting the pre-marriage guidance program for prospective brides and grooms, it is suggested that the government also carries out post-marriage counseling for married couples to help solve marital issues. This post-marriage counseling can be implemented in the same procedures as the pre-marriage guidance, being a regular activity that follows the appropriate guidance module of the Post-Marriage Counseling program.

### **Conclusion**

Based on questionnaire and interview data as well as the results of the analysis of the Marriage Guidance program in the provinces of Aceh and South Sumatra, it has been running well as one of the requirements for prospective brides and grooms prior to getting married. Moreover, as one of the government's efforts, it is supported by relevant human resources, facilities, infrastructure, and budget.

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<sup>49</sup> "Interview with Ahmad Marjan, Head of Office of Ministry of Religious Affairs, Central Aceh, Aceh Province, March 26, 2020," n.d.

However, this has not prevented the high divorce rate in Indonesia yet, including in South Sumatra and Aceh. Therefore, a follow-up program is necessary, such as post-marriage counseling. It is expected that such counseling offers married couples further knowledge about marital issues and it can eventually help to create resilience within the family.

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