

Vol. 14 No. 1 June 2019

ISSN (Print) 1907-591X
ISSN (online) 2442-3084
Akreditasi: 12 M/Kp/II/2015

al-Ihkâm

Jurnal Hukum dan Pranata Sosial

**Ainol Yaqin
Rizka Ahmadi**

*Highlighting Intrinsic Objectives of Bull
Race Culture Based on Maqâshid al-Syarî'ah
Kaleidoscope*

Achmad Mulyadi

*Taklif of Lunar and Solar Eclipse Prayers
According to Fiqh and Scientific Perspective*

**Sigit Riyanto
Fajri Matahati
Muhammadin**

*The Urgency to Incorporate the Islamic
Concept of Rights into the International
Human Rights Law Course in Indonesian
Law Schools*



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



al-Ihkam: Jurnal Hukum dan Pranata Sosial, Vol. 14 No. 1 2019
ISSN: 1907-591X, E-ISSN: 2442-3084
Accreditation: 30/E/KPT/2019

al-Ihkam

Jurnal Hukum dan Pranata Sosial

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

Editor-in-chief

Erie Hariyanto | Scopus ID: 57216753326 | Faculty of Shariah Institut Agama Islam Negeri Madura, Pamekasan, Indonesia

Executive Editors

Mohammad Mahbubi Ali | Scopus ID: 55615193600 | International Institute of Advanced Islamic Studies, Kuala Lumpur, Malaysia

Editors

Fajri Matahati Muhammadin | Scopus ID: 57213189402 | Universitas Gadjah Mada, Indonesia

Mohamad Abdun Nasir | Scopus ID: 42462139100 | Universitas Islam Negeri Mataram, Indonesia

Azhar Ibrahim | Scopus ID: 7202979037 | Department of Malay Studies, National University of Singapore, Singapore City, Singapore

Yanwar Pribadi | Scopus ID: 56241252500 | Sultan Maulana Hasanuddin State Islamic University, Banten, Indonesia

Wildani Hefni | Scopus ID: 57203727158 | Institut Agama Islam Negeri Jember, Jember, Indonesia

Muhammad Taufiq | Scopus ID: 57216749006 | Faculty of Shariah Institut Agama Islam Negeri Madura, Pamekasan, Indonesia

Maimun | Scopus ID: 57216939645 | Faculty of Shariah Institut Agama Islam Negeri Madura, Pamekasan, Indonesia

Ayang Utriza Yakin | Scopus ID: 57156477200 | Ghent University, Belgium



al-Ihkam: Jurnal Hukum dan Pranata Sosial, Vol. 14 No. 1 2019
ISSN: 1907-591X, E-ISSN: 2442-3084
Accreditation: 30/E/KPT/2019

Miftahul Huda | Scopus ID: 57217550555 | Institut Agama Islam Negeri
Ponorogo, Indonesia

Assistant to Editors

Ahmad Faidi | SINTA ID : 6086254 | Faculty of Shariah Institut Agama
Islam Negeri Madura, Pamekasan, Indonesia

Abdul Haq Syawqi | SINTA ID: 6711517 | Faculty of Shariah Institut Agama
Islam Negeri Madura, Pamekasan, Indonesia

Syukron Affani | SINTA ID: 6005882 | Institut Agama Islam Negeri Madura,
Pamekasan, Indonesia

English Language Advisor

Achmad Fauzi, Faculty of Shariah Institut Agama Islam Negeri Madura,
Pamekasan, Indonesia

Dimas Danar Septiadi, Faculty of Shariah Institut Agama Islam Negeri
Madura, Pamekasan, Indonesia

Proofreader

Masyithah Mardhatillah | SINTA ID : 6019130 | Institut Agama Islam
Negeri Madura, Pamekasan, Indonesia

Technical Team

Bhismoadi Tri Wahyu Faizal | SINTA ID : 6730589 | Faculty of Shariah
Institut Agama Islam Negeri Madura, Pamekasan, Indonesia

Anton Budi Mulyatno, Institut Agama Islam Negeri Madura, Pamekasan,
Indonesia

PUBLISHED BY :

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



al-Ihkam: Jurnal Hukum dan Pranata Sosial, Vol. 14 No. 1 2019
ISSN: 1907-591X, E-ISSN: 2442-3084
Accreditation: 30/E/KPT/2019

OFFICE:

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



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



al-Ihkam: Jurnal Hukum dan Pranata Sosial, Vol. 14 No. 1 2019
ISSN: 1907-591X, E-ISSN: 2442-3084
Accreditation: 30/E/KPT/2019

al-Ihkam

Jurnal Hukum dan Pranata Sosial

Table of Contents

- ◆ Highlighting Intrinsic Objectives of Bull Race Culture Based on *Maqâshid al-Syarî'ah* Kaleidoscope
DOI 10.19105/al-ihkam.v14i1.1844
Ainol Yaqin, Rizka Ahmadi 1-26
- ◆ *Taklif* of Lunar and Solar Eclipse Prayers According to *Fiqh* and Scientific Perspective
DOI 10.19105/al-ihkam.v14i1.1862
Achmad Mulyadi 27-49
- ◆ The Study of *Maqâshid Syarî'ah* Toward Maduresse Traditional Inheritance by Using System Approach
DOI 10.19105/al-ihkam.v14i1.2159
Mohammad Hipni 50-71
- ◆ The Transformation of *Ijârah*: From *Fiqh* to Sharia Banking Products
DOI 10.19105/al-ihkam.v14i1.1893
Hasanudin, Ainul Yaqin 72-98



al-Ihkam: Jurnal Hukum dan Pranata Sosial, Vol. 14 No. 1 2019
ISSN: 1907-591X, E-ISSN: 2442-3084
Accreditation: 30/E/KPT/2019

- ◆ Specific Treatment of Elderly Pilgrims on *Hajj* According to Hadith;
The Approach of *Mukhtalif Ahadis*
DOI 10.19105/al-ihkam.v14i1.2290
Masyithah Mardhatillah 99-123
- ◆ The Contract of the Social Security Agency for Employment (BPJS
Ketenagakerjaan) in The Perspective of Sharīa Economic Law
DOI 10.19105/al-ihkam.v14i1.2197
Bahjatul Imaniyah 124-145
- ◆ Al-Âtsâr al-Mutarattibah ‘Âla PERPPU (Lawâih al-
Hukûmiyyah al-Badaliyyah) min al-Munazhzhâmât al-
Mujtama’iyyah raqm 2 li ‘âm 2017 dlidda wujûd hizb al-
Tahrîr Indûnîsiyâ min Manzhûr saddi al-dzarî’ah
DOI 10.19105/al-ihkam.v14i1.1982
Abdul Jalil, Muhammad Taufiq 146-177
- ◆ The Urgency to Incorporate the Islamic Concept of Rights into the
International Human Rights Law Course in Indonesian Law
Schools
DOI 10.19105/al-ihkam.v14i1.1844
Sigit Riyanto, Fajri Matahati Muhammadin 178-200



PEDOMAN TRANSLITERASI

ا	= a	ط	= th
ب	= b	ظ	= zh
ت	= t	ع	= `
ث	= ts	غ	= gh
ج	= j	ف	= f
ح	= <u>h</u>	ق	= q
خ	= kh	ك	= k
د	= d	ل	= l
ذ	= dz	م	= m
ر	= r	ن	= n
ز	= z	و	= w
س	= s	هـ	= h
ش	= sy	ء	= `
ص	= sh	ي	= y
ض	= dl		

Untuk madd dan diftong

â	= a panjang	أَوْ	= aw
î	= i panjang	أَيَّ	= ay
û	= u panjang	إِي	= iy



al-Ihkam: Jurnal Hukum dan Pranata Sosial, 14 (1), 2019: 1-26
ISSN: 1907-591X, E-ISSN: 2442-3084
DOI: <http://doi.org/10.19105/al-ihkam.v14i1.1844>

Highlighting Intrinsic Objectives of Bull Race Culture Based on *Maqâshid al-Syarî'ah* Kaleidoscope

Ainol Yaqin

*Post-Graduate Universitas Islam Negeri Sunan Ampel Surabaya,
Jl. Ahmad Yani 117 Surabaya-60237
Email: ainulfairus@gmail.com*

Rizka Ahmadi

The Australian National University, Canberra ACT 2600, Australia

Article history: Received: 7 Agustus 2018, Accepted: 30 Juni 2019, Published: 9 Juli 2019

Abstract:

This article is to reveal the intrinsic objectives and values of Bull Race culture. Basically, every culture must contain a purpose forecasted by the first initiator. Therefore, it tries to analyze the culture through Islamic Law by using the theories of 'urf and *maqâshid al-syarî'ah* as the approach. The historical data shows that the intrinsic purpose of the culture is to create prosperity by increasing people's income, especially in crop production. Besides, this culture also gives additional income to the cow's livestock. As the result, Bull Race culture really gives great benefit to the society. The dry field becomes fertile and the crop production gets much more successful. Furthermore, the income of cow also increases significantly because the local cows are healthy and fat with high quality meat. Meanwhile, the noble values from the Bull Race culture are: hard working, cooperative, competitive, discipline, sportive. Considering the intrinsic objectives and cultural values, it concludes that the culture of Bull Race is not contradictory with the Islamic rules. In fact, it is relevant with the *maqasidh al-syari'ah* providing that it neither hurts the animals (cows) nor contains gambling and any other immoralities.

Keywords:

Bull Race; Culture; 'Urf; Maqâshid al-Syarî'ah

Author correspondence email: ainulfairus@gmail.com

Available online at: <http://ejournal.iainmadura.ac.id/index.php/alihkam/>

Copyright (c) 2019 by al-ihkam. All Right Reserved



Abstrak:

Artikel ini adalah untuk mengungkap tujuan dan nilai intrinsik budaya kerapan sapi. Pada dasarnya, tiap budaya harus mengandung tujuan yang diramalkan oleh perintis pertama. Artikel ini mencoba menganalisis budaya kerapan sapi dalam Hukum Islam dengan menggunakan pendekatan teori *'urf* dan *maqâshid al-syarî'ah*. Data historis menunjukkan bahwa tujuan intrinsik budaya kerapan sapi adalah untuk menciptakan kemakmuran dengan meningkatkan pendapatan masyarakat, terutama dalam produksi tanaman. Selain itu, budaya ini juga memberikan penghasilan tambahan untuk ternak sapi. Hasilnya, budaya kerapan sapi telah memberi manfaat besar bagi masyarakat. Lahan kering menjadi subur dan produksi tanaman menjadi jauh lebih sukses. Selain itu, pendapatan dari ternak sapi juga meningkat secara signifikan karena sapi lokal sehat dan gemuk dengan daging berkualitas tinggi. Sementara itu, nilai-nilai luhur dari budaya kerapan sapi adalah: kerja keras, koperasi, kompetitif, disiplin, sportif. Dengan mempertimbangkan tujuan intrinsik dan nilai-nilai budaya, disimpulkan bahwa budaya kerapan sapi tidak bertentangan dengan aturan Islam. Bahkan, relevan dengan maqashid al-syarî'ah asalkan tidak menyakiti binatang (sapi) atau mengandung perjudian dan amoralitas lainnya.

Kata Kunci:

Kerapan Sapi; Budaya; 'Urf; Maqâshid al-Syarî'ah

Introduction

The Bull Race is a distinctive and original culture of Madura.¹ It could not be found in other regions. In the past, Madura people used

¹Culture is commonly defined as mind and the work of human. Koentjaraningrat, *Kebudayaan, Mentalitet dan Pembangunan* (Jakarta: Gramedia, 1974), 11. Raymond Williams defines culture into three scopes. First: culture can be used to refer to a general process of intellectual development, spiritual, and aesthetic. Second, culture can be understood as a particular way of life of society, period, and a particular group. Third, culture is also referred as works and intellectual practices, especially artistic activity. John Storey. Translated by Elli el Fajri. *Teori Budaya dan Budaya Pop, Memetakan Lanskap Konseptual Cultural Studies* (Yogyakarta: Qalam, 2004), 2. The three scopes above illustrate that the cultural sphere has a very broad sense. Meanwhile,

to hold Bull Race after annual harvest season. The culture that becomes the pride of Madura community cannot be separated from agriculture, especially in terms of plowing and cultivating field using a pair of cows, because the origin of the Bull Race is intended to increase crop production of the society.

Historically, Sultanate of Sumenep in the XV century (1561 AD) was led by a wise king who always cared of his people and assured them to live safely in prosperous condition. He was Syaikh Ahmad Baidhawi, popular with the nickname Katandur Prince, who was enthroned at the Sumenep palace. He was clever in taking lessons from previous kings to make everything perfect. By reason of that, he liked to consult with clever people in achieving the dreams to create sufficient livelihoods so that people could meet their daily needs. At first, he changed the farming methods considering that it was the cause of minimum crop production. The old farming tool, which was stone, was also replaced by tools made from bamboo and pulled by a pair of cows.²

It was told that he received a mandate from Sunan Kudus to spread Islam in Madura. To make the mission successful, in addition to master Islamic teachings, he equipped himself with knowledge on how to grow crops. For this reason, he was given two corn cobs to plant after arriving at the destination. Strangely, after the plant, the corn cobs grew quickly so that it could be harvested in less than two days. Seeing that miracle, many people were amazed and wanted to learn on how to grow the corn. The Prince took this opportunity very much well to preach Islamic teachings in the midst of society. Before he embedded the stick into the field, people were recommended to say, *bismillahirrahmarairrah*.

They were taught to begin their activities by mentioning the name of the Allah who is Merciful and Blessing. Then, he recommended them to read *syahâdataini* (two points of Islamic confession) before planting the first seed to the field. The confession is intended to testify that there is no god but Allah Almighty and testify

Peter L. Berger defines culture as the totality of human products, whether material product or not. Peter L. Berger, *Langit Suci Agama sebagai Realitas Sosial* trans. Hartono. (Jakarta: LP3ES, 1994), 8.

²Edy Setiawan, *Menjaga Kesenian Tradisional* (Tnp: SIC, 2004), 80; Moh. Noer Dewo, *Kerapan Sapi* (Jakarta: T. KINTA, 1983), 15.

that the Prophet Muhammad is His Messengers.³ From this, we can understand that the strategy in preaching requires knowledge of the basic needs of the targetted community so that the call to the Islamic path could be well received.

This article aims to analyze intrinsic values and objectives of the Bull Race by tracing the initial history then observing it through a kaleidoscope of *maqâshid al-syarî'ah*. The focuses of this discussion are the values of Bull Race; the objectives of it; the relationship between the *maqâshid al-syarî'ah* formulas and the intrinsic objectives of Bull Race culture; and the rules of *maqâshid al-syarî'ah* as an *istinbâth* reference of Islamic law in portraying the Bull Race.

The Values of The Bull Race Culture

The Bull Race or *Kerapan Sapi* consists of two words; *kerapan* (race) and *sapi* (bull), so the Bull Race or *Kerapan Sapi* simply means the race of bull. There are two versions on the origin of *Kerapan Sapi* term. The first version stated that it is from the word *kerap* or *kirap* which means leaving and being released simultaneously. The second version said that *Kerapan Sapi* is from Arabic words; *gurâbah* which means close friendship. However, *kerapan* does not always use cows or bull to contest. Sometimes, it changes to buffalo as happened in Kangean Island and popular as *mamajir*.⁴

In a deeper analysis, some noble values of Bull Race could be uncovered and those could also be used as a guide in navigating the community life. These values include:

1. Hard work; this value is reflected in the process of selecting the bull to join the competition. It must be the strong, tough and agile bull and those criteria could be well gained and developed by hard work of the owners. They need to train the bull very well patiently and persistently. It also needs the strong belief of owners that the bulls can run fast on the race and become the champion.
2. Cooperative; this value is clear from process of the game of race. The Bull Race involves many parties who work hand

³Soegianto, *Kepercayaan, Magik, dan Tradisi dalam Masyarakat Madura* (Jember: Penerbit Kapal Kuda, 2003), 157.

⁴Tim Penyusun, *Ensiklopedi Pamekasan* (Yogyakarta: PT Intan Sejati, 2010), 163.

in hand. They are the owners, jockeys, catchers and several other members who actively participate and strive for the victory in the race. Without cooperation, it is impossible to hold this kind of game properly.

3. Competitive; this value can be seen in the process of the race. According to Koentjaningkat, competition is an effort made to outperform or defeat other efforts. In this case, the participants will try as good as possible to make their bulls run faster so they could reach the finish line earlier than other opponents. Conditions like this provoke a competitive mentality among participants.
4. Orderliness; this value is not only obeyed by the contestants, but also the supporters in order to make the race run smoothly. For that reason, participants must be patient in waiting for their turn to race their bulls. Besides, all supporters must obey the rules and are strictly forbidden to do mischief or any damageous and disturbing actions.
5. Sportsmanship; it is reflected in the attitude of the players (jockey) to play fairly, not cheating during the race and be broad minded in the lose.⁵

The Intrinsic Purpose of Bull Race in the Kaleidoscope of *Maqâshid al-Syarîah*

Basically, every culture has certain noble goals that each initiator expected to achieve. The Bull Race culture, which was hereditarily spread widely in Madura island until now, is not an exception. At least, there found three kinds of intrinsic objectives of this culture as follow:

a. Increasing Harvest Production

Earlier, the main livelihoods of the Sumenep people relied on the results of farming. They used very simple agricultural tools which were made of stone. As a result, the field they cultivated was not so fertile so that they failed to make the crop production plentiful. Most of them lived in poor conditions and unable to meet their daily needs

⁵Herry Lisbijanto, *Kerapan Sapi* (Yogyakarta: Graha Ilmu, 2013), 35; Tim penyusun, *Ensiklopedi Pamekasan*, 165.

like foods, clothing, and shelter. Seeing that condition, Syaikh Ahmad Baidhawi (Prince Katandur/1561 AD) sought to find a solution in coping with the less successful crop production. After some discussion, the prince found a brilliant idea to replace a stone-made farming tool with another tool made of bamboo, so that it could be pulled by two (a pair of) cows. The tool is later known as "*nanggala*" and functions to break up the soil's surface so that the seeds can be easily planted and grow up well. In addition, it is also useful to reduce the farmer's problems in cultivating their agricultural land.⁶

Furthermore, the prince developed the idea creatively and innovatively in order to increase the food production as people expected. Finally, he rediscovered the brilliant idea to attract public attention by arranging a game that in a form of Bull Race. The dry field became the race arena. Meanwhile, a pair of bulls contested in the game must be paired with plows, which are generally used to break up the soil's surface. With the event of the race, the community is expected not to neglect their daily activities as a farmer. It is also wished that the event could trigger enthusiasm and passion for agriculture and farming works.⁷ This idea was very well welcomed and received. That was why, after the harvest, they behold this celebration enthusiastically.

Moreover, it turned out that the prince's brilliant idea resulted very good responses. Peoples' crops were increasing because the dry fields and rice fields got more fertile since the soils' cavities were widened using a better plowing tool. Additionally, the rainfall got better because of the reforestation in the field which had just been scrubbed. Those all factors made people more enthusiastic about processing and plowing their agricultural land in order to obtain satisfactory yields.⁸ Although the main purpose of the selection is to produce fast running one, the physical health and appearance are also

⁶Edy Setiawan, *Menjaga Kesenian Tradisional*, 80.

⁷*Ibid.* 81.

⁸Moh. Noer Dewo, *Kerapan Sapi*, hlm. 24. Madurese in general earn money through livelihoods in the agriculture and livestock sectors, even though the land conditions in Madura are very barren. If the percentage between 70% and 80% of the Madurese population meets their needs by relying on agricultural activities. Huub. de Jonge, *Madura dalam Empat Zaman: Pedagang, Perkembangan Ekonomi, dan Islam* (Jakarta: PT Gramedia, 1989), 35.

considerable since the factors also affect on producing cattles with good quality meat to eat. Therefore, until now, Maduresse cattle are widely known as that of very soft and delicate meat fibers.⁹

b. Increasing Yield of Cattle

The Bull Race is also beneficial in terms of increasing the yield of cattle. It is because the more the Bull Race and people enthusiasm are widespread, the more people want to grow the cattle. They would give the best effort to grow the good cattle and make it fat, healthy, and full of good quality meat. This brings the positive effect as the livelihoods of people at the sector of the cattle farming would significantly increase. They become much more enthusiastic in cattle farming particularly at the aim to produce good cows for race or for farming. Moreover, the Madurese cattles are not only attractive or marketable among the domestic buyers, but also from that of overseas.

c. Tightening the Relationship (*Silaturrahmi*)

The Bull Race culture held after each harvest can be an inviting magnet in gathering people. They came from various corners of the village to witness this prestigious event. Even, Maduresse who work overseas often went back home to to watch it. This is a moment for them to build and tighten a good relationship (*silaturrahmi*). They greet, interact and stay in touch each other. Therefore, the bond of kinship is getting closer and stronger among people especially those who live far away. The social relations coming from the Bull Race event is sustainable until now.¹⁰

Before the Bull Race culture is examined through *maqsaâhid al-syarî'ah* approach, it is necessary to describe the views of *'ushul fiqh ulama* (Islamic jurists) regarding to this term. The Islamic jurists define *maqâshid al-syarî'ah* as "the meanings and objectives considered by Islamic laws in all laws or in large part of the laws for seeking the benefit of humanity". Another term of *maqâshid al-syarî'ah* is *al-*

⁹Moh. Noer Dewo, *Kerapan Sapi*, 24; Edy Setiawan, *Menjaga Kesenian Tradisional*, 83.

¹⁰Herry Lisbijanto, *Kerapan Sapi* (Yogyakarta: Graha Ilmu, 2013), 37.

asrâr/the secrets behind every law that is ruled.¹¹ Related to this, Imam al-Ghazilî mentioned that *mashlahah* (public benefits) is principally any action that brings benefits and takes any pernicious things away. However, the last mentioned definition is not theoretically used in this paper. What is meant by *mashlahah*, in this case, is a protection against the objectives of *syara'* which consists of five types, namely protecting religion and faith, protecting souls, protecting minds, protecting lineage, and protecting wealth. Therefore, every act containing protection on those five foundations is called *mashlahah*. On the contrary, every action that injures those five foundations is called *mafsadah* and every act rejects the *mafsadah* automatically becomes a *mashlahah*.¹²

Ushul Fiqh scholars share the opinion that every *syari'ah* law must be intended for people benefits, either it is an immediate *mashlahah* or a *mashlahah* to realize later on. Sometimes, *mashlahah* come in the forms of benefits that reject destructive and harmful actions for people. Therefore, every *mujtahid* (Muslim jurist) must pay attention to *maqâshid al-syari'ah* when understanding the divine texts (*nash*) and formulating the law to make sure the law they produce contains *mashlahah* for mankind.¹³ Mastery of *maqâshid al-syari'ah* for *mujtahid* is very necessary so that they could avoid misunderstanding

¹¹Wahbah aL-Zuhayrî, *Ushûl al-Fiqh al-Islâmî*, Vol. II (Beirut: Dâr al-Fikr, 2009), 307; 'Allâl al-Fâsî, *Maqâshid al-Syari'ah al-Islâmiyah wa Makârimuhâ* (Riyadh: Dâr al-gharab al-Islâmî, 1993), 7. According to Ibn 'Asyûr, examining *maqâshid al-syari'ah* from the universal and specific aspects come into two parts, namely *maqâshid al-syari'ah al-'ammâh* and *maqâshid al-syari'ah al-khâssâh*. The former contains meanings or wisdom considered by *syâri'* (God) in all or most of the provisions of the *shari'ah* and not specific to the laws of *shari'ah* (*fiqh*) only. Included in this category are the characteristics of *shari'ah*, universal goals, wisdom as the center of *syara'*s attention and wisdom in several laws, even if not in the whole law. Meanwhile, the later contains ways that *syara'* desires in order to maintain useful goals or general benefit for humans in the movements of their actions. Included in this category are every lesson taken into account in the legal observance of human actions and actions, such as the purpose of strengthening guarantees in the *rahn* contract, enforcement of the household order in the marriage contract, the removal of on-going *dharurat* in divorce and so on. Muhammad Thâhir Ibn 'Âsyûr, *Maqâshid al-Syari'ah al-Islâmiyah* (Yordan: Dâr al-Nafâ'is, 2001), 251.

¹²Muhammad ibn Muhammad al-Ghazâlî, *al-Mustashfâ min 'ilmi al-Ushûl*, Vol. I (Beirut: Dâr al-Fikr, 2009), 139.

¹³Wahbah al-Zuhailî, *Ushûl al-Fiqh al-Islâmî*, Vol. II, 307.

in revealing the spirit of *al-tasyrî'* behind verbal *nash* (texts). This is particularly important when there found a contradiction between or among texts (*nash*) in which *maqâshid al-syarî'ah* can compromise it. This could be done through, among others, choosing and implementing the *nash* which is more relevant to the *mashlahah* in a given space and time.

Imam Ash-Syâthibî (an expert of Mâlikî *ushul fiqh*) asserted that a *mukallaf* can reach happiness, pleasure, and blessing both in the world and in the hereafter when the five objectives above are enacted and maintained. Additionally, based on the results of *istiqrâ'* (induction) on some *nash* in the Qur'an and hadith, *Ushul fiqh* scholars infer that the five basic objectives are the protection of religion, soul, mind, lineage, and wealth. In short, according to Wahbah al-Zuhail's, Islamic law is ordered to preserve the natural system and to protect humanity so there would not be any forms of disobedience. This is through doing actions that reach *mashlahah* and avoid *mafsadat*.¹⁴ Therefore, every human is obligated to care of these five objectives and for the sake of their satisfaction, the law is formulated in the form of orders, prohibitions, and permissions that people need to obey and carry them out.

Therefore, in order to maintain and protect these five main objectives, the *'ushul fiqh* scholars divide the *maqâshid al-syarî'ah* aspects based on the quality of their needs into three levels, namely *ad-dharûriyât* (primary *mashlahah*), *al-hâjîyât* (secondary *mashlahah*) and *at-tahsîniyât* (tertiary *mashlahah*).¹⁵

¹⁴al-Zuhailî, *Ushûl al-Fiqh al-Islâmî*, Vol. II, 309.

¹⁵Abû Ishâq al-Syâthibî, *al-Muwâfaqât fî Ushûl al-Syarî'ah*, Vol. II, (Saudi Arabia: Dâr Ibn 'Affân, 1997), 17; al-Ghazâlî, *al-Mustashfâ min 'ilmi al-Ushûl*, Vol. I, 139; 'Alî Ibn Muhammad al-Âmidî, *al-Ihkâm fî Ushûl al-Ahkâm*, Vol. III (Riyadh: Dâr al-Shamî'î, 2003), 343; Muhammad Ibn 'Alî Ibn Âdam Mûsa, *al-Jâlis al-Shâlih al-Nâfi'* (t.tp: Maktabah Ibn Taimiyyah, 1998), 411; al-Bannânî, *Hâsiyyah 'alâ syarhi al-Jalâl al-Mahallî*, Vol. II (Beirut: Dâr al-Fikr, t.th), 280; Hasan Ibn Muhammad Ibn Mahmûd al-'Athhâr, *Hâsiyyah al-'Athhâr 'alâ Jam'i al-Jawâmi'*, Vol. II (Beirut: Dâr al-Kutub al-Ilmiyah, t.t), 322; Jalâluddîn al-Suyûthî, *Syarh al-Kaukab al-Sâthî'*, Vol. II (Kairo: Maktabah al-Îmân, 2000), 246; Muhammad Ibn Mahmûd Ibn Ahmad al-Bâbartî, *al-Rudûd wa al-Nuqûd*, Vol. II, (Riyadh: Mahtabah al-Rusy, 2005), 542; 'Alî Ibn Sulaimân al-Mardâwî al-Hanbalî, *al-Tahbîr Syarh al-Tahrîr fî Ushûl al-Fiqh*, Vol. VII (Riyadh: Maktabah al-Rusy, 2000), 3379; Muhammad Ibn 'Alî al-Syaukânî, *Irsyâd al-Fuhûl ilâ Tahqîq al-Haq min 'Ilmi al-Ushûl*, Vol. II (Riyadh: Dâr al-Fadhîlah, 2000), 900; Mahmûd Ibn

- a) *ad-dharûriyât* is the ultimate benefit concerning with the stability of human life, particularly related to religion and world affairs. The priority scale of this *maqâshid* level is very high since if it is not maintained, it can cause chaos and disorder of human life as well as damage (*fasad*) in the world. Also, it perhaps even affects on the disappearance of pleasure, safety, and goodness in the hereafter. *Maqâshid* in this level includes protection of religion, soul, mind, lineage, and wealth. This is the top level of *maqâshid*. According to al-Zuhail, the establishment of religion and the world rests on these five things and if maintained, it will result in the stability of both community and personal life of the human.¹⁶

In carrying out those points of *maqâshid*, the Islamic law sets three aspects; aspects of *ijâd* (manifestation/formation), *tahqîq* (realization) and aspects of *baqâ* (eternity). The first aspect is constructive, active and aims to preserve the existence of the five main objectives. Meanwhile, the second aspect comes in the form of negative, passive maintenance and aiming to avoid any nothingness or nonexistence. In the realization of religion, *syari'ah* obliged all Muslims to uphold five pillars of Islam. Meanwhile, for the sake of preserving religion, it contains *jihad*, punishment for the destroyer of religion and sentence for apostates. As for the preservation and embodiment of the soul is through the *Islamic* regulation of marriage which aims to maintain human life with childbirth. Next on, in order to maintain the existence of soul, *syara'* requires the consumption of

'Abdurrahmân Ibn Ahmad al-Ashfahânî, *Bayân al-Mukhtashar Syarh Mukhtashar Ibn al-Hâjib*, Vol. III (Jeddah: Dâr al-Madani, 1987), 118; Muhammad Ibn Muhammad Ibn 'Abdurrahmân, populer dengan sebutan Ibnu Imâm al-Kâmiliyyah, *Taisîr al-Wushûl ilâ Minhâj al-Ushûl min al-Ma'qûl wa al-Manqûl*, Vol. V, (Kairo: al-Fârûq al-Hadîtsah, 2002), 283; Sulaimân Ibn 'Abdulqawî Ibn 'Abdulkarîm al-Thûfî, *Syarh Mukhtashar al-Raudhah*, Vol. III (Beirut: Mu`assasah al-Risâlah, 1990), 206; Sa'id al-Din al-Taftâzânî, *Syarh Mukhtashar al-Muntahâ al-Ushûlî*, Vol. III (Beirut: Dâr al-Kutub al-Ilmiyah, 2004), 420; al-Husain Ibn Rayîq al-Mâlikî, *Lubâb al-Mahshûl fi 'Ilmi al-Ushûl*, Vol. II (t.t. : Dâr al-Buhûts lidirâsah al-Islâmiyah, 2001), 455.

¹⁶Wahbah al-Zuhailî, *Ushûl al-Fiqh al-Islâmî*, Vol. II, 310.

food and drink as a form of *dharuri* (basic) needs and also legalizes the punishment of *qishas*, *diyat* and *kaffarat* for the killers. Likewise, *syara'* also allows human to do everything to develop logical reasoning by absorbing knowledge, technology and art in order to maintain its function to produce many benefits. To protect the logical reasoning ('*aql*) of human, *syara'* forbids anything that potentially damage, reduce and weaken it. Besides that, *Syara'* also regulates wary effect sentences for those who consume *khmar* and the likes. Likewise, the application of *syariah* about marriage, the prohibition of adultery and the accusation of *zina* aim to preserve the progeny, while its objective is to give punishment for *zina* doer and *qadhaf*. For the objective of wealth protection to avoid illegal acquisition, theft is forbidden and the thief is automatically punished. Fraud, betrayal, usury and the illegal acquisition of wealth are also forbidden. While *syara'* requires people to earn fortune and all forms of transactions that do not contradict with *syari'ah*, this legalization is intended to keep assets in terms of *îjâd* and *tahqîq*.

- b) *al-Hâjiyât* is the type of benefit that human need for ease and elimination of their narrowness, hardship and destitution. The measurement of this level of *maqâshid* can be known if the thing in this category could not be maintained, although it does not result in damaging the human life system. However, it can lead to narrowness and difficulty in living life. The whole *Islamic Syari'ah* aims at eliminating narrowness in order to facilitate and lighten humanity in tracing the paths of life. This type of *maqâshid* is at the second priority after *ad-dlarûriyât*.
- c) *al-Tahsîniyât* or *al-Kamâliyât* is the benefits formed by the demands of *murû'ah*, which is intended to guide good customs and noble ethics. The absence of this category would not suffer the system of human life, nor does it cause narrowness and distress. This kind of *maqâshid* is not enforced. It just affects on social condition because

without this type of *maqashid*, it would be seen as not good enough by common sense.

Based on the description of the *maqâshid al-syarî'ah* above, the Bull Race culture is in line with *maqâshid al-syarî'ah* spirit particularly in the *dharûriyyât* level from *îjâd* and *tahqîq al-mâl*. This is closely related to a noble goal of the culture which is to improve the agricultural products of the community, breed quality cows and as hold event for building a relationship. Likewise, it can be categorized into a *hâjjiyât* level because the distinctive culture can relieve the burden on the community to earn a better livelihood in the agricultural sector.

The Principles of *Maqâshid al-Syarî'ah* as An Absolute Basic of Islamic law *Istinbath*

To make it easier in making *maqâshid al-syarî'ah* as the basic of Islamic law *istinbath* (decision making process), al-Jilâlî al-Marînî formed the principles derived from the reviews of *maqâshid al-syarî'ah* by Imam asy-Syâthibî. According to him, the *maqâshid al-syarî'ah* of Imam asy-Syâthibî could be classified into three categories, namely the rules relating to *maqâshid*, the rules relating to *mashlahah* and *mafsadah*, and the rules relating to legal reasons of Islamic law.

The first category emphasizes the embodiment of welfare as a vital element of the formulation of Islamic law. The principles included in this section are:

تكاليف الشريعة ترجع الى حفظ مقاصدها في الخلق

Meaning: *Islamic law intends for the welfare of beings*

Every *maqâshidiyûn* agrees that behind every law, there must be a goal to carry on, namely bringing *maslahah*/benefit and taking away *mudharat*/*mafsadat*/danger. They are also in one tone dealing with the division of *maqâshid al-syarî'ah* into three parts. Imam asy-Syâthibî, for example, said that in sum, the purpose of Islamic law is in three parts, namely *ad-dharûriyat*, *al-hâjjiyat* and *al-tahsîniyat*.¹⁷ In line with asy-Syâthibî', Imam al-Ghazâlî classified the *maqâshid al-syarî'ah* in terms of

¹⁷asy-Syâthibî, *al-Muwâfaqât fi Ushûl al-Syarî'ah*, Vol. II, 17.

the need level and clarity in three types, namely *mashlahah* in the *dharûriyat* level, *mashlahah* in the *hâjiyat* level and *mashlahah* in the level of *tahsîniyat* or *tazyînat*.¹⁸

Meanwhile, Ibn 'Âsyûr (a Tunisian contemporary Islamic thinker) divided *maslahah* based on its influence as a pillar of the affairs into three levels:

a) *Mashlahah dharûriyât*, which is *mashlahah* in the level of *dharurat* (basic needs). It needs to carry out this kind of *mashlahah* for the constellation of human at general because its absence means instability and damaged or destructed human life. The 'destructed' word that Ibnu 'Âsyûr mentioned does not mean destruction and obliteration, but the condition in which human behave likes animals, which is not preferable and desired by *Syâri'* (essential *Syari'ah* maker; Allah SWT and the Messenger).¹⁹ Included of this *maslahah* are protection of religion, soul, mind, lineage, and wealth. These five objectives are well considered by all religions for the welfare of human race. *al-Ushûl al-khamsah* is definitely identified as a goal of *syara'* not only from one postulate, but also in some postulates. Therefore, it is fair to say that *mashlahah ad-dharûriyât* is based on the *qath'î* postulate at the same level at *mutâwatir maknawî*.²⁰ This *Mashlahah ad-dharûriyât* is originally extracted from the 12nd verse of *Surah al-Mumtahanah*:

يَا أَيُّهَا النَّبِيُّ إِذَا جَاءَكَ الْمُؤْمِنَاتُ يُبَايِعْنَكَ عَلَىٰ أَنْ لَا يُشْرِكْنَ بِاللَّهِ شَيْئًا وَلَا يَسْرِقْنَ
وَلَا يَزْنِينَ وَلَا يَقْتُلْنَ أَوْلَادَهُنَّ وَلَا يَأْتِينَ بِبُهْتَانٍ يَفْتَرِينَهُ بَيْنَ أَيْدِيهِنَّ وَأَرْجُلِهِنَّ

Meaning: "O Prophet, when the believing women come to you pledging to you that they will not associate anything with Allah, nor will they steal, nor will they commit unlawful sexual intercourse, nor will they kill their children, nor will they bring forth a slander they have invented between their arms and legs..."

¹⁸al-Ghazâlî, *al-Mustashfâ min 'ilmi al-Ushûl*, Vol. I, 139.

¹⁹Ibn 'Âsyûr, *Maqâsid al-Syari'ah al-Islâmiyah*, 300.

²⁰al-Ghazâlî, *al-Mustashfâ min 'Ilmi al-Ushûl*, Vol. I, 418; asy-Syâthibî, *al-Muwâfaqât fî Ushûl al-Syari'ah*, Vol. I, 34-39; al-Taftâzânî, *Syarh Mukhtashar al-Muntahâ al-Ushûlî*, Vol. III, 420.

Relating to this, Imam asy-Syâthibî stated that there are two aspects of protection for *mashlahah dharûriyât*. First is the establishment of the principles and the main points of the *mashlahah* and *second* is the rejection of the causes of anything which could damage them (*maslahah*).²¹ Meanwhile, for Ibnu Âsyûr, the protection of the *mashlahah kulliyât/ dharûriyât* aims to keep people in a good condition of the people, and more importantly protection of the people as a whole. Religious protection means keeping the religion safe from anything that possibly damage the faith and all activities relating to the religion itself. This kind of protection, in terms of the *people* as a whole, means to reject anything that potentially corrupt the definite basis (*qath'î*) religion.

Meanwhile, the life protection is in the form of maintaining personal spirit and human being as a whole so that they could be safe from any possible damage. According to him, therefore, the punishment of *qishash* is the weakest step in life protection and therefore ineffective because it can cause other damages. The most important form of life protection, for him, is to keep it safe before any damage comes, such as doing preventive action through fighting infectious diseases. Another form of life protection is protecting the part of body from any damage, especially the punishment such as the full sentence *diyât* for inadvertently doing criminality.

Later, mind protection is clear from the activities of keeping the human mind safe from damage, chaos and infirmity because if the mind has been contaminated with destructive things, it can result greater damage. As for wealth protection takes the form of preserving human assets from damage or illegally taken.²²

b) *Mashlahah Hâjiyât* is the necessity that people need to fulfill to obtain beneficial things, the regularity of their business in a good way. If this could not be fulfilled, it does not give a bad impact on the existing order. It only causes the situation little bit messier in a disorderliness. The example of this is various problems in *mu'amalah*.²³

²¹asy-Syâthibî, *al-Muwâfaqât fî Ushûl al-Syarî'ah*, Vol. I, 324-325. See also, Muhammad al-Khudharî Bek, *Ushûl al-Fiqh* (Kairo: al-Maktabah al-Tijâriyah al-Kubrâ, 1969), 300.

²²Ibn 'Âsyûr, *Maqâsid al-Syarî'ah al-Islâmiyah*, 303.

²³*Ibid.*, 306.

c) *Mashlahah Tahsîniyât* is a *mashlahah* which completes the life order so that it could guarantee to secure human life and make it elegant in other people' eyes. This factor would be attracting one to invite them get closer to Muslim. Most of *mashlahah* in this type are related to ethical morals or noble values, either it is related to the general things such as closing *aurat* or special things such as the issue of *fithrah* (human nature), caring of beards and so on.²⁴

Based on the concept of *maqâshid al-syarî'ah* of Ibnu Âsyûr, the Bull Race culture is suitable with *mashlahah dharûriyât* (*hifdz al-mâl*), *hâjiyât* and *tahsîniyât* at the same tackle. More specifically, it is in the category of *tahsîniyât* because it is attractive, artistic and entertaining that it could delight the people and make them relax their nerves and muscles after working for months.

المقاصد الضرورية في الشريعة اصل للحاجية و التحسينية

Meaning: *Maqâshid dharûriyat* is the origin of *maqâshid hâjiyat* and *tâhsiniyat*. It is also the determination of Islamic law.

This principle is similar to previous one. It means that *maqâshid ad-dharûriyat* is like the parent of the *maqâshids* at the level below. It is because the stability and survival of human life closely relate to the maintenance and manifestation of the *maqâshid*, while the *maqâshid al-hâjiyat* is around the orbit of *ad-dharûriyat* which serves as a support for the embodiment of the *maqâshid*. The barometer of *maqâshid al-hâjiyat* is to simplify and lighten people in practicing *Shari'ah* and spending the life time. One example is about the existence of *rukhsah* (concession) for the sick not to do fasting until they get recovered. Such provisions can help and maintain religion so that the pillars of Islam (fasting) can still be well enforced. Meanwhile, the *maqâshid at-tahsîniyat* serves as a supplement for *dharûriyat* and *hâjiyat*. Therefore, ignoring or neglecting this *dhâruriyat* can result the collapse of *hâjiyat* and *tahsîniyat*. However, ignoring *hâjiyat* and *tahsîniyat* does not affect to the *dharûriyat*.

In this case, asy-Syâtibî stated that if *tahsîniyat* and *hâjiyat* are broken, chaotic, and injured, it will destroy the *dhâruriyat* as well. This opinion is based on several following arguments,

²⁴*Ibid.*, 307.

a. *dharûriyat*, *hâjiyat* and *tahsîniyat* are interrelated, so that the cancellation of the lower level of *maqâshid* would cause the destruction of the higher *maqâshid*,

b. *tahsîniyah*, *hâjiyat* and *dharûriyat* are like a *sunnah* case before a compulsory case,

c. *hâjiyat* and *tahsîniyat* accommodation are comparable to *dharûriyat*. It would be possible to carry out *maqâshid dharûriyat* if it is well equipped with *hâjiyat* and *tahsîniyat* so that *mukallaf* (persons who are obliged to act in accordance with Allah's orders and to perform worships) can practice Islamic law and live based on their ability and leniency, without any narrowness and distress. Besides that, it is also in line with traditional customs and noble characters.

d. *hâjiyat* and *tahsîniyat* function as support for *dharûriyat*. Thus, paying attention to *hâjiyat* and *tahsîniyat* is an urgent action in order to implement the *dharûriyat* entirely.²⁵

المقصد الشرعي من وضع الشريعة اخراج المكلف عن داعية هواه

Meaning: The purpose of syara' in establishing the law is to save the mukallaf from the lust impulse.

This principle underlies the necessity of Muslims to submit to obedience to the Islamic Shari'a. It is based on several following arguments:

1. *Sharîh Nash* (clear text) shows the obligation for human being as His servants to worship Allah the Almighty by enlivening all His commands and avoiding all His prohibitions. Disobey Islamic rules would cause any damage (*mafsadah*) as clear from activities like blindly following the desire and worshipping other than Allah.
2. Any actions violating Islamic Shari'ah rules must be considered blameworthy. It is very clearly stated in a number of Qur'anic verses about the disgrace of those who blindly follow their desire and stay away from Allah. They are also threatened with painful punishment.
3. Experiments and people customs illustrate that *mashlahah* concerns the issue of religion. It is also clear that the world

²⁵ al-Jilâlî al-Marînî, *al-Qawâ'id al-Ushûliyah 'inda al-Imâm al-Syâthibî* (Kairo: Dâr Ibn 'Affân, 2002), 266; asy-Syâthibî, *al-Muwâfaqât fi Ushûl al-Syarî'ah*, Vol. II, 38.

will not 'permit' or compromise any bad action solely based on desire.²⁶ In this context, the culture initiated by Prince Katandhur did not deviate from the Islamic sharia. In fact, it is consistent with the values and general principles of the Qur'an and al-Sunnah through the noble goals it contains.

قصد الشارع من المكلف ان يكون قصده في العمل موافقا لقصده في التشريع

Meaning: The purpose of Syâri 'in determining the law is to make the act of mukallaf in line with the aim of the Islamic shari'ah

The aim of Islamic law is for the benefits of human being. Therefore, they must think of the words and deeds they do whether in line and not violating the aim of *syara'*.²⁷

موافقة العمل لمقتضى المقاصد الاصلية يستلزم صحته و سلامته مطلقا

Meaning: Any actions accordance with the purpose of *maqâshid al-`ashliyah* must be considered valid and absolutely safe.

This principle implied that if the *mukallaf* have done deeds and spoken in accordance with the *maqâshid `al-ashliyah*, individually or collectively, they can be considered legitimate and safe. One example is someone who has performed prayers in accordance with the manner regulated by *syara'* while aiming it to carry out the divine command, then the prayer is legitimated and sacred (safe from any defect).²⁸ Ash-Syâthibî relied this principle based on two basics, namely the purpose of *Syâri'* 'in giving the law to the *mukallaf* so their actions are in line with the Islamic Shari'ah, and the purpose of Islamic law is to save the *mukallaf* from any lust. Thus, every act of *mukallaf* should be in line with the purpose of *maqâshid al-`ashliyah* and in accordance with the objectives of *Syâri'* 'to save them from any the lust so that they are considered themselves slaves to Allah swt.²⁹

The second category concerns about the barometer and the standards for determining *mashlahah* and *mafsadah*. The principles included in this category are as follow:

²⁶al-Jilâlî al-Marîni, *al-Qawâ'id al-Ushûliyah 'inda al-Imâm al-Syâthibî*, 283; al-Syâthibî, *al-Muwâfaqât fi Ushûl al-Syarî'ah*, Juz II, 289.

²⁷al-Jilâlî al-Marîni, *al-Qawâ'id al-Ushûliyah 'inda al-Imâm al-Syâthibî*, 265.

²⁸*Ibid.*, 289.

²⁹al-Syâthibî, *al-Muwâfaqât fi Ushûl al-Syarî'ah*, Vol. II, 328.

المصالح المجتلبة شرعا والمفاسد المستدفة انما تعتبر من حيث تقام الحياة الدنيا للحياة الأخرى لا من حيث أهواء النفوس في جلب معالمها العادية او درء مفسدها العادية

Meaning: Every action with *mashlahah* or those that reject negative impact (*mudharat*) can be a consideration of Islamic law as long as it could uphold the worldliness for the sake of the afterlife's prosperity, not solely based on the impulse of lust.

This principle shows that there found a strong connection between the world and the hereafter just like a causality law. A wordly action with welfare becomes media for achieving *mashlahah* in the hereafter. Therefore, Allah arranges the Islamic rule perfectly so that people could obtain the benefit of the world as well as the hereafter. Therefore, the standard for determining *mashlahah* and *mafsadah* must be returned to *syara'*, not just be based on the lust. This is particularly because Islamic shari'a is characterized by a comprehensive orientation to the happiness of life in the world and the hereafter.

Mashlahah and *mafsadah* that *syara'* examined are those useful in both enforcing the wordly life and becoming a means of reaching hereafter blessings. Therefore, wordly *mashlahah* which has no connection to hereafter *mashlahah* is not considered by Shara', such as those solely coming from the lust.³⁰ From here, the Bull Race culture, considering its intrinsic objectives, becomes a means of achieving happiness in the world and the hereafter. When someone has fulfilled their basic needs including clothing, shelter, and food, he/she would no longer be evicted by worldliness and and therefore able to perform individual and social worships very well.

الامر في المصالح مطرد مطلقا في كليات الشريعة و جزئياتها

Meaning: *Mashlahah* is absolutely valid in the Islamic Shari'ah whether it is universal and partial

One of the characteristics of Islamic Shari'ah is universality that it could be applied in any place, region, and country from diverse

³⁰al-Jilâlî al-Marîni, *al-Qawâ'id al-Ushûliyah 'inda al-Imâm al-Syâthibî*, 297; al-Syâthibî, *al-Muwâfaqât fî Ushûl al-Syarî'ah*, Vol. II, 63.

historical background, customs, ethnic, and languages. It also does not specialize any tribe, and/or any group. Apart from that, Islamic Shari'ah is not limited to certain times or eras. In fact, it is applicable all times.³¹ In short, Islamic Shari'ah is relevant in any place and time. Therefore, the Islamic Shari'a contains universal *maqâshid* / goals in nature and not confined to a certain place and time.³²

الطاعة او المعصية تعظم بحسب عظم المصلحة او المفسدة الناشئة عنها

Meaning: The barometer of obedience or disobedience is on the *mashlahah* or *mafsadah* that it causes to appear.

This principle means that the level of either *mashlahah* and *mafsadah* is based on the level of either obedience or disobedience it causes to appear. Therefore, *mashlahah* relating to *al-dharûriyat al-khams* has the criteria as the greatest *mashlahah*. On the contrary, every action threatening the main objectives is the biggest *mafsadah*. According to Asy-Syâthibî, this principle comes from the existence of threat and *hadd*/punishment for those who committed to destruct *al-dharûriyat al-khams*, such as doing *kufur*, murder, adultery, drink *khamr* and so on.³³

The third category relates to the classification of laws as *ta'abbudî* and *ta'aqqulî*. The principles in this segment are as follow:

الأصل في العبادات التعبد و في العادات التعقل

Meaning: The origin in the worship is *ta'abbud* (dogmatic), while the problem of culture is rational

Every Islamic law relating to tradition must have 'illat, purpose and wisdom. On the contrary, in term of worship, there is no 'illat and therefore it must be cultural/ dogmatic. Relating to this, asy-Syâthibî mentioned several arguments, those are:

1. *Istiqrâ'* (induction). *Syâri'* requires people to take a *janabah* bath because of release of the semen as well as to break the fasts because intentionally do the release. This applies although semen is considered holy, different from the dirty (*najis*). Similarly, it is obligatory to compensate fasting because of menstruation and

³¹al-Syâthibî, *al-Muwâfaqât fi Ushûl al-Syarî'ah*, Vol. II, 86.

³²al-Jilâlî al-Marîni, *al-Qawâ'id al-Ushûliyah 'inda al-Imâm al-Syâthibî*, 300.

³³al-Jilâlî al-Marîni, *al-Qawâ'id al-Ushûliyah 'inda al-Imâm al-Syâthibî*, 303; al-Syâthibî, *al-Muwâfaqât fi Ushûl al-Syarî'ah*, Vol. II, 511.

childbirth and it does not apply the same to compensate prayers for those who get *syar'i* obstacles. Likewise, this also applies the same for all forms of worship such as fasting, *haji* and so forth that people perform merely as of obedience and submission to obey all the commands of Allah and for the sake of His pleasure.

2. The existence of the postulation about the flexibility in worship shows the limited problem. A good example of it is the special rules for travelers to perform *qashr* or *jam'* prayers and do *ifthâr* (not fasting). This dispensation cannot be applied to the *muqîmîn* (people who do not travel) even though they feel *masyaqqat* (get difficulties and exhaustion).³⁴ Nevertheless, according to ash-Syâthibi, at global, every worship form intended for the goodness of people at the world and hereafter contains 'illat and wisdom, but not every detail of it is logically reachable.

In line with it, Imam al-Qarâfî (684 H; *fiqh* expert of Maliki) stated that a *mujtahid* who formulates the law must first examine the habits widespread in the community so that the law would not eliminate the public benefit. Meanwhile, Imam asy-Syâthibî (790 H; expert of Mâlikî *ushûl fiqh*) and Imam Ibn Qayyim al-Jauziyyah (expert of the Hanbalî *ushûl fiqh*) said that the majority of the *fiqh* jurists "received" the *urf* as legal sources as long as there found no postulate or divine text (*nash*) which explicitly explained the law of a certain problem. Furthermore, Imam Ibn al-Qayyim in his monumental work "*I'lâm al-Muwaqqi'în*" beautifully described that a *mufti* (*fatwa* issuer) and a judge could not release a fatwa and law correctly before comprehending two kinds of things. *First* is to understand the reality, explore the essence of the phenomenon and observe the indications as well as the surrounding signs. *Second* is to understand the law of Allah Almighty affirmed in his book (Al-Qur'an) or through the hadith of Messenger then to apply one to another. Anyone who devotes all his abilities for this mission (*ijtihad*) would get either single or double reward. He also added that those who called by 'âlim is

³⁴DR. al-Jilâlî al-Marîni, *al-Qawâ'id al-Ushûliyah 'inda al-Imâm al-Syâthibî*, 307; al-Syâthibî, *al-Muwâfaqât fi Ushûl al-Syar'ah*, Vol. II, 513.

someone who really knows the law of Allah Almighty and His Messenger through knowing and understanding the reality.³⁵

Concerning with this, Ibn al-Qayyim commented that the right *fâqih* (*fiqh* expert) is someone who is capable to elaborate the formulation of law in connection to reality. In declaring the law, he should not only consider the *nash*, but also see the social reality so that the the law could accommodate people's welfare (*mashlahah*). Therefore, he often lowers the ideal level by considering the reality. This is also the reason why Ibn Qayyim told about the necessity to adjust the *fatwa* due to changes in the times, places, and conditions of society.³⁶ In this context, Ibn 'Âbidîn gave graceful description in a *risâlah* entitled "*Nasyr al-'Urfi*". He argued that most laws are different each others because of the changes of era and local traditions of people, specifically about something urgent and moral or behavioral decadence. As a consequence, if a certain law remains unchanged in any condition, it must result difficulties and harms (*mudharat*) then clash with other principles of the Shari'ah about relief and ease as well as the spirit to dismiss all the harmful and destructive things.³⁷ Oftentimes, *Hanafiyah* scholars respond to the diversity of opinions with the following expression; "*this is the difference in time and place, not in legitimation and argument*"³⁸. Therefore, from the perspective of *adat* or 'urf , Bull Race as the unique culture of Madura is a good *adat* or 'urf (habit) because it contains a *mashlahah* (benefit) for the whole community. It deserves, then, preservation and nurture to make still exist and avoid the extinction. However, it is worth to note that

³⁵Ibnu Qayyim al-Jauziyah, *I'lâm al-Muwaqqi'în 'an Rabbil'âlamîn*, Vol. I (Riyâd: Dâr Ibn al-Jauzi, 1423 H), 26.

³⁶Ibnu Qayyim al-Jauziyah, *I'lâm al-Muwaqqi'în 'an Rabbil'âlamîn*, Vol. IV. 139. See also, Ahmad Ibn Idrîs Ibn 'Abdurrahmân al-Shanhâjî, popularly known as imam al-Qarâfi, *Kitâb al-Furûq*, Vol. III (Cairo: Dâr al-Salâm, 2001), hlm. 977. The principles of *fiqh* that are consistent with this statement are: لا ينكر تغير الأحكام بتغير الأزمان (changes in laws cannot be denied because of the changing times). Ahmad Ibn Muhammad al-Zarqâ, *Syarhu al-Qawâ'id al-Fiqhiyah*, 2nd edition, (Damasykus: Dâr al-Qalam, 1989), 227.

³⁷Ibnu 'Âbidîn, *Majmû'ah Rasâ'il Ibnî 'Âbidîn*, Vol. II, (s.l: s.a., s.a), 125.

³⁸Ibnu 'Âbidîn, *Raddu al-Mukhtâr 'alâ Durri al-Mukhtâr*, Vol. IX (Beirut: Dâr al-Kutub al-Ilmiyah. 2003), 178; Muhammad Ibn Abî Sahl al-Sarkhasî, *al-Mabsûd*, Vol. VIII (Beirut: Dâr al-Ma'rifah, s.a), 178; Ibnu al-Himâm al-Hanafî, *Syarh Fath al-Qadîr*, Vol. V (Beirut: Dâr al-Kutub al-Ilmiyah, 2003), 405.

Madura's culture should not be corrupted by any acts of immorality and *mafsadat*.

كل ما ثبت فيه اعتبار التعبد فلا تفرع فيه كل ما ثبت فيه اعتبار المعاني دون
التعبد فلا بد فيه من اعتبار التعبد

Meaning: Anything dogmatic cannot be seen through *qiyâs* while everything with meaning must be able to examine through *qiyâs*

Every legal dogmatic problem can not use analogical inference of *qiyâs* in determining its law because it cannot be touched by logical reason so that '*illat*' cannot be established. Meanwhile, every legal problem with unknown '*illat*' must not be included in the area of *qiyâs*, such as *rukû'* and *sujûd* in prayer. Based on this principle, every *syarî'ah* law must be related to the rights of Allah Almighty or that of His servants either both immediately and later. Allah's right for servants in the realization of self-servitude is by worshiping while not associating Him with anything, carrying out all His commands and avoiding all His prohibitions. Furthermore, performed worldly laws must be shaded by the self-servitude to God. Likewise, every law fulfilling the servants' right, both immediately and later, can only be built on the basis of benefit for the servants themselves. If *mashlahah* is worldly, it is to examine in the scope of the servants' rights, while if the welfare is afterlife matters (*ukhrawi*), it is considered as the right of God Almighty.³⁹

Finally, from this description, we can reveal that the purpose of the Bull Race is in line with *maqâshid al-syarî'ah* in the field of *hifdz al-mâl* (wealth protection) particularly from the aspects of *ijâd* and *tahqîq*. Bull Race culture was originally intended by their pioneers to create prosperity through increasing crop yields. Besides that, it is useful to arouse people's enthusiasm to work hard in earning sustenance from livelihoods related to agricultural sector. Furthermore, it share the same 'mission' with *maqâshid al-hâjjiyât* because Madura's culture is projected to facilitate and accelerate the process of breaking up the rice fields so that it would not be so difficult to cultivate. If the Madura's original culture (at the past time) was seen through the

³⁹al-Jilâlî al-Marîni, *al-Qawâ'id al-Ushûliyah 'inda al-Imâm al-Syâthibî*, 312; al-Syâthibî, *al-Muwâfaqât fî Ushûl al-Syarî'ah*, Vol. II, 529.

perspective of *`urf* or *'âdat* (tradition) concept,⁴⁰ it can be considered as a legitimate culture⁴¹ because it does not clash with the *syara'* principles as long as it does not contain actions of hurting animals, gambling and all kinds of immorality.

Conclusion

Bull Race is a unique and authentic culture of Madura that can not be found in other regions. The pioneer of this culture was Syaikh

⁴⁰*'âdat* (tradition) is an activity that is done repeatedly without any dependence on reason. Some *'ushûl fiqh* scholars stated that *`urf* and *'âdat* are synonym, while some others suggested that *'urf* is more common than *'âdat* because *'urf* includes a word and deed, while *'âdat* is only an act. On the contrary, other scholars think *'adat* is more common than *`urf*. Wahbah al-Zuhailî, *Ushûl al-Fiqh al-Islâmî*, Vol. II, 105. 3. *'Urf* in terms of its validity according to *syara'* is divided into two types, namely *al-'urf al-shahîh* and *al-'urf al-fâsid*. The former, *al-'Urf al-Shahîh* (الْعُرْفُ الشَّاهِدُ) is a habit that prevails in the midst of society that does not clash with the divine text (*nash*), does not forbid the lawful and does not justify the forbidden. For example, the *halal bihalal* tradition, engagement by handing over a variety of cakes and various fruits, the husband living in his wife's house and vice versa and others. Meanwhile, the latter, *al-'Urf al-Fâsid* (الْعُرْفُ الْفَاسِدُ) is the custom of people which contrasts with *syara'* principles, justifying the forbidden or forbidding the lawful. For example, cultural habits in the community in practicing usury, mixing women with men in public locations, drinking alcohol in celebration days, new year celebrations, birthday celebrations, wearing gold-made rings for men, bribery to graduate in a profession or to win the case and so on. al-Zuhailî, *al-Wajîz fî Ushûl al-Fiqh*, 98; 'Abdu al-Wahhâb Khallâf, *Ilmu 'Ushûl al-Fiqh* (Beirut: Dâr al-'Ilmi, 1978), 89; al-Zuhaylî, *Ushûl al-Fiqh al-Islâmî*, Vol. I, 109.

⁴¹Abdu al-Wahhâb Khallâf defines *'urf* as everything that has been known and practiced by people be it in the form of a word, an action or leaving a thing. There are two kinds of *'urf*, namely *'urf shahîh* and *'urf fâsid*. *'Urf shahîh* is *'urf* which has been widely known by the public, not contrary to *syara'* principles, not justify *haram* cases and not cancel mandatory cases. Meanwhile, *'urf fâsid* is *'urf* that has been known to many people yet is contrary to *syara'*, justifying illegitimate matters or canceling compulsory cases. 'Abd al-Wahhâb Khallâf, *Ilm Ushûl al-Fiqh*, 89. In line with it, al-Zuhaylî gave an understanding of *'urf* as something that has been accustomed to people and they have done, both popular actions among them and a *lafadz* (word) with special understanding out of common language but could be well understood. *'Urf* in this sense includes *'urf amalî* and *'urf qaulî*. Al-Zuhaylî, *Ushûl al-Fiqh al-Islâmî*, Vol. II, 105. Not different from the previous two, Yûsuf al-Qardhâwî formulated the definition of *'urf* as everything accustomed and accepted by people in terms of their lives which then proceeds in a sustainable manner, both in the form of a speech and an act, both universal and local. Yûsuf al-Qardhâwî, *'Awâmil al-Si'ah wa al-Murânah fî al-Syari'ah al-Islâmiyah* (Cairo: Dâr al-Shahwah, 1992), 31.

Ahmad Baidawi (Katandur Prince), who had ruled the Sumenep Palace in the XV century (1561 M). This culture was spread out in all region in Madura gradually. Madurese people are very interested in this culture and its annual event always takes so much attention that makes the arena full of visitors. Furthermore, it does not only local people who are interested to watch, but also people from other regions even abroad. The culture which is also the pride of Madura can be examined through kaleidoscope of *maqâshid al-syarî'ah*. It is found that this culture is relevant to *the maqâshid al-syarî'ah* in the domain of *hifdz al-mâl* (protection of wealth) particularly from aspects of *ijâd* and *tahqîq*. This culture was projected in creating people's prosperity through increasing the livelihoods of the agricultural sector. Besides that, it is also useful to arouse hard work spirit of local people so they would love the jobs they do to earn living blessed by God, especially in the cattle farming. When the cattle market share is increasing, the selling power becomes more expensive and therefore, many people breed cattle with the aim of producing cows for participating in the Bull Race or simply for economic purpose. Therefore, the Bull Race culture is able to preserve as the icon of Madura society as long as it does not contain harmful behaviors like animal torture, gambling and all kinds of immorality.

Bibliography

- 'Abd al-Rahmân, Muhammad Ibn Muhammad Ibn. *Taisîr al-Wushûl ilâ Minhâj al-Ushûl min al-Ma'qûl wa al-Manqûl*. Kairo: al-Fârûq al-Hadîtsah, 2002.
- 'Âsyûr, Muhammad Thahir Ibn. *Maqâshid al-Syarî'ah al-Islâmiyah*. Yordan: Dâr al-Nafâ'is, 2001.
- 'Aththâr, Hasan Ibn Muhammad Ibn Mahmûd al-. *Hâsiyah al-'Aththâr 'alâ Jam'i al-Jawâmi'*. Beirut: Dâr al-Kutub al-Ilmiyah, t.t.
- Âmidî, 'Alî Ibn Muhammad al-. *al-Ihkâm fî Ushûl al-Ahkâm*. Riyadh: Dâr al-Shamî'i, 2003.
- Ashfahânî, Mahmûd Ibn 'Abdurrahmân Ibn Ahmad al-. *Bayân al-Mukhtashar Syarh Mukhtashar Ibn al-Hâjib*, Juz III. Jeddah: Dâr al-Madani, 1987.
- Bâbartî, Muhammad Ibn Mahmûd Ibn Ahmad al-. *al-Rudûd wa al-Nuqûd*, Juz II. Riyadh: Mahtabah al-Rusy, 2005.

- Bannâni, al-. *Hâsyiyah 'alâ syarhi al-Jalâl al-Mahallî*. Beirut: Dâr al-Fikr, t.th.
- Berger, Peter L. terj. Hartono. *Langit Suci Agama Sebagai Realitas Sosial*. Jakarta: LP3ES, 1994.
- Dewo, Moh. Noer. *Kerapan Sapi*. Jakarta: P.T. Kinta, 1983.
- Fajri, John Storey, terj. Elli el-. *Teori Budaya dan Budaya Pop, Memetakan Lanskap Konseptual Cultural Studies*. Yogyakarta: Qalam, 2004.
- Fâsî, 'Allâl al-. *Maqâshid al-Syarî'ah al-Islâmiyah wa Makârimuhâ*. Riyadh: Dâr al-gharab al-Islâmî, 1993.
- Ghazâlî, Muhammad ibn Muhammad al-. *al-Mustashfâ min 'ilmi al-Ushûl*. Beirut: Dâr al-Fikr, 2009.
- Hanbalî, 'Alî Ibn Sulaimân al-Mardâwî al-. *al-Tahbîr Syarh al-Tahrîr fî Ushûl al-Fiqh*. Riyadh: Maktabah al-Rusy, 2000.
- Ibnu 'Âbidîn. *Majmû'ah Rasâ'il Ibnî 'Âbidîn*, Juz II. t.tp: t.np, t.t.
- Ibnu 'Âbidîn. *Raddu al-Mukhtâr 'alâ Durri al-Mukhtâr*. Beirut: Dâr al-Kutub al-Ilmiyah. 2003.
- Ibnu al-Himâm al-Hanafî. *Syarh Fath al-Qadîr*. Beirut: Dâr al-Kutub al-Ilmiyah, 2003.
- Jonge, Huub. de. *Madura dalam Empat Zaman: Pedagang, Perkembangan Ekonomi, dan Islam*. Jakarta: PT Gramedia, 1989.
- Khallâf, 'Abdu al-Wahhâb. *'Ilmu Ushûl al-Fiqh*. Beirut: Dâr al-Ilmi, 1978.
- Khudharî Bek, Muhammad al-. *Ushûl al-Fiqh*. Kairo: al-Maktabah al-Tijâriyah al-Kubrâ, 1969.
- Koentjaraningrat. *Kebudayaan, Mentalitet dan Pembangunan*. Jakarta: Gramedia, 1974.
- Lisbijanto, Herry. *Kerapan Sapi*. Yogyakarta: Graha Ilmu, 2013.
- Mâlîkî, al-Husain Ibn Rayîq al-. *Lubâb al-Mahshûl fî 'Ilmi al-Ushûl*, Juz II. t.t.p.: Dâr al-Buhûts lidirâsah al-Islâmiyah, 2001.
- Marînî, DR. al-Jilâlî al-. *al-Qawâ'id al-Ushûliyah 'inda al-Imâm al-Syâthibî*. Kairo: Dâr Ibn 'Affân, 2002.
- Muhammad Ibn Abî Sahl al-Sarkhasî. *al-Mabsûd*. Beirut: Dâr al-Ma'rifah, tt.
- Mûsa, Muhammad Ibn 'Alî Ibn Âdam. *al-Jâlis al-Shâlih al-Nâfi'*. t.tp: Maktabah Ibn Taimiyyah, 1998.
- Penyusun, Tim. *Ensiklopedi Pamekasan*. Yogyakarta: PT Intan Sejati, 2010.

- Qardhâwî, Yûsuf al-. *'Awâmil al-Si'ah wa al-Murûnah fî al-Syarî'ah al-Islâmiyah*. Kairo: Dâr al-Shahwah, 1992.
- Setiawan, Edy. *Menjaga kesenian Tradisional*. Tnp: SIC, 2004.
- Soegianto. *Kepercayaan, Magik, dan Tradisi dalam Masyarakat Madura*. Jember: Penerbit Kapal Kuda, 2003.
- Suyûthî, Jalâluddîn al-. *Syarh al-Kaukab al-Sâthi'*. Kairo: Maktabah al-Îmân, 2000.
- Syâthibî, Abû Ishâq al-. *al-Muwâfaqât fî Ushûl al-Syarî'ah*. Saudi Arabia: Dâr Ibn 'Affân, 1997.
- Syawkânî, Muhammad Ibn 'Alî al-. *Irsyâd al-Fuhûl ilâ Tahqîq al-Haq min 'Ilmi al-Ushûl*. Riyadh: Dâr al-Fadhîlah, 2000.
- Taftâzânî, Sa'îd al-Din al-. *Syarh Mukhtashar al-Muntahâ al-Ushûlî*. Beirut: Dâr al-Kutub al-Ilmiah, 2004.
- Thûfi, Sulaimân Ibn 'Abdulqawî Ibn 'Abdulkarîm al-. *Syarh Mukhtashar al-Raudhah*. Beirut: Mu`assasah al-Risâlah, 1990.
- Zuhaylî, Wahbah al-. *Ushûl al-Fiqh al-Islâmî*. Beirut: Dâr al-Fikr, 2009.



al-Ihkam: Jurnal Hukum dan Pranata Sosial, 14 (1), 2019: 27-49
ISSN: 1907-591X, E-ISSN: 2442-3084
DOI: <http://doi.org/10.19105/al-ihkam.v14i1.1862>

***Taklîf* of Lunar and Solar Eclipse Prayers According to *Fiqh* and Scientific Perspective**

Achmad Mulyadi

Post-Graduate UIN Walisongo, Jl. Walisongo Ngaliyan Semarang
Email: mulyadidik71@gmail.com

Article history: Received: 24 Agustus 2018, Accepted: 21 Februari 2019, Published: 11 Juli 2019

Abstract:

The motion of earth, moon and sun result in natural phenomena which people can directly see and tangibly experience. They occur globally yet are experienced locally, such as the phenomenon of solar and lunar eclipses. In Islamic studies discussion, this leads to specific consequence relating to *taklîf* (compulsion) of worship to perform eclipse prayers. Therefore, this study aims to elaborate whether the local eclipse phenomenon could apply the *taklîf* globally. Another question is on when the obligation is urged to Moslem. Using the approach of *fiqh* and science through descriptive-analytic method, this study finds that in scientific perspective, both solar and lunar eclipses are *sunnatullah* or natural phenomenon relating to rotation of earth, moon and sun. From the earth, this phenomenon comes in two types of condition. *First*, it could be both computed and witnessed, while *second*, it could only computed but not everyone could eye-nakedly witness it. In fact, solar eclipse, for instance, although globally accessible through digital instruments, could be only manually seen in any local and limited area. Therefore, in the *fiqh* based perspective, the *taklîf* of eclipse prayers only applies based on *mathla` wilâyah al-hukm*. It is based on the strong belief that *hisâb* indicates the occurrence of eclipse on any certain area in Indonesia and is empirically proved. The *taklîf*, therefore, only applies for those who see the phenomenon.

Keywords:

Eclipse Prayers; Local Mathla`; Kusûf; Khusûf

Author correspondence email: mulyadidik71@gmail.com

Available online at: <http://ejournal.iainmadura.ac.id/index.php/alihkam/>

Copyright (c) 2019 by al-ihkam. All Right Reserved



Abstrak:

Pergerakan bumi, bulan dan matahari mengakibatkan terjadi fenomena alam yang dapat dilihat dan dirasakan secara nyata. Fenomena ini bersifat global, akan tetapi dirasakan secara lokal seperti fenomena gerhana matahari dan bulan. Dalam kajian keislaman, fenomena ini memunculkan akibat khusus yang berkaitan dengan *taklîf* ibadah, yakni salat gerhana matahari dan bulan. Apakah fenomena gerhana yang bersifat lokal tersebut dapat berlaku secara global, dan kapan *taklîf* tersebut terbebaskan pada setiap umat muslim. Dengan pendekatan fiqh dan sains secara deskriptif analitis, artikel ini menemukan bahwa dalam perspektif sains, fenomena gerhana matahari dan bulan adalah sunnatullah yang berkaitan dengan rotasi bumi, bulan dan matahari. Bagi penduduk bumi, fenomena ini dapat dialami dalam dua kondisi, yaitu pertama, dikomputasi sekaligus disaksikan, dan kedua dikomputasi, akan tetapi tidak semua semua orang bisa menyaksikan. Karena itu, fenomena gerhana matahari walaupun dapat dikomputasi secara global, akan tetapi hanya dapat disaksikan secara lokal. Dengan demikian, dalam perspektif fiqh, *taklîf* ibadah salat gerhana diberlakukan berdasarkan *mathla` wilâyah al-hukm*, yaitu apabila diyakinkan bahwa secara hisâb menunjukkan terjadi gerhana dalam kawasan tertentu di Indonesia dan dapat dibuktikan dengan fenomena empiriknya, maka *taklîf* shalat gerhana tersebut hanya berlaku bagi mereka yang menyaksikan fenomena gerhana tersebut.

Kata Kunci:

Eclipse Prayers; Local Mathla` ; Kusuf; Khusuf

Introduction

Astronomic phenomenon is natural events related to the motion, position and the condition of celestial objects. As a consequence of earth rotation and its own shape, the phenomenon could be either observable or no depending on the location of observer. Among others, there found the phenomenon of night sky, meteor rain, Mars approaching the Earth, solar eclipse and others as the result of rotation of earth, moon and sun.¹

¹ LPMA and LIPI, *Penciptaan Jagat Raya dalam Perspektif al-Quran dan Sains* (Jakarta: Kemenag RI, 2012), 85-86.

The phenomenon is literally amazing as it leads to other phenomena useful for human's life, such as timing reference of sun clock to determine prayers' time, crescent moon indicating the beginning of months, eclipse as an alarm to perform eclipse prayers and so forth. These astronomic phenomena are local, as they depend on the location of observers. Therefore, it is important to discuss on how to enforce worship obligation to the eclipse phenomenon which locally takes place.

Technically, eclipse is a phenomenon where shadow of an object covers another object. Relating to the moon's orbit surrounding the earth, there found two popular types of eclipse, solar and lunar eclipses. The former happens when either some or the whole part of the sun surface is covered by the moon, while the latter is when the moon, either the cut or the whole part of it, is covered by the sun. In other words, it would be counted as a solar eclipse when the moon is in conjunction to the sun while the lunar eclipse is when the moon is in the opposite line to the sun. However, because the slope of moon orbit filed is only 5 degree to the ecliptically part, not every moon conjunction results in solar eclipse. And likewise, not every opposition of moon and sun results a lunar eclipse.²

From the cutting point of moon and ecliptically orbit field, there found two cutting spots called *node*, which is the point where the moon cuts the ecliptically field. The eclipse would happen when the moon is in conjunction, at the exact position, or not far from the node points. Indeed, the moon needs 29.5 days to move from both a conjunction and opposition to the next one. Therefore, when an eclipse happens, let say the solar eclipse, a lunar eclipse would also take place because two node points are in a line connecting the sun and the earth.³ A solar eclipse is actually a visible conjunction phenomenon, while conjunction or what is popular as *ijtimâ'*, is a sign of the shift of month in calendar system which is based on the moon phases such as *Hijriyah* calendar system. Relating to this, the solar

²Hendro Setyanto, *Membaca Langit* (Jakarta Pusat; al-Ghuraba, 2008), 97.

³Uum Jumsa, *Ilmu Falak: Panduan Praktis Menentukan Hilal* (Bandung: Humaniora, 2006), 59.

eclipse could be a reference to determine *hilâl* position which is literally a crescent moon.⁴

In the eclipse phenomenon, both solar and lunar, there found some related facts. Particularly to the solar eclipse, there found four types of eclipse. *First*, the total solar eclipse; happens when the whole part of solar is covered by the whole body of the moon. *Second*, the annular eclipse; happens when the moon only covers the middle part of sun's disk in the summit of eclipse or when the moon surface is narrower than surface of sun that it causes sun light appears like a bright ring around the surface of moon. *Third*, the hybrid (annular/total eclipse); happens when the total solar eclipse is visible from another edge of central shadow of the earth. *Fourth*; partial eclipse; happens when solar eclipse is caused by the coverage of surface of moon to some parts of surface of sun.⁵

Meanwhile in the lunar eclipse, there found three related facts. *First*, panumbra lunar eclipse; when the moon enters the pseudo shadow of earth. *Second*, partial lunar eclipse; when some parts of moon surface get into the central shadow of the earth (*umbra*) then get out again. *Third*, total lunar eclipse; when the whole surface of moon get into the central shadow of earth.⁶

Eclipse Phenomena and Prayers in The Prophet Era

The eclipse prayer is one of some un-compulsory worship in Islam. It was regulated after the regulation of five compulsory prayers in the event of *Isra'-Mi'raj*. The event itself, according to the calendar calculation, happened at *Legi* Monday, 27 Rajab at the third year of *Hijriyah* or March 19th, AM. Six years later, and specifically six years and two months ahead, the eclipse prayer was regulated. It was exactly at the fifth year of *Hijriah* when the total lunar eclipse took

⁴Hasna Tuddar Putri, "Redefinisi Hilal dalam Perspektif Fiqh dan Astronomi", *Journal al-Ahkam*, p-ISSN: 0854-4603/e-ISSN: 2502-3209, Vol. 22, No. 1, April 2012.

⁵ T. Djamaluddin, *Semesta Pun Bertawaf* (Bandung: Mizan, 2018), 80.

⁶ Uum Jumsa, *Ilmu Falak.*, pp. 60-61. See also Muhtar Salimi, "Visibilitas Minimum: Studi Komparatif antara Kriteria Depag dan Astronomi", *Jurnal Penelitian Humaniora*, Vol. 6, no. 1, 2005, 1-13.

place at Wednesday, 14th day of *Jumadal Akhirah*, 4th year of *Hijriyah* or November 20th, 625 AM.⁷

Since then, there were three events of performing the eclipse prayers until the death of Prophet at *Legi Monday*, 14th of *Rabi'ul Awwal* 11 H/June 8th, 632 as the following table mentions:

First Lunar and Solar Eclipses after the Regulation of Eclipse Prayers
14 *Jumadal Akhirah* 4 H/November 20th, 625 M to 14th of *Rabi'ul Awwal* 11 H/June 8th, 632 M.

Date		Day	Eclipse Type	The First Eclipse	The First Eclipse Totally	The End of Eclipse Totally	The End of Eclipse	Eclipse Duration	Total Duration	%
Higriyah	AM									
14 Jum. Akhir 4	20/11/625	Wage Wednesday	Lunar T	00:50:48	01:52:15	03:20:26	04:31:53	03:41:04	01:38:11	100%
15 Dzulhijjah 4	17/05/626	Pahing Saturday	Lunar T	03:24:59			06:44:44	03:19:45		95%
29 Dzulqo'dah 5	21/04/627	Legi Tuesday	Solar T	10:32:04			11:21:39	00:49:35		5%
14 Dzulqo'dah 6	25/03/628	Kliwon Friday	Lunar P	17:31:00			19:38:01	02:07:01		31%
29 Jumadal Ula 7	03/10/628	Pahing Monday	Solar C	05:58:37			06:57:42	00:59:05		12%
14 Dzulqo'dah 7	15/03/629	Kliwon Wednesday	Lunar T	01:12:43	02:11:48	03:52:20	04:51:25	03:38:42	01:40:31	100%
15 Dzulqo'dah 8	04/03/630	Wage Sunday	Lunar P	16:09:51			18:52:39	02:42:47		68%
29 Syawal 10	27/01/632	Pon Monday	Solar C	07:15:20			09:53:40	02:38:20		82%

Historically, there found some explanation about the mentioned data. *First*, six months after the lunar eclipse in which the eclipse regulation took place, particularly at 15th of *Dzulhijjah* 4 H/May 17th, 262 AD, there happened a partial lunar eclipse. It began right before

⁷http://www.kompasiana.com/moeidzahid/sekelumit-sejarah-dan-fiqih-gerhana_56cd312e81afbd010c1ed5f4. Accessed on February 24, 2016

the dawn and ended after the dawn, exactly when the moon set in eclipse condition. *Second*, the next eleven months, specifically at 29th of *Dzul Qa'dah* 5 H/April 21st 627 AD, a solar eclipse happened, but only 5% of the surface of sun was covered so it was invisible by naked eyes. *Third*, another next eleven months later, at 14 *Dzulqo'dah* 6 H/March 25th, 628 AD, a 31% moon took place about the sunset (*maghrib*) time. It began before the rise of moon so when it rose, it came in the eclipse condition.

Then, it finally ended some minutes before *isya*. *Fourth*, next six months, at 29 *Jumadal Ula* 7 H/October 3rd, 628 M, another solar eclipse happened, but the covered surface was only 12% so probably, it was invisible by naked eyes. The beginning of eclipse was before the sunrise at *Madinah* so the sun rose in eclipse while the ending of it was some minutes after the sunrise. *Fifth*, next five months, at 14 *Dzulqo'dah* 7 H/March 15th, 629 M, a total moon eclipse happened at the midnight. March is the end of winter season so there were less of Arabian activities due to the weather. Besides, the rest of cloud might remain a lot so the eclipse was unnoticeable by Arabians.

Sixth, next twelve months, particularly at 15 *Dzulqo'dah* 8H/March 4th 630 AD, there happened a partial eclipse with the summit percentage reaching about 68% at sunset (*maghrib*) time. It began before the moon rose so it rose in eclipse. In about 23 minutes after the rise, eclipse had ended. *Seventh*, next twenty three months, at 29 *Syawal* 10 H/January 27th 632 M, there occurred a solar eclipse with summit percentage reaching 82%. The day was the death of Sayyid Ibrahim, the son of Rasulullah and Maria Al-Qibtiyyah. It was also the first and last time in which Rasulullah performed the solar eclipse prayer.⁸

Therefore, among others, there found some significantly related notes. *First*, although calendar calculation noted the occurrence of eclipses both moon and sun many times, some of them happened closely right to the rise or the set of either moon or sun and it made the duration very short. *Second*, during some eclipses, Rasulullah only

⁸ The analysis result of Ibnu Zahid Abdo el-Moeid on the calculation of eclipse prayers is as listed at the table above. See also, Alimuddin, *Gerhana Matahari Perspektif Astronomi*, Jurnal Ad-Daulah, p-ISSN: 2303-050X/e-ISSN: 2580-5797 Vol. 3, No.1, June 2014: 72-79.

performed the prayers two times; the lunar eclipse at 14 *Jumadal Akhirah* 4 H or November 20th 625 M and the solar eclipse at 29 Syawal 10 H or Januari 27th, 632 M. The interesting point of this data is the distinction between the eclipse prayers that Rasulullah performed (two times) and the frequency of eclipses (four times for moon eclipse and three times for solar eclipse).⁹

The Fiqh Perspective of Eclipse Prayers

Any visible eclipse phenomenon provides special chances for Moslem as it comes as a rare moment where they could do special worship by reciting much *takbîr* and performing the eclipse prayers. In the study of *fiqh*, the term of solar eclipse is called *kusûf*, while lunar eclipse refers to *khusûf*. However, some Islamic scholars mentioned that *kusûf* is the synonym of *khusûf*.¹⁰ *Kusûf* happens when the light of moon and sun disappears either fully or partially then they turn to be black.¹¹ Meanwhile, the definition of *kusûf* prayer is the one performed using the specific manner when there happens an eclipse of either sun or moon, totally or partially. According to the most of Islamic scholars (*jumhûr ulamâ'*), performing the eclipse prayer is very much recommended just like 'Eid prayers. The Malikiyah and Hanafiyah schools consider the lunar eclipse prayer as the *sunnah mandûbah*, different from the solar eclipse prayers which they mentioned as *sunnah mu'akkadah*. Additionally, some Islamic scholars mention that the eclipse prayers are *fardl kifâyah* as the same as the funeral prayers.¹²

It is much preferable to perform eclipse prayer together (*jamâ'ah*) in a mosque, while the performers are suggested to take a bath before the prayers. However, different from other types of prayer, it is not recommended to deliver *azan* and *iqâmah* before the

⁹ Historical notes about eclipse prayers that Rasulullah performed are fully mentioned in *Sahih Bukhari*. See Masyhar, M.A, et al (translator), *Eksiklopedia Hadits I: Abu Abdullah Muhammad bin Ismail al-Bukhari, Shahih al-Bukhari I*, (Jakarta; Al Mahira, 2011), 30-237.

¹⁰ Wahbah al-Zuhaylî, *Al-Fiqh al-Islâmî wa Adillatuhu* (Damaskus: Dar al-Fikr, 2006), Vol. II, 1421.

¹¹ Sayyid Sabiq, *Fiqh al-Sunnah* (Beirut: Dar al-Fikr, 1981), Vol. I, 180-181.

¹² Sihabuddin ar-Romli, *Nihayah al-Muhtaj Ila Syarh al-Minhaj* (Beirut: Dar al-Kutub al-Ilmiyyah, tt), II: 394.

prayers. Instead, it is suggested to recite such a slow calling. The leader of prayer, additionally, is obliged to recite *al-Fâtiḥah* and short Qur'anic *surahs* loudly in lunar eclipse, while the slow voice is for solar eclipse.¹³

According to calendar calculation theory (*ḥisâb*), in the lunar eclipse, the shadow covering moon has two types. *First*, the shadow of penumbra and the second is many umbras. Umbra shadow is the central image of the earth, while penumbra is the biased image of the earth. Therefore, when the penumbra shadow touches the surface of moon, it could not be easily identified by naked eyes. The moon looks likes as it usually does, full but somewhat grim. The lunar eclipse, therefore, can be identified by naked eyes only when the umbra shadow touches the surface of moon. To sum up, it could be concluded that the lunar eclipse begins since the umbra shadow (central image) touches the surface of moon until all of the shadow out of it.¹⁴

Meanwhile, the solar eclipse happens since umbra shadow of the moon touches the surface of sun until all part of umbra out of it. Therefore, according to *fiqh* perspective, the time to perform eclipse moon prayer counts from the time when umbra (central) shadow of the earth touches the surface of moon until all part of umbra out of it. While for the solar eclipse, it counts since the umbra shadow of the moon touches the surface of sun until the whole part of umbra out of it. The duration ends at the full recovery of solar eclipse or the sunset time, although it is still in eclipse position. While for the lunar eclipse, the time also ends at the full recovery of eclipse or the rise of the sun, although the moon still goes on in the eclipse.¹⁵

¹³According to Hambaliyah school, Khattabi and Ibnu Mundzir, it is also obliged to up the voice in performing the solar eclipse. Sayyid Sabiq, *Fiqh*. 60. See also, Syaeful Mujab, "Gerhana: Antara Mitos, Sains dan Islam", *Yudisia: Jurnal Pemikiran Hukum dan Hukum Islam*, ISSN: 1907-7172/e-ISSN:2477-5339, Vol. 5. No. 1, 2014.

¹⁴ Muh. Rusywan Syarif, *Islam Fenomenalis Gerhana Matahari di Indonesia: Studi Budaya 'Siemme Matanna Essoe' pada Perempuan Bugis Bone*, Proceedings ARICIS, No. 1, 2016: 520-534.

¹⁵ According to Imam Syafi'ie and Imam Malik, it is allowed to perform eclipse prayers in non-recommended times (*makruhah*) because it is categorized as prayers due to certain causes. However, Imam Hanafi and Imam Achmad said that it is not

According to *fiqh* perspective, the performance of eclipse prayer is on dispute among the Islamic scholars. Bakhit Al-Muthi'¹⁶ commented that it could be based on the *hisâb qath'î* (exact calculation) provided the fact that the objects (moon or sun) could not be seen because of the cloud. This opinion was relied on the analogical perspective (*qiyâs*) on the determination of the beginning of the month through the *hisâb qath'î*. It applies when *hilâl* already rises and probably would be visible after the dawn (*maghrib*) but later, it turns out that *hilâl* is out of reach of vision because of the cloud. When this condition happens, the calendar calculation is the alternative to determine the beginning of the month. If it goes that way for determination of beginning of the month which is something compulsory (*wajib*), it also goes the same for un-compulsory things (*sunnah*) such as eclipse prayers. This also closely relates to the similarity among the *hisâb* (calendar calculation) of *hilâl*, moon and solar eclipses which involve trustworthy and fully sure calculation.

On the other hand, Ibnu Hajar said that it does not give any consequence when the cloud covers sun or moon before the eclipse happens although *hisâb* expert confirms the occurrence of eclipse. In other words, there is no obligation to perform eclipse prayers because the initial condition is normal without eclipse. However, when the eclipse is clear before the cloud comes and people are doubt whether it is finished—although the experts say it is finished already—, it is still recommended to perform eclipse prayers because the initial law is the visibility of eclipse. He mentioned that there is no space for experts in this kind of condition and consequently, depending only the *hisâb* calculation is not allowed, including the *qath'î hisâb*. To sum up, for him, eclipse prayer is obliged when eclipse condition is visible by naked eyes (*ru'ya*).

All by all, the cloudy weather making eclipse invisible makes the prayers obligation invalid. It accords to the explanation of Ibn Utsaymin saying that, it might happen a time when Allah makes eclipse visible for certain areas and makes it invisible for the rest.

allowed to do so and they said it is enough to replace the prayer with reciting *tasbih*. *Fiqh*. 60.

¹⁶Ibn Hajar al-Haytamî, *Tuhfah al-Muhtaj bi Syarh al-Minhaj*, (Beirut: Dar al-Kutub al-Ilmiyyah, s.a), 94.

There must be *hikmah*/lesson learnt beyond.¹⁷ At the same condition, anyone who has just noticed the eclipse condition when it had already gone is not obliged to do so because the obligation relates to the time when the eclipse is visible.¹⁸

The Concept of *Mathla`* in Worship Obligation

1. *Mathla`* Concept in Determination of the Beginning of the Hijriyah Month According to *Fiqh* Perspective

In the *fiqh* discourse, *mathla`* concept is known from two theories. The first is *ittifâq al-mathâli`*. It suggests that the rise of *hilâl* which is visible from a certain spot of the earth could apply the same for rest of the planet. It is based on a general meaning of a *hadith* addressed for all people prevalently. As the consequence, if there found anyone who has witnessed the *hilâl*, anywhere in the earth s/he is, then it applies for the rest of people as well. *Second* is what is called as *ikhtilâf al-mathâli`* theory which suggests that rise of *hilâl* accessible from any part of the earth only applies for the limited location, which is the location in which the *hilâl* is visible and the nearby location particularly at the West side of the spot. This theory relies on a story of Kuraib, narrated by Muslim that Ibn `Abbâs who lived in Madinah did not take Syam people's *ru'yat* into account although it had been approved by the ruling *khalîfah* (leader), Mu'awiyah.¹⁹

Global *mathla`* theory suggested that the rise and visibility of *hilâl* in Ramadan and Syawal at a specific area needs to be followed by others which have not done so. Therefore, the difference of location in which the *hilâl* appears does not give any impact of different dates to begin fasting or to celebrate the *Eid* for other areas. It also leads to a logical consequence that if a certain area had already witnessed the *hilâl*, then other areas could rely on the *hilâl* visibility (*ru'yat*) on it no matter the distance, geographical location and other astronomical factors are. This theory is based on the hadith narrated by Kuraib.

The hadith implied as if Ibn `Abbâs was the one who very firstly began to determine the *mathla`* differences between Madinah and

¹⁷Abu Malik Kamal bin al-Sayyid Salim, *Shahih Fikih Sunnah*, (Jakarta: Pustaka Azzam, s.a), 309.

¹⁸*Ibid.*, 434.

¹⁹al-Nawawî, "Kitab al-Shiyâm", Chapter 5, Hadith Number. 28-[1087] in *Syarh Shahîh Muslim*

Syam and therefore, Moslem would determine the start and the end of Ramadan based on the *ru'yat* applied in a certain territorial limit of each region or country. However, the story of Kurayb had actually indicated that what made the differences of the day to begin fasting between Madinah and Syam was the absence of direct news to Madinah people from Kurayb who, at that time, was witnessing *hilâl* at the Tuesday night. That was why, Ibn `Abbâs was sure that *hilâl* had not rose at Madinah at that evening (Tuesday night) and would had risen the day after (Friday night).²⁰ The hadith, therefore, showed the obligation to do fasting for all Moslems based on an unbound/unlimited *ru'yat*. As a consequence, *ru'yat* could be fulfilled from the group or individuals whose testimonies are approved.

Furthermore, according to al-Syawkanî, what could be relied on as the basic of this is the saying of Prophet pbuh instead of the *ijtihad* (critical thinking) of Ibn `Abbâs. The hadith by Kurayb was considered as Ibn `Abbâs' *ijtihad* relying on Prophet Muhammad as indicated in Ibn `Abbâs' saying, *hakaza amarana Rasulullah* (this is exactly what Rasulullah told us to do) and *fala nazalu nasumu hatta nukmila salasina* (we do not begin fasting until it completely reaches the day 30). The hadith of Umar r.a did not indicate that the result of *ruckyah* is personal (locally applicable), because the interlocutor applies for all Moslem, so that the result of *ruckyah* in any certain country also applies for other countries. On the other hand, according to Abu Hanifah, Malik and Ahmad, the determination of the beginning of the fasting at Ramadan and the celebration of Eid is only based on the arrival/deliverability of news about *ru'yat hilâl* without considering the difference of *mathla`*. *Ru'yat hilâl* applies for all areas, be it far or near. *Hilâl* which was witnessed from a certain area would apply the same (obligation to do fasting) for others as long as the news about the *hilâl* visibility is delivered.²¹

Meanwhile, the local or regional *mathla`* theory suggests that the successful observation of visibility on the crescent only applies for the observation area and nearby areas in single law category. This opinion, used by some scholars, confirms that *ru'yat* applies for each

²⁰ Imam Abi Zakariya Muhyiddin ibnu Syaraf-Nawawi, *Syarh Shahih Muslim* vol. VII, (Beirut: Dar al-Kutub al-Ilmiah, s.a), p. 172.

²¹ Ibnu Hajar, *Fathul Bari* vol. IV (Beirut; Dar al-Fikr, s.a), p. 47.

area because of the differences of *mathla`* or *ikhtilaf al mathla`*.²² It takes the following hadiths by Ibu `Umar and Ibn Kurayb as basic.

عن عبد الله بن عمر رضى الله عنهما قال : قال رسول الله صلى الله عليه و سلم : الشهر تسع و عشرون فإذا رأيتم الهلال فصوموا وإذا رأيتموه فافطروا فإن غم عليكم فاقدروا له (رواه مسلم)

Narrated from Abdullah Ibnu Umar that Prophet Muhammad pbuh said: A month consists of twenty nine days. Do not do fasting before seeing hilâl and do not break the fast (celebrate the Eid) before seeing another next hilâl. If you cannot witness it because it is covered by something else, make a prediction.²³

حد ثنا موسى بن إسماعيل حد ثنا إسماعيل يعني ابن جعفر أخبرني محمد بن أبي حرملة أخبرني كريب أن أم الفضل ابنة الحرث بعثتها إلى معاوية بالشام قال : فقدمت الشام فقضيت حاجتها واستهل رمضان وأنا بالشام فرأينا الهلال ليلة الجمعة ثم قدمت المدينة في آخر الشهر فسألني ابن عباس ثم ذكر الهلال فقال متى رأيتم الهلال؟ قلت : رأيته ليلة الجمعة , قال أنت رأيته؟ فقلت نعم ورأه الناس و صاموا وصام معاوية , قال : لكننا رأيناه ليلة السبت فلا نزال نصومها حتى نكمل الثلاثين أو نراه , فقلت : أفلا تكفي برؤية معاوية و صيامه ؟ قال لا هكذا أمرنا رسول الله صلى الله عليه و سلم (رواه ابو داود)

...Narrated from Kuraib, that Ummu Fadhl bint Harits delegated him to see Mu'awiyah in Syam (Suriah: Damascus). He mentioned: I arrived at Syam then I finished her business. People were searching for hilâl of Ramadan while I was at Syam. We witnessed the hilâl at Tuesday night then I returned to Madinah

²²Wahbah az-Zuhaili, *al-Fiqhu al-Islam wa Adillatuhu* vol. II (Damaskus: Dar al-Fikr ,2006), pp: 1660-1661.

²³ The hadith was narrated by Muslim, number: 1522.

and arrived there at the end of Ramadan. At that time, Ibnu Abbas asked me a question then he remembered about hilâl of Ramadan and asked: When did you witness the hilâl? I answered: I witnessed at the Tuesday night. He replied, did you witness it by yourself? I said: I did, and so did other people, so they did fasting the next day, including Mu'awiyah. He continued, However, we, the Madinah people, witnessed it at Friday night then we do fasting at the 30th day or until we see another next hilâl of Syawal. I commented: Is not it enough for you with Mu'awiyah's ru'yat and fasting? He replied, It is not the way the Prophet told us to do (Narrated by Abu Dawud).²⁴

Meanwhile, Syafi'iyah school mentioned that when people in a certain area already witnessed the *hilâl*, the the surrounding area inside 24 *farsakhs* (about 120 kilometres) from the spot of *rukayah*, could follow the *rukayah* result.²⁵ As for the area outside the radius, its people could do another *rukayah* process and are allowed not to follow the first *ru'yat* result. The *mathla`* parameter in Syafi'iyah school, at least, is presented in four following opinions. *First*: the distance is equal to 24 *farsakhs*. This was told by Syaikh Tajuddin Al-Tibrisi and considered *shahîh* by Al-Nawawi. 1 *farsakh* is equal to 5.544 m x 24 =133.056 m (about 13 km). There is also another opinion determining that 1 *farsakh* is equal to 3 meters, while 1 mile is 1.6093 km. Therefore, 1 *mathla`* is equal to 3 x 24 x 1.6093 = 115.8696 km. *Second*, the distance is not further than *masâfah al-qashr* to the area in which the *hilâl* is clearly visible.

This second theory belongs to Al-Fawrani, Imam Haramain, Al-Gazali, Al-Bagawi and Khurasan scholars. *Masâfah al-qashr* is equal to 4 *barids* (the plural form is 2517 *burud*) or 16 *farsakhs* (1 *farsakh* = 5.544 m), so the *masafah al-qasr* is about 4 x16 x 5.544 = 88.704 meters. Another opinion said that 1 *farsakh* is about 3 miles (1 mile = 1.6093 km), so *masafah al-qasr* is equal to 16 x 3 x 1.6093 km = 77.2464 km. *Third*, the same chance to experience or witness the visibility of *hilâl*.

²⁴Muslih Husein, "Hadis Kuraib dalam Konsep Rukyatul Hilal", Jurnal Penelitian, p-ISSN: 1826-9903/e-ISSN: 2541-6944, Vol. 13 No. 2. 2016, 211-224.

²⁵Abdu ar-Rahman al-Jazari, *al-Fiqhu 'ala al-Mazahibi al-Arba'ah* vol. I (Beirut: Dar al-Kutub al-Ilmiah, 1990), 500.

This theory is mentioned by Sarakhsi.²⁶ Meanwhile, the four which is the last theory said it was the difference of 8 degrees longitude as mentioned in a book entitled *Bughyah al-Mustarsyidîn*.²⁷

The difference of *mathla`* among some countries is logically reasonable. However, Islamic scholars are still on dispute on the condition when *hilâl* is visibly seen in certain countries. The dispute is about whether the *ru'yat* result applies for all Moslem in the world or each country is based on their own *ru'yat* results. There are at least two different opinions regarding with this as the following;

First, most of Islamic scholars, including Abu Hanifah and Imam Ahmad, think that *ru'yat* in a certain country would apply the same for all Moslems in other countries, so the *mathla`* differences cause no influence to the determination of *ru'yatul hilâl*. This opinion is based on some *hadithes*, such as a hadith narrated by Umar r.a indicating that although *ru'yat* result is personal (locally applicable), the interlocutor is all Moslems and therefore, the result of *ru'yat al-hilâl* (witnessing the *hilâl*) would apply the same to the global world. Based on this, some of *fiqh* experts, such as Abu Hanifah, Mâlik and Ahmad said that determination of the beginning of the fasting and *Eid* only relies on the deliverability of news about the result of *ru'yat al-hilâl* without considering differences of *mathla`*. *Rukya al-hilâl* applies for all areas, be it near or far. Once the *hilâl* is visible in a certain area, then the rest of the world (which could get the news about the visibility) applies the same law, i.e. the obligation to follow the result of *ru'yat al-hilâl* in the area applies.

Second, opinion delivered by al-Syâfi'î and some traditional scholars that determination of the beginning of the *Hijriyah* month considers the differences of *mathla`*, so each country determines the beginning of every month based on their own result of *ru'yat al-hilâl*. This is based on the context of hadith of Abu Hurayrah which is considered relative, giving the consequence that it is addressed for those who witness *hilâl*, so for those who do not, they are excluded from the category. This opinion is quite reasonable from the

²⁶Imam Abi Zakariya Muhyiddin ibnu Syaraf Al-Nawawi, *al-Majmu' Syarhu al-Muhazzab* Vol. VI, (Beirut: Dar al-Fikr, s.a), 272.

²⁷ Abdurrahman bin Muhammad Ba 'Alawi, *Bughyah Al-Mustarsyidin*, (Beirut: Dar Al-Fikr, 1997), 70.

perspective of *dalîl naqlî* (logical thinking) and astronomical science. The time calculation of each day is different, be it either in fasting or non-fasting period based on the texts (*nash*) and agreement (*ijmâ'*). This kind of *mathla`* difference is the agreement of astronomic experts. Therefore, if *mathla`* is found the same, the result of *ru'yat* also applies and otherwise. This opinion relies on a hadith narrated by Ibnu Abbas and compiled by Muslim.²⁸

2. *Mathla`* Concept in Determination of The Beginning of Hijriyah Month According to Astronomical Perspective

In the perspective of astronomy, the concept of *mathla`i*²⁹ is a limit of any geographical location which experiences/witnesses the rise of *hilâl* at the top horizon of West after the sunset. Consequently, all spots at the area have the same date on the beginning of each month. This *mathla`* concept, although clearly elaborated, still leads to a dispute on the application, particularly whether the rise of *hilâl* applies to all areas at the earth or only for limited areas which witness the *hilâl* at the same time. Therefore, this concept of *mathla`* could not be discussed merely from the normative perspective by involving Qur'anic verses and *hadith* as the basic for drawing *fiqh* based conclusion, but also from the perspective of astronomy. It is literally because the rise of *hilâl* closely relates to the lunar, solar and earth circular system.³⁰

Astronomically, the motion system of earth, moon and solar leads the monthly change of *hilâl* rise condition, time, position and the height. As a consequence, any area on the earth in which the *hilâl* rises at the very first time also regularly changes. Nevertheless, the application of this *mathla`* concept is not without any limit. The *mathla`* limit from the spot of observation result from considering the speed motion of the earth around its axis, the speed of moon moving

²⁸ Ibnu Hajar, *Fathul Bari* vol. IV (Beirut; Dar al-Fikr, s.a), p. 147.

²⁹ The meaning of *matlak* is the time or place of rising, be it solar, dawn or moon. See Depdikbud, *Kamus Besar Bahasa Indonesia* (Jakarta; Depdikbud, 2006), 108.

³⁰ Muhtar Salimi, 'Rukyat, Hisab, dan Matlak'. Paper was presented in 25th of Munas Tarjih, July 6-7, 2000, 22.

around the earth, and the speed of pseudo motion of sun all through the ecliptically circle.³¹

According to its motion system, the earth moves around its axis from the West to the East once in a single lap (360 degrees) during 24 hours, so it could be calculated that the speed of earth's move in a hour is 15 degrees. Meanwhile, the moon moves around the earth from the West to the East during one month or about 27.32 days (27 days, 7 hours and 43 minutes). This time is called a sideral month. Therefore, the daily speed of moon move is 13 degrees, 10 minutes and 34,89 seconds. Meanwhile, the motion of sun (influenced by the moves of earth surrounding it) is pseudotic among the stars in the sky from the West to the East. The pseudo moves of sun, from one point until coming back to it (a single lap) occurs about 365,242199 days (365 days 5 hours 45 minutes 46 seconds). To sum up, in the end, the speed of pseudo moves of sun every day (24 hours) is 0 degree, 59 minutes and 8.33 seconds and every hour is 0 degree, 2 minutes and 27.85 seconds.

From the above calculation, it could be compared that the moon is faster in moving to the East than the sun does with the difference number about 12 degrees, 11 minutes and 26.56 seconds every day or 0 degree, 30 minutes 28,6 seconds for every hour. If the speed of moon move keeping away from the solar to the East numbering 0 degree, 30 minutes and 28.6 seconds every hour is attributed to the speed of earth move to the East around its axis numbering 15 degrees for every hour, it would be found that the move of earth numbers 1 degree or equal to 0 degree, 2 minutes, 1.91 month moves.

Otherwise, the move of moon numbers 1 degree and is equal to 20 degrees 31 minutes 50.84 seconds of the earth move. Based on the data mentioned, the limit of *mathla`* to the East from the spot of *ru'yat* could be calculated using one of these two formulations:

- a. Degree of *irtifâ`* hilâl, subtracted with degree limit of *imkan ru'yat* (visibility), divided with 0 degree, 30 minutes, 28.6 seconds, then multiplied with 15.

³¹ Salam Nawawi, *Rukyat Hisab di Kalangan NU-Muhammadiyah*, (Surabaya: Diantama, 2004) p.104.

- b. Degree of *irtifâ'* hilâl, subtracted with the limit of *imkan ru'yat* (visibility), multiplied with 29 degrees, 31 minutes, 50.84 seconds.³²

The above mentioned two formulations show that the limit of *mathla`* at the East side of *markaz ru'yat* would be longer when the limit of *imkanur rukyah* which becomes the basic is 2 degrees smaller. Otherwise, it would be shorter if the limit of *imkanur rukyah* which becomes the basic is 2 degrees bigger.

3. The Application of *Mathla`* Concept of The Beginning of the *Hijriyah* Month in Eclipse Prayers Obligation

The command to perform the eclipse prayers, as mentioned before, at least, is based on two hadith(es) narrated by Muslim, Ahmad and Bukhari.³³ The hadith(es) are as follow:

First, a hadith narrated by Muslim

فَإِذَا رَأَيْتُمْ مِنْهَا شَيْئًا، فَصَلُّوا، وَادْعُوا اللَّهَ حَتَّى يَكْشِفَ مَا بِكُمْ

Second, a hadith narrated by Bukhari

إِنَّ الشَّمْسَ وَالْقَمَرَ آيَاتَانِ مِنْ آيَاتِ اللَّهِ لَا يَنْكَسِفَانِ لِمَوْتِ أَحَدٍ وَلَا لِحَيَاتِهِ فَإِذَا رَأَيْتُمُوهُمَا فَادْعُوا اللَّهَ وَصَلُّوا حَتَّى يَنْجِلِي

Those two hadith(es) relate to the lunar and solar eclipses. In a quite deep reading, it could be noticed that the contents imply the sign about two coinciding things, i.e witnessing the eclipses and performing prayers due to the sign.³⁴

Furthermore, the hadith(es) have same characteristics with another hadith on the beginning of the month determination at the phrase *رَأَيْتُمُوهُمَا* as it is clear as follows:

³² Salam Nawawi, *Rukyat Hisab.*, 106-110.

³³ Salam Nawawi, *Rukyat Hisab.*, 106-110.

³⁴ There found six hadithes on the events of solar and lunar eclipses. Although they were narrated by different narrators (*rawi*), there are some similarities among the texts, particularly at the word *ra'a* which means to see carefully or to witness. See Masyhar, M.A, et al (translator), *Ensiklopedia Hadits*, Vol. I, 230-237.

عن عبد الله بن عمر رضى الله عنهما قال : قال رسول الله صلى الله عليه و سلم :
الشهر تسع و عشرون فإذا رأيتم الهلال فصوموا وإذا رأيتموه فافطروا فإن غم
عليكم فاقدروا له (رواه مسلم)

Therefore, discussing the eclipse phenomenon using the keyword رَأَيْتُمُوهُمَا would lead to the study on *ru'yat* and *hisâb*. It means that witnessing the eclipse could be done through the direct observation (*ru'yat*) as well as based on the calendar calculation (*hisâb*).³⁵ This discussion had generally reached the very deep analysis and got so much attention. *Rukyat* study, for example, had formulated systematic concept and methods on studying celestial objects empirically. Meanwhile, *hisâb* studies had already created system and methods for calculation or computation/digitization of celestial objects. In the studies on earth, moon and sun rotation or moves, those two also had become main topics for discussion on prayers schedule determination, the beginning of the *hijriyah* month and the eclipse. There found a general agreement for the use of prayers time locally, while topics on the beginning of the *hijriyah* month determination and the eclipse are still on dispute particularly whether it applies locally or globally.³⁶

The very urgent problem about determination of the beginning of the *hijriyah* months and eclipse phenomenon is the spot location in which the observation takes place since it serves as the basic in the calculation. This needs to get much attention because the round shape of the earth causes the differences on the observation process and computation of the moon and sun position depending on the spot

³⁵Ahmad Izzuddin, *Ilmu Falak Praktis; Metode Hisab-Rukyat Praktis, dan Solusi Permasalahannya*, (Semarang; PT. Pustaka Rizki Putra, 2012), 1.

³⁶ *Ru'yat* (witnessing the *hilâl*) and *hisâb* (calendar calculation) had become inseparable part of studies about determination of the beginning of the month of Hijriyah. Therefore, *ru'yat* is considered as a method to determine the beginning of the month by looking at or observing the appearance of *hilâl* when the sun sets upcoming the beginning of month of hijriyah using naked eyes or telescope. This method was firstly used since the era of Prophet Muhammad. As the time went on, there also used another method called *hisâb*, which determines the beginning of month of hijriyah using calendar calculation. See Nugroho Eko Atmanto, ELFALAKY: Jurnal Ilmu Falak, Vol. 1. No. 1. Tahun 2017 M/1438 H.

location of the *markaz* reference. As an elaboration that the very first look of the month above the earth (forming as *hilâl*) after the conjunction of solar eclipse phenomenon is limited, it does not always cover all part of earth surface. This also means that at the very first look of the eclipse, there are some parts of the earth which its people can see it, while some others cannot. Considering the fact about some areas in the earth which can see the very first look and some others which cannot, a problem appears for the second area. Relating to the problem of determination, it could be further studied particularly on into how far the eclipse phenomenon, either solar or lunar, would take place and give any consequence.³⁷

In the context of area relating to obligation to perform eclipse prayers, it could be compared to the enforcement of *law area* in which the *falak* terminology calls it *mathla`*. If the last conclusion on whether eclipse phenomenon could be witnessed or not and the obligation to perform eclipse could apply, it would depend on the certain *mathla`*. The difference of *mathla`* could be the main reason for differences in performing eclipse prayers.

The *mathla`* of obligation enforcement to perform eclipse prayers could also be well compared to the concept of *mathla`* on the enforcement of *ru'yat* and *hisâb* globally. In the context of the similarity of *mathla`*, it could be used global *mathla`*. If that is so, any area in the earth could get the same command to perform eclipse prayers. However, if the enforcement is based on the different *mathla`*, these following three concepts of *mathla`* could be used. *First*, it applies as far as the *qasar* rule could not be used, which is about 80 km. *Second*, it applies as far as 8 degree longitude as used in Brunei Darussalam. *Third*, it applies as far as the law area (*mathla` wilayah al-hukmi*) reaches and consequently, no matter where the *ru'yat* or *hisâb* takes place, the result applies for all law area of a nation/government.³⁸

³⁷ Rusydi Sulaiman, "Gerhana dan Keharusan Kosmologi Manusia: Tinjauan Filsafat Wujud", *Eduagama: Jurnal Kependidikan dan Sosial Keagamaan*, p-ISSN: 2598-8115/e-ISSN: 2614-0217, vol. 3 No.1 2017, 1-22.

³⁸ Ruskanda, Farid, dkk. *Rukyat dengan Teknologi: Upaya Mencari Kesamaan* (Jakarta: Gema Insani Press, 1995), 59.

The next discussion is about how could the enforcement be scientifically defended? This could start by understanding the system of the running time, particularly whether it is logically or globally minded. As explained before, comparing to the conception of beginning of the month determination, *mathla`* on the perspective of *fiqh* could be explained using two types of theory, which are *ittifâq al-Mathâli`* (formulated by Hanafi, Maliki and Hanbali school) and *ikhtilâf al-Mathâli`* (formulated by Syafi'i school). According to the former, lunar or solar eclipse phenomenon which could be witnessed from the earth would result the global enforcement of eclipse prayers obligation to the whole area of the earth. While for the later, the local observable eclipse phenomenon would enforce obligation for the local area as well or the area in the same *mathla`* or inside the same *mathla`* border. When the eclipse only occurs in a certain area, according to this second theory, it could not apply for the rest of the world because the differences in diverse areas make it impossible to make all areas in the earth under the single *mathla`*.

However, it needs a closer and more proportional look relating to the time because it would affect on the understanding of implementation which needs to adjust to the running time instead of logic or language understanding. *Sunnatullah* about the running time system at the earth is based on locus or place (partial or local) instead of global. At the earth, the time runs from the East to the West in line with the stream of day and night. The East areas experience *syurûq* and *ghurûb* of the sun earlier than those at the West. The further distance of West and East between two areas is, the bigger differences in time between them would be. Therefore, it comes not a surprise that those who have a long trip would deal with difficulties relating to the time differences. The term 'times' in all religious texts could be logically understood in line with the systematic running time at the earth which is partial and locus based. If, for instance, at the sunset (*ghurûb*) in Indonesia, any lunar eclipse could not be seen, it is illogical to follow other countries which perform the eclipse prayers because they already witnessed it. The same thing happens when understanding the beginning of *dzuhr* time in Indonesia about 4 PM

based on the time of slipping sun at the Mecca or at 10 AM based on the time of slipping sun at Tokyo.³⁹

The above illustration shows that it is not only illogical to apply the principle of global enforcement, but also could not guarantee the same day for the beginning and the end time of eclipse to the whole area of the earth. Therefore, on the perspective of *syarî'ah* and scientific, it is not relevant to make any unification of the day of worship using the *ru'yat* global issue.

Conclusion

The motion of earth, moon and sun causes unique natural phenomenon. The shift of day and night is one of the results. This leads to more specific consequences related to the obligation of worship, including the eclipse prayers. In the perspective of science, solar eclipse phenomenon could be experienced in two types of condition. The first is being able to be both computed and witnessed, while the second is being able to be computed but not nakedly observable by everyone. Therefore, although it could be globally computed, it is still accessible limited in any local area. Meanwhile in the perspective of *fiqh* (Islamic law), the obligation applies for those who witness it directly or depending on the calendar calculation or computation (*hisâb*). Based on the *mathla` wilayah al-hukm*, or in other words, if it is convicted – through the calendar calculation – that there occurs eclipse in certain areas in Indonesia and ensured by the empirical phenomenon, the obligation to perform the eclipse prayers applies. However, it is limited for those who witness the phenomenon no matter it is total eclipse, annular eclipse, annular/total eclipse, partial eclipse or panumbra lunar eclipse.

Bibliography

- Ahmad Izzuddin, *Ilmu Falak Praktis, Metode Hisab-Rukyat Praktis, dan Solusi Permasalahannya*, Semarang; PT. Pustaka Rizki Putra, 2012
- Alimuddin, *Gerhana Matahari Perspektif Astronomi*, Journal Ad-Daulah, p-ISSN: 2303-050X/e-ISSN: 2580-5797 Vol. 3, No.1, Juni 2014

³⁹ Ros Maimunah Haji Yahya Zikri, "Cerapan GMT di Palembang, Indonesia dan Simulasi Menggunakan Perisian Stellarium: Satu Pengalaman", *Jurnal Reflektika*, p-ISSN: 2337-6821/e-ISSN: 2580-4006 Vol. 11, No. 2 August, 2016, 102-126.

- Hendro Setyanto, *Membaca Langit*, Jakarta Pusat; al-Ghuraba, 2008.
- Masyhar, M.A, dkk (trans), *Eksiklopedia Hadits I: Abu Abdullah Muhammad bin Ismail al-Bukhari, Shahih al-Bukhari I*, Jakarta: Almahira, 2011.
- Wahbah az-Zuhaili, *Al-Fiqh al-Islami Wa Adillatuhu*, Damaskus: Dar al-Fikr, 2006.
- Sayyid Sabiq, *Fiqh as-Sunnah*, Beirut: Dar al-Fikr, 1981
- Sihabuddin ar-Romli, *Nihayatul Muhtaj Ila Syarh al-Minhaj*, Beirut: Dar al-Kutub al-Ilmiyyah, tt.
- Ibnu Hajar al-Haitamiy, *Tuhfatul Muhtaj bi Syarh al-Minhaj*, Beirut: Dar al-Kutub al-Ilmiyyah, tt.
- Abu Malik Kamal bin as-Sayyid Salim, *Shahih Fikih Sunnah*, Jakarta: Pustaka Azzam, s.a
- A Warson Munawwir. *Kamus al-Munawwir*, Surabaya: Pustaka Progresif, 1984
- Departemen Pendidikan dan Kebudayaan, *Kamus Besar Bahasa Indonesia*, Jakarta: Balai Pustaka, 2001
- Muhyidin Khazin, *Kamus Ilmu Falak*, Yogyakarta: Buana Pustaka, 2005.
- Suskinan Azhari, *Ensiklopedi Hisab Rukyat*, Yogyakarta: Pustaka Pelajar, 2005.
- Abd. Salam Nawawi, *Rukyat Hisab di Kalangan NU Muhammadiyah: Meredam Konflik dalam Menetapkan Hilal*, Surabaya: Diantana, 2004
- Imam Abi Zakariya Muhyiddin ibnu Syaraf-Nawawi, *Syarh Shahih Muslim*, (Bairut: Dar al-Kutub al-Ilmiyah, s.a
- Muslim, *Sahih Muslim*, tnp; al-Qana'ah, s.l
- Muh. Rusywan Syarif, *Islam Fenomenalis Gerhana Matahari di Indonesia: Studi Budaya 'Siemme Matanna Essoe' pada Perempuan Bugis Bone*, Proceedings ARICIS, No. 1, 2016: 520-534
- Rusydi Sulaiman, *Gerhana dan Keharusan Kosmologi Manusia: Tinjauan Filsafat Wujud*, Edugama: Jurnal Kependidikan dan Sosial Keagamaan, p-ISSN: 2598-8115/e-ISSN: 2614-0217, Vol. 3 No.1 2017
- Muslih Husein, *Hadis Kuraib Dalam Konsep Rukyatul Hilal*, Jurnal Penelitian, p-ISSN: 1826-9903/e-ISSN: 2541-6944, Vol. 13 No. 2 2016
- Ibnu Hajar, *Fathul Bari*, Beirut; Dar al-Fikr, ttp

- Abdu ar-Rahman al-Jazari, *al- Fiqhu 'ala al-Mazahibi al-Arba'ah*, Beirut: Dar al-Kutub al-Ilmiah, 1990
- Imam Abi Zakariya Muhyiddin Ibnu Syaraf- Nawawi, Al-. *al-Majmu' Syarhu al-Muhazzab*, (Bairut: Dar al-Fikr, tt
- Abdurrahman bin Muhammad Ba 'Alawi, *Bughyah Al-Mustarsyidin*, Beirut: Dar Al-Fikr, 1997.
- Ibnu Hajar, *Fathul Bari*, Beirut; Dar al-Fikr, ttp
- Ibnor Azli Ibrahim, Mohd Razlam Ahmad, Mohd Hafiz Safiai, *Balai Cerap Astrofiqh Di Malaysia: Kesenambungan Ilmu Falak Syarie dari Asia Barat, International Journal of West Asian Studies EISSN: 2180-4788 Vol 5 no. 2 (pp.35-50) DOI:10.5895/ijwas.2013.09*
- Hasna Tuddar Putri, *Redefinisi Hilal dalam Perspektif Fiqh dan Astronomi*, Jurnal al-Ahkam, p-ISSN: 0854-4603/e-ISSN: 2502-3209, Vol. 22, No. 1 April 2012
- LPMA dan LIPI, *Penciptaan Jagat Raya dalam Perspektif al-Quran dan Sains*, Jakarta: Kemenag RI, 2012
- Depdikbud, *Kamus Besar Bahasa Indonesia*, Jakarta; Depdikbud, 2006
- Salam Nawawi, *Rukyat Hisab di Kalangan NU-Muhammadiyah*, Surabaya; Diantama, 2004
- Muhtar Salimi, *Visibilitas Minimum: Studi Komparatif Antara Kriteria Deoag dan Astronomi*, Jurnal Penelitian Humaniora, Vol. 6, no. 1, 2005
- Nugroho Eko Atmanto, *ELFALAKY: Jurnal Ilmu Falak Vol. 1. No. 1. Tahun 2017 M / 1438 H*
- Ros Maimunah Haji Yahya Zikri, *Cerapan GMT di Palembang, Indonesia, dan Simulasi Menggunakan Perisian Stellarium: Satu Pengalaman*, *Journal Reflektika*, p-ISSN: 2337-6821/e-ISSN: 2580-4006 Vol. 11 No. Agustus 2, 2016
- Ruskanda Farid. et.al, *Rukyat dengan Teknologi, Upaya Mencari Kesamaan Pandangan tentang Penentuan Awal Bulan Ramadhan dan Syawal*, Jakarta: Gema Insani Press, 1994
- Syaeful Mujab, *Gerhana: Antara Mitos, Sains dan Islam, Yudisia: Jurnal Pemikiran Hukum dan Hukum Islam*, ISSN: 1907-7172/e-ISSN:2477-5339, vol. 5. No. 1, 2014
- Syarifuddin Yusmar, *Penanggalan Bugis-Makasar Dalam Penentuan Awal Bulan*, Jurnal Hunafa, vol. 5 no. 3, December 2008
- T. Djamaluddin, *Semesta Pun Bertawaf*, Bandung: Mizan, 2018.

Ahmad Mulyadi

Uum Jumsa, *Ilmu Falak: Panduan Praktis Menentukan Hilal*, Bandung:
Humaniora, 2006.



al-Ihkam: Jurnal Hukum dan Pranata Sosial, 14 (1), 2019: 50-71
ISSN: 1907-591X, E-ISSN: 2442-3084
DOI: <http://doi.org/10.19105/al-ihkam.v14i1.2159>

The Study of *Maqâshid Syarî`ah* Toward Maduresse Traditional Inheritance by Using System Approach

Mohammad Hipni

*Trunojoyo University of Madura, Jl. Raya Telang Kamal Bangkalan
Email: busyro.pro18@gmail.com*

Article history: Received: 20 Februari 2019, Accepted: 27 Juni 2019, Published: 11 Juli 2019

Abstract:

In traditional societies such as Maduresse who carry out religious teaching strongly, women in certain contexts are generally positioned in the lower position than men. However, in the cultural context of Maduresse inheritance, women are on the equal footing with men. Even, parents give more priority on the legacy to their daughters. The purpose of this study is to understand the phenomenon of the women position in traditional Maduresse legacy by using *maqâshid* sharia particularly the system approach. The use of system approach aims to explain parts that influence the position of women in Maduresse traditional inheritance system and determine the legislation ratio on the legal phenomenon. This research discovers that women in Madurese society are considered not only as passive family members, but also as a symbol of honor and sustainability in Madurese family. These arguments make Maduresse's understanding on the inheritance verses more comprehensive. Therefore, women are positioned equal with men for the legacy distribution in Madura traditional inheritance.

Keywords:

Islamic Jurisprudence; Cultural Legacy Distribution; System; Madurese

Author correspondence email: busyro.pro18@gmail.com
Available online at: <http://ejournal.iainmadura.ac.id/index.php/alihkam/>
Copyright (c) 2019 by al-ihkam. All Right Reserved



Abstrak:

Pada masyarakat tradisional seperti Madura dengan karakter keras memegang teguh agama, wanita pada konteks tertentu diletakkan dalam posisi yang lebih rendah dari pada laki-laki. Namun, dalam konteks kewarisan adat Madura, wanita diposisikan setara dengan kaum laki-laki. Bahkan, orang tua memberikan prioritas lebih atas bagian waris anak perempuannya. Penelitian ini bertujuan memahami fenomena kedudukan wanita dalam waris adat Madura dengan menggunakan *maqâshid syarî'ah* khususnya pendekan sistem. Analisis sistem ini diharapkan mampu menjelaskan bagian-bagian yang memengaruhi kedudukan wanita dalam sistem waris adat Madura dan mengetahui *ratio legis* dari fenomena hukum tersebut. Penelitian ini menghasilkan temuan bahwa wanita dalam masyarakat Madura dianggap tidak hanya sebagai anggota keluarga pasif, namun sebagai simbol kehormatan dan simbol keberlangsungan keluarga masyarakat Madura. Pandangan yang demikian membuat pemahaman terhadap ayat waris lebih komprehensif. Oleh karena itu, wanita diposisikan setara dengan laki-laki dalam pembagian waris adat yang dipraktikkan dalam adat masyarakat Madura

Kata Kunci:

Hukum Islam; Waris Adat; Sistem; Madura

Introduction

Legacy is one of Islamic main lessons that every Moslem should obey. Islam divides the legacy comparison for men and women in 2:1¹ quantification. This rule is *qath'î* (definite)² and supposed to be the main guide for all Moslems,³ including Maduresse people whose majority is Islam believers. Any break of the legacy rule is considered as the infraction of Allah's command⁴ and threatened with the hell's torture.⁵

¹ Q.S al-Nisâ' (4): 11

² Rachmat Syafe'i, *Ilmu Ushul Fiqih*, (Bandung: Pustaka Setia, 2015), 56

³ Wahbah Zuhailî, *al-Tafsîr al-Munîr: Fi al-'Aqîdah wa al-Syarî'ah wa al-Manhaj*, Vol. II, (Damaskus: Dâr Fikr, 2003), 608

⁴ The sentence used in Al-Quran is *washiyyatan min al-Allah*, Allah's testament. The meaning of the testament is mentioned at the next verse "those are the limitation of Allah", so al-Sayyuti considers it as Allah's order. Al-Sayuthî, *al-Dzurr al-Manthûr al-*

On the basis of it, Maduresse people who are famous of their great religiosity ideally practice the division of legacy in accordance to Islamic rules. However, Maduresse people do not always literally use the Islamic rules mentioned in al-Qur'an as the main source in the practice of "legacy division". Sometimes, a Maduresse woman gets more preferential treatment than a man. A daughter may get a house and a field of land for her legacy while her brother only gets a land. In the doctrinal level, a Moslem must obey all of religious teachings perfectly (*kaffah*), whether they like it or no. What makes this research important and interesting is because it portrays a phenomenon of Maduresse people who use inappropriate legacy rules on the Islamic legacy point of view. This study will engage religious, social, and cultural aspects that are systemically built in Maduresse life particularly relating to the legacy division. The Maduresse traditional legacy system was absolutely built based on the strong *ratio of legislators* that it later becomes a fact of Islamic law with a special characteristic. This research is trying to discuss the "*istinbâth* (conclusion making)" of Islamic law model among Madurese people by using *maqâshid syarî'ah* particularly the system approach.

The previous researches about *maqâshid* usually revolve in episteme level and still do not engage axiology level. To mention some, there found researches by Ali Mutakin,⁶ Maulidi,⁷ and Sadari⁸ that concerned at most with *maqâshid* as the *istinbath* law method. Meanwhile, the study about application of *ijtihâd maqâshidi* products in people's life is still rare to find.⁹ This research gives the application of *ijtihâd maqâshidi* in a partial case in a certain people's life. Using this

Tafsîr bi al-Ma'tsûr, Juz IV, (Kairo: Markaz lil Buhûs wa al-Dirâsah al-'Arabiyyah wa al-Islamiyah, 2003), 270

⁵ Q.S al -Nisâ' (4): 14

⁶ Ali Mutakin, "Teori Maqashid al-Syariah dan Hubungannya dengan Metode Istimbath Hukum" in *Kanun Jurnal Ilmu Hukum*, Bol 19 No. 3, August, 2017.

⁷ Maulidi, "Paradigma Progresif dan Maqashid Syariah: Manhaj Baru Menemukan Hukum Responsif", in *Asy-Syir'ah: Jurnal Ilmu Syariah dan Hukum*, Vol .49 no. 2, December 2015

⁸ Sadari, "Qur'anic Studies: Ber-ushul Fiqh dengan Maqashid Syariah sebagai Metode dalam Prespektif Adian Wahyudi, in *Shahih*, Vol 3 No. 1 January, 2018.

⁹ The study of *ijtihâd maqashidi* has ever been done by Abdul Mukti Thabrani, "Maqashid Revitalization in Global Era: Istidlal Study from Text to Context" in *al-Ihkam*, Vol. 13 No.2 Desember 2018.

approach, it is wished that this research can comprehend Maduresse people local wisdom in doing “*ijtihâd*” and understanding the traditional legacy division.

The System Features as Islamic Law Phenomenon Understanding Method

According to Singer, as it is cited by Danandjaja, understanding the essence of reality in the society begins with the willingness to see human as an individual who lives in a certain culture as the place where they interact each other.¹⁰

From the basic concept and the framework above, phenomenon of Maduresse traditional legacy looks as the pull and push reality between Maduresse people as individuals and various backgrounds they come from in a side and its existence as the social reality or common rules of Madurese people in dividing the property to their generation in another side. To understanding the complicated phenomenon, the writer uses qualitative research through *maqâshid sharia* as the research paradigm and the *system approach* as the main analysis method.

Maqashid sharia with its system approach is basically used as *istinbath* method to predict and answer many kinds of Islamic law problems so that it would be still compatible to the current development. However, its use in this research is as a method to understand a certain fact of Islamic law among certain people. Therefore, here, the Maduresse traditional legacy phenomenon is used as the object of the study which would later be analyzed using the approach system of *maqâshid syar'iyah* framework. Its use is wished to get comprehensive understanding on Maduresse traditional legacy.

Theoretically, *maqâshid syarî'ah* is a value that shari'a tries to maintain through some rules extracted from religious texts to ensure the human being's interest remains well kept.¹¹ In other word, *maqâshid syarî'ah* is the essence or spirit of Islamic law regulated to human as the God's servants. If it were not because of the values in

¹⁰ James Danandjaja, *Antropologi Psikologi: Teori, Metode dan Sejarah Perkembangannya*, (Jakarta: Rajawali, 1988), 89

¹¹ Saad Ahmad al-Yûbî, *Maqâshid al-Syârî'ah al-Islamiyah wa Alâqatihâ bi al-Adillah al-Syar'iyah*, (Saudi Arabiya: Dâr Hijrah li an-Nasr wa al-Tawzî', 1993), 38

maqâshid, there would have not been found any law that Allah regulates. Therefore, *maqâshid syarî'ah* is considered as *illat* (main cause) on any *tasyri'* (law making) that Allah gives to his servants.¹²

Meanwhile, according to Indonesian Language Dictionary, system is a set of elements that are strictly connected to each other in forming the totality.¹³ One of which is the totality of social reality. In this case, the system refers to Maduresse traditional legacy division that contains spirit of women's empowerment inside its division. The use of system approach in this research is due to its characteristic, which is to know and understand related elements which form the Maduresse traditional legacy division system model.

Furthermore, the system approach used in this study is the approach of Jasser Auda, a contemporary Islamic thinker. Auda is a *maqâshidi* (expert of *maqâshid syarî'ah*) who tried to bridge the gap between Islamic texts and Moslem's changing problems. In many previous studies, he used *maqâshid syar'iyah* as the main basic¹⁴ and system approach as the basic method. The basic concept of system approach and analysis uses wider approaches and makes it possible on the interrelatedness among some features as follow; Seeing the whole research object (*wholeness*), being open to the improvements (*openness*), the interrelation of some values (*interrelated hierarchy*), engaging some dimensions (*multidimensionality*), and giving priority on the main purpose (*purposefulness*).¹⁵

The system is also called as *cognitive science* considering that every concept of science, whatever it is, always involves the mind intervention or human cognition. It cannot be imagined that a perfect

¹² In the realm of learning *tauhid*, particularly the 'illat on action (*fi'l*) of Allah, there found a long debate since the beginning of *ilmu kalam* discussion. The long debate was among Muktaẓilah, Asy'ariyyah, Matûridiyyah, Dhâhiriyyah etc. However, the debate about *illat* was not continued to *fiqh* science realm, where there found a deal of *illat* law. See, 'Âdil Syuwâih, *Ta'lîl al-Ahkâm fi al-Syarî'ah al-Islamiyyah*, (Thantah: Dâr Basyir li al-Tsaqafah wa al-'Ulûm, 2002).

¹³ KBBI

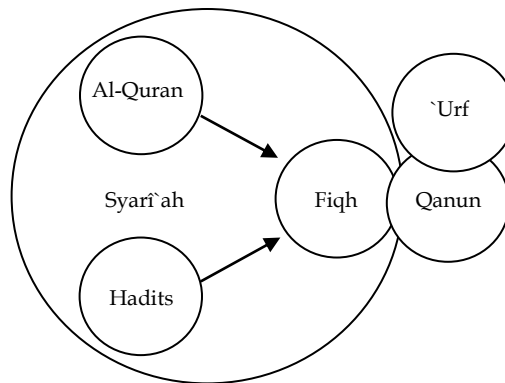
¹⁴ Jasser Auda is a scholar who learns about *maqasid syariah*. His published works on this theme could be said almost complete ranging from the early *maqasid*, *maqasid for beginner* (2008) until the development of his work *Maqâsid al-Syarî'ah as Philosophy of Islamic Law: A System Approach* (2007)

¹⁵ Jasser Auda, *Maqasid al-Shari'ah as Philosophy of Islamic Law: A System Approach*, (London: The International Institute of Islamic Thought, 2007), 45-55.

concept could stand by itself without the participation of mind. Abstract concepts like classification, categorization, and also cognitive nature from (pure) law, for example, will be used to develop the fundamental concept of Islamic law theories as the research object. In the very first time, this approach was used to construct Islamic science generally, but the writer also uses it in discussing elements of Maduresse traditional legacy that are related each other in building a reality.

The use of this approach system in *ijtihad maqâshidi* model impacts to the changing view on *fiqh*. *Fiqh* which before was considered divine revelation and therefore cannot be logically understood turns to be a product of human cognition and is supposed to be in line with prosperity and justice.¹⁶ Here is the point of view comparison on *fiqh* between *ushul fiqh* conventional approach model and *maqâshid syari'ah* model using system approach.

Figure 1. Conventional

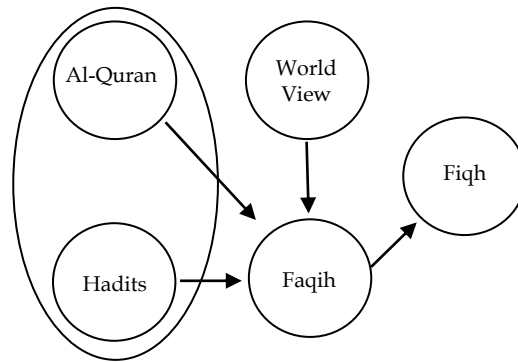


¹⁶ Absori, "Transformation of Maqashid al-Syari'ah (An Overview of the Development of Islamic Law in Indonesia), in *al-Ihkam*, vol 11, No I June, 2016. Also, see the work of Hasan Hanafi which stated the importance of revelation contextualization as the representative of human's "understanding" toward God's words. Hasan Hanafi, *al-Ijtihadi al-Kalami*, (Lebanon: Dar al-Hadi, 2002), 332. See also Wael B. Hallaq, *An Introduction to Islamic Law*, (USA: Cambridge University Press, 2009). Meanwhile, Bassam Tibi looks the Islamic law as open texture, Bassam Tibi, *Islam and the Cultural Accomodation of Social Change* (America: Wastview Press, 1991).

The picture above shows how the past *muftis* (fatwa issuers) made the *fiqh* closed. *Fiqh* was a part of sharia in the same level with The Qur'an and The Hadis. It is unreachable by human's logical thinking and in the untouchable area. Hence, the change of law due to any difficulty or urgency was never easy to do. Any idea or effort to discuss the *fiqh* was considered the same as disturbing the purity of the sharia. Meanwhile, the contextual value of human life, or so called *urf* was only seen as the external factor which does not give any impact on *fiqh*. In fact, *urf* was even seen as the effect of *fiqh* application. Different from it, implementation of *kanun* was considered as the duplication result of *fiqh* or in another word, *kanun* became the interaction of those three.¹⁷

Jasser Audah offered quite significantly different diagram. On his perspective, *fiqh* that was categorized as integral part of sharia needs to be pulled out from untouchable realm to another area in which logical reasoning could take place. Thus, *fiqh* must be a part of *mujtahid's* logical system which is full of interrelated values. The model of system approach is as the illustration below:

Figure 2. System Approach



The picture shown above is an effort of *mujtahid* in pulling out *fiqh* from the realm of untouchable revelations to the touchable ones. *Fiqh* is put as the logical product of a *fâqih* or *fiqh* expert after some

¹⁷ Jasser Auda, *Maqāshid al-Syarīah as.....*, 58.

enrichment process of influencing potentials. The process uses some features of system as identified before. For example, cognition feature is not only used to pull out *fiqh* from the realm of revelation to the realm of science, but also for enriching the prophet's Sunnah. Sunnah is no longer fully considered as *khithab* or the law imposition, but further divided into three parts: *Sunnah* as a law that Moslem need to obey; *Sunnah* as a law with a certain specification, so the execution/performance must be appropriate to the specification, and the last, *sunnah* is as human's behavior. This perspective on the Prophet's *sunnah* really affects the ways the process *istinbath* based on Prophet's *sunnah* takes place.¹⁸

In the last picture, it is clear that a *faqih* with his surrounding elements becomes the central of *istinbath*. *Faqih* is supposed to be able to integrate the sharia universal values¹⁹ (*maqâshid syarî'ah*) with some noble world views in order to produce a *fiqh product* which is compatible to any change and development of nowadays Moslem. In the perspective of system approach, the role of a *faqih* in *istinbath* process of Islamic law is to use all features in *maqâshid sharia* paradigm to create a responsive *fiqh product*.

The Woman Existence in Maduresse Traditional Legacy Law

The focused *locus* of this research is in Bangkalan. This limitation aims to get the valid Maduresse traditional legacy portrait, especially for the women portion and position. To reach that purpose, the data explanation about the elements of Maduresse traditional legacy development is explored in balance. Those include data about culture, family and religion system which all of them are considered important in the data compilation.

In this research, respondents come from two different typologies. The first typology consists of those who represent the village and city culture. Meanwhile, the second makes education level as basic for selecting respondents.

Figure 3: Respondents' Data

Respondent	Education	Domicile
------------	-----------	----------

¹⁸ *Ibid*, 195-196

¹⁹ Fazlur Rahmân, *Islam*, (London: Chicago University, 1979)

H. Baidlowi	Islamic Boarding School	Kwanyar Subdistrict
Dlawi	Senior High School	Socah Town
Anita	S1 (Bachelor)	Bangkalan Town
Nasruddin	Local Public Figure	Kwanyar Subdistrict
Iqbal	S1 (Bachelor)	Bangkalan Town
Ansori	Islamic Boarding School	Kwanyar Subdistrict

This research is a qualitative one because it studies the law practiced in a certain society, Madura, as a cultural system.²⁰ In the realm of law research, a research on any law applied in a society is categorized as empiric law research. The law research itself could not be separated from social and cultural life where the law lives and develops. Hence, Maduresse traditional legacy research is important to do in order to know the cultural and social portrait and how it is practiced.

The Portrait of Bangkalan's Culture

According to folklore, the name of Bangkalan was taken from Maduresse language "*bangka*" and "*la'an*". *Bangka* means dead from the very rude Maduresse language. This word is usually spoken to a rude or hated people who died. While *la'an* means done or finished, so both of the words are combined into one and named for a town, Bangkalan. The history of these two words combination particularly came from folklore about *Ke' Lesap's* rebellion that was ended by the murder of Bangkalan's *Adipati*, Cakraningrat V.²¹

Bangkalan's and Maduresse people are mostly Moslem. Their point of view never gets apart from religion as the basic value of their life. According to them, religion is not just a basic life view, but also their identity as Maduresse people.²² It is an undeniable sociological fact of Madura that mostly, its people are Moslem. This indicates that religion is the important value of Maduresse people. Their loyalty on religion has become their identity. Among others, this is clear from the way local people get dressed, like wearing *samper* (a long fabric for

²⁰ Nur Syam, *Islam Pesisir* (Yogyakarta: LkiS, 1995), 2.

²¹ Abdurahman, *Sejarah Madura, Selayang Pandang*, (Sumenep: 1971. s.a), 33

²² Latief Wiyata, *Mencari Madura*, (Jakarta: Bidik-Phronesis Publishing, 2013). 3

Maduresse women's traditional skirt), *kebaya*, *burgo'* (women's head cover), *sarong* (men's skirt) and *songko'* (men's rime less cap) as the clothing style of Maduresse people which also symbolize the Islamic traditional fashion of local Moslem villagers.²³

For Maduresse men villager, the wearing of *songko'* does not only give a unique value, but also symbolize strong willingness to study religious teaching. This is as what has been said by H. Baidlowi, "*oreng lok akocca'an jiah bisa arosak ka derejedeh orang jiah. Apapole cak keaeh, oreng se lok toman akocca'an bisa eanggeh oreng lok adil sehingge lok bisa deddih bellinah anaknah.*"²⁴ (those who do not wear *songko'* break their dignity by themselves. Moreover, one of the local Islamic leaders (*kyai*) said that a man who does not wear *songko'* cannot become the marriage guardian for any bride). The quotation implies an effort to include the local culture to the religious value so it would become a part of must-done religious practice.

Furthermore, the shape of *songko'* in Madura, especially Bangkalan, shows social degree identity of those who wear it. The white *songko'* is usually worn by a man to show his identity as a student of Moslem schools whether he had gone for *haji* or not yet. When combined with *sorban* (a kind of turban), it indicates that the wearer is a religious leader. Meanwhile, the black *songko'* with the sharp corner at the front and back sides with a higher size than the normal is worn by a person with a wide relation or so called *blater*). This is different from the black *songko'* with a normal size as it is usually worn by common people.

Besides religion as the basic point of view in facing any realities, the pride or prestige is another basic value of Maduresse people.²⁵ This leads to the good behavior of respecting each other as it is clear from the proverb *mon etobi' sake,' jek nobik oreng laen*, (if being pinched is painful, do not pinch others). This perspective also creates the common norm of the interaction called as *adhet tatakrama kasopanan* (polite behavior). This norm is the term of understanding and obeying habitual rules of the society which manages relation among

²³ Mien Rifa'i, *Manusia Madura*, (Jakarta: Pillar Media, 2007), 446

²⁴ The interview's result with H. Baidlowi in October 2, 2018.

²⁵ Maulana Surya Kusumah, "Sopan, Hormat, dan Islam Ciri-ciri Orang Madura", in *Kepercayaan, Magi, dan Tradisi dalam Masyarakat Madura*, (Jember : Penerbit Tapal Kuda, 2003), 18

generation, degree, and gender, whether in the society or private community.²⁶ This politeness cultural practice is applied strictly in order to minimize the violation of the norms mainly those categorized as the hard violation because the doers would be regarded as “*lok taoh adhet*” which means those who do not understand the politeness culture.

The proverb *lok taoh adhet* refers to a very bad connotation among Maduresse people. They will certainly get offended when referred with the proverb much more than considered materially poor or do not understand religious teaching. This is as what had been said by Iqbal as following; “*mon oreng laok taoh ngajih, jiah bisa eajek dek keaeh, tapeh mon oreng lok thaoh adhet, pas bengataonah norok kabbi*”. (If a person cannot read the holy Qur’an, he or she is still able to learn to a religious leader. But if s/he does not know about culture, all of his or her ancestors get the bad stereotype as well).²⁷ The violation on culture, therefore, causes the ancestors get bad impact right away as they would be considered not teaching their offspring education about culture. For Maduresse people, this is so embarrassing.

The violation makes Maduresse people so embarrassed (*malo*). This particularly relates to very bad deeds which harass the pride through any disturbance on the wife, family members, and property. The disturbance on women or wife is the biggest reason of Maduresse people to feel offended and get their pride trampled. Women are considered as weak creatures which need protection as well as become the symbol of pride for Maduresse people. It is very clearly shown in Maduresse proverb saying “*oreng bini’ mateh e lencak, reng lakek mateh abedek dere*” (a woman is died on the bed, while a man is died covered in blood). Meanwhile, property becomes the last reason after the wife and family members because the stealing of property is not considered as a very big threat for Maduresse people’s pride. Maduresse crime of stealing the property is more considered as an embarrassment to the family and neighbor as the one whose properties are stolen would only be mentioned as coward because of inability to maintain his property.

²⁶ *Ibid*, 11.

²⁷ The interview with Iqbal in October 3, 2018.

Another reason of Maduresse people's embarrassment is due the harassment on family members. The *bengatoah* (ancestor) pride is manifested in a family relationship. Therefore, sometimes, the spirit to maintain the family's pride seems "too strict" and unable to compromise when one of the family members gets a threat. To maintain harmony and keep the spirit of family protection, Maduresse people generally do some efforts through many ways: visiting each other, especially from the younger to the older in some special good days, *nyambung bheleh* through marrying other family members who either geographically or genealogically far, as known as *mapolong tolang*, etc. The spirit of protecting each other is also clearly represented in the proverb "*rampak naong beringin korong*".

After having explanation of Maduresse society life portrait in many aspects ranging from social, cultural, perspective, character and religion system, it comes as urgency to discuss the importance of *ratio legis* for a law practice in a certain society's entity. Therefore, the next part would explain the law practice of Maduresse traditional legacy.

The Division of Maduresse Traditional Legacy

The transfer of wealth between generations is called inheritance. In Maduresse people's tradition, if the transfer happens when the giver is alive, it would be named as *hibbe* (hibah, grant). After the transferring process is done, the heritage is then called as *sangkolan*. *Sangkolan* has more meaning than just getting the legacy. More than that, it has a cultural meaning about loyalty toward parents as the legacy (*sangkolan*) giver.

Sangkolan in Maduresse tradition is likened to the eternal relationship between parents and their kids. As long as *sangkolan* does still exist, the primordial relationship between parents or ancestors and their children still continues. The eternity of *sangkolan* is clear from what was mentioned by Dlawi. According to him, *sangkolan* is the symbol of loyalty to parents and the soul maturity of its recipient. Furthermore, *sangkolan* is considered as the family's identity that should be kept seriously. The inability to keep it, such as by selling or giving it to other people out of family members would raise the stigma for its doer as *tak jeg-jeg* or those with no convictions or life

goal because the effort of keeping it is regarded the same as an effort of obedience to parents..²⁸

In Maduresse culture, the parents as the owners – and givers – of the legacy become the central process of traditional legacy. According to Madurese people, parents are considered as *pangeran katon* (the visible God). Hence, their words are strongly believed as having magical meaning and good impact for the future. A Maduresse proverb clearly describes it by saying “*bupak babu guru ratoh cakna kaeh*”. It means that Maduresse people should respect their parents, teachers, and king or leader. This proverb is still well kept as a cultural value of Madurese people nowadays.

Practically, the parents divide and decide each legacy of the heirs based on several considerations as their prerogative right. Any consideration that parents have is believed as the reflection on how they protect and nurture the kids. One little example is from the Anita’s family which lives in Bangkalan town. When her father was alive, he gathered his kids to tell all about his property. According to Anita, the property was initially inheritance of her grandparents from two sides, her father and her mother. Her father’s property consists of a field of land from her grandfather after the division among four siblings, including her father, with equal counting.

The field which was the only property belonging to Anita’s father is then given to Anita and her brother now, so it is divided into two parts. One is for Anita, and another one is for her brother, Abdullah. However, because of Anita’s consideration as a married woman who has got her own house with her husband, Anita sold it to Abdullah, her brother, who bought it with some grams of gold. After the land was fully owned by Abdullah, he built a house and stay there with his family. Meanwhile, Anita’s mother’s property is also divided into two parts; Anita gets a field of land and her brother, Fauzan, got two parts of rice field as the *sangkolan* from their mother.²⁹

In some cases of legacy, Maduresse parents often consider the daughter as their priority much more than the son. It is shown by the unbalanced legacy division between men and women, where a daughter gets much more legacies than a son. This is particularly clear

²⁸ The interview result with Dlawi in October 4, 2018.

²⁹ The interview result with Anita in October 3, 2018.

from the case of Nasruddin's family in deciding those who will stay at home to live with him as a parent.

*"Dâ'iyeh, Hip. Mon orèng towa ka anak jiyâ adek se kemma'a. Lo' sè lakè', lo' sè bini, padâ kabbi monggu reng towa. Mon teppaè apolong rowa cè' sennengah. Tapè tempo karè wâ' duwâ'ân, reng towa kapèkkèran. Bhâ' andi' sè èkakana tang ana'. Mangkana engko' ngapolong Kholifah riya. Mon sè lakè' dina marè nyarè kasab dhibi'. Rèng lakè' lakar kapranah akasab. Mon rèng binè', iyâ lakèna mon andi' kasab. Bân polè engko' la towa, dina engkok minta rabet Khalifah. Polana mon rèng binè' biasana pratèn bân alos. Mon apolong anak lakè', masa' engko' minta'a rabet ka manto, ana'en orèng. Iyâ mon bellâs."*³⁰ (It goes on like this, Hip. Parents would consider all of kids the same no matter they are men or women. It feels beyond happy to welcome them together here. As they grow up and get married, I still keep in mind on them, whether they have money to pay the bill or not. Therefore, I stay here with Khalifah, my daughter. I do not do the same for my son as he would go as the breadwinner. Meanwhile for my daughter, it is her husband who would be his breadwinner, if he does so. I have grown old, so I ask her to take care of me because usually, daughters are better at taking care of her parents. If it was my son who lives with me, that would be my daughter in law who would take care of me, if she does so well and sincerely).

Nasruddin's quotes above make it clear about Maduresse parents' consideration in deciding the amount of property to each of heirs. The division is based on the highly valued concept of division of labor of men and women. It has been literally mentioned that a man should be responsible to earn money and fulfill what family needs, while a woman has no direct responsibility of it.

Another fact shows that in a rich Maduresse family, a new house would be built for a daughter and she would stay there as soon as she gets married. The house is usually built close to the parent's house or even made as *pamolean*, a place where all family members would go there in some special days or occasions and as the symbol to keep the family's wholeness. Relating to this, Anshori, a head of a household who stays in Kwanyar says that his daughter is chosen as

³⁰ An interview at Nasruddin's house in August 3, 2018.

pamolean because of the *ewuh pakewuh* consideration to other family members. He said that it would not be good if a son visits a *pamolean's* home and needs to ask for food from his sister in law (if another son becomes *pamolean*).³¹ Different from a daughter, a son usually gets a field as *sangkolan*.

Many kinds of Maduresse people's cultural construction about how the formation of traditional system of inheritance takes place becomes a shared value in transferring the wealth to the generation and is symbolized as Maduresse traditional legacy.

The *Istinbath* of Female Inheritance using System Approach

The compiled data shows that there founds some systemically interconnected elements in the practice of Maduresse traditional legacy which then form the reality. Those elements live in the society's cultural system as the desired values of their life. Among others, it is mainly about the value of legacy division which pays attention mostly to the women. In understanding the construction and relation of each forming elements, it is considered proper to use the system approach of Jasser Audah. According to him, basic features of system approach are *cognition, wholeness, openness, interrelated hierarchy, multidimensionality, and purposefulness*.³²

First of all, the application of this approach needs separation between the sacred content of religious texts (*nash*) and the cognitive "understanding" on it. This means that all law products of *faqih* coming from the reading of texts (*nash*) are *ihimal*, meaning that it could contain either right or wrong.³³ This very first step is called as *cognition* in system feature.

The Maduresse people's understanding on legacy practice seems dynamic. They generally think that legacy is not only a process when daughters/sons get inheritance (property) right from their parents, but also a process of entrusting good values that they need to keep it well as *kak-cekkak* (a kind of sacred trace) of parents to their kids. This very specific thing symbolizes the shifting perspective on

³¹ The interview with Ansori in October 7, 2018.

³² Jasser Auda, *Maqāṣid al-Sharī'ah as Philosophy of Islamic: A System Approach*, 45-55

³³ Abdul Wahab Khalāf, *Ilmu Ushūl Fiqh*, (Lebanon: Dār Kutub al-Islamiyah, 2010), 13

inheritance from theological meaning to Maduresse societies' cultural values.

The shifting from theological into cultural realm makes the research object, Madurese traditional legacy, in Nur Syam's language, as the system of culture.³⁴ Therefore, religion as a cultural system can be seen as *pattern of behavior*. In this case, religion is considered as the frame of interpretation on human's action or behavior, as famous as *model for*. While in another side, religion in society is also called as *model of*, where human's practical behavior creates a fact about religion itself.³⁵ In a simpler explanation, it could be mentioned that people's behavior describes their understanding on religion. This understanding, in its turn, potentially gets unique inputs from the external elements which could be diverse among societies.

The changing perspective from dogmatic to human logical realm affects the Maduresse people's *instinbath* in deciding their legacy division and making it dynamic. The understanding of Qur'anic verse 2:1 is not only based on textual ones, but also on the local cultural setting so that it eventually affects the *instinbath* result. As the cultural concept of *rampak naong*, the responsibility to take care of the big family is given more to the daughter. In addition to it, the *malo* feeling which appears when there found a discord in a family also affects the legacy division. Those dreamed cultural values "force" Maduresse people to share and divide their wealth to the kids when the parents are still alive. This aims to avoid any family discord in Maduresse people's family system. The "forcing" power is local people's effort in understanding the Qur'anic verse 2:1 in the cultural language constructed in *sangkolan* legacy.

From the perspective of Islamic legacy concept, *sangkolan* heritage cannot be considered as legacy because the division happens when the giver is alive.³⁶ Hence, based on Islamic epistemological law, this practice cannot be categorized as legacy, although people consider it as legacy. This kind of *ijtihad* is allowed

³⁴ Nur Syam, *Islam Pesisir*, (Yogyakarta:LkiS, 2005), 2

³⁵ Clifford Geertz, *Kebudayaan dan Agama*, translator, Fransisco Budiman Hardiman, (Yogyakarta : Kanisius, 1992), 9

³⁶ One of the requirements of legacy is the death of the giver. See Mustafã al-Khin, et.al, *al-Fiqh al-Manhajî alã Madzhab al-Imãm al-Syafi'î*, Vol V, (Damaskus: Dãr Qalam, 1992), 74

by *fiqh* as the application of grant (*hibah*) concept. Giving any grant (*hibah*) to the heirs is absolutely allowed. However, it is highly recommended to make fair division³⁷ by not differentiating portion for men and women.³⁸

After the psychological side on the cognitive feature, the next element is the *wholeness* which, in this context, comes as the broad minded perspective on understanding reality. This *wholeness* feature is urgently needed as it is used to complete the *ushul fiqh* reading model that often gets trapped in atomistic and reductionistic approach. The atomistic relies on one religious text (*nash*) without seeing another related *nash* to solve many kinds of religious problems in the society. This feature considers Al-Quran as a perfect related intact unity. Therefore, it is very compatible to use as the consideration in answering any law problem by observing the whole related texts and not only limited to law verses.³⁹

In this specific context, this second feature can be used to see the fact of Maduresse traditional legacy and consider it as local people's whole understanding on their religion's *nash*. This is clear from the data about the equal amount division between the wealth given to the daughter and the son. Another datum even shows that daughter gets special treatment much more than the son. In fact, according to Al-Quran concept, the sentence *للذكر مثل حظ الأنثيين* explains that the division for a son is two times much more than of a daughter.⁴⁰

Those mentioned data eventually show that Maduresse people do not consider the legacy verse independently and solely as law theorem. In fact, they integrate it with the verse(s) of *nafakah*, particularly about the responsibility of earning money for family which belong to men instead of women. However, women are also supposed to help men in that role. The data above mention that other than those, a daughter is also supposed to care of her parents more

³⁷ The justice concept in social life cannot be understood as the equality division. Justice is an ideal element in the law system. See, Bahder Jihan Nasution, "Kajian Filosofis tentang Hukum dan Keadilan (Dari Pemikiran Klasik sampai Pemikiran Modern)", in *al-Ihkam*, Vol 11, no. 2 Desember 2016, 273

³⁸ Mustafā al-Khin, et.al, *al-Fiqh al-Manhajī ala Madzhab al-Imam al-Syafi'ī*, Vol VI, (Damaskus: Dār Qalam, 1992), 131-132.

³⁹ Jasser Auda, *Maqāsid al-Sharī'ah as Philosophy.....*, 46-47.

than a how a son must do, although this obligation actually belongs to those two. A Maduresse woman also has a big role in keeping her family's unity as clear from its position as *apamolean*. All of those big and various roles of Maduresse women create a cultural wisdom to make gender equality in getting their legacy right.

From *maqâshid syariah* point of view, keeping the family's unity is one of Al-Quran points that Moslem should maintain. Keeping the *ukhuwah* is the another main point of Islamic teaching, and the continuity of its maintenance is all Moslem's obligation.⁴¹ When the obligation of keeping the good relationship is combined with grant concept applied among Maduresse people, it is not contradictory to the spirit of Islamic law.

The next feature is *openness* or being open minded to every possibility of recovery and improvement. This feature is one of the characteristics of social sciences where the change is considered as something absolute. The changing of social aspect, cultural and many kinds of people's life aspects requires the law changing as the answer of any happening change. Based on the data, Maduresse traditional legacy practice has actually changed from *hibbe* (grant or voluntary giving) concept to *sangkolan* legacy concept. The changing of this legacy concept comes from strong religiosity of Maduresse people in one side and the strong solidarity to avoid any family discord or family's *carok* on the other side. However, this change does not affect on Maduresse people's perspective in considering the wealth as inheritance or *sangkolan*. The ownership of *sangkolan* is still considered valid among Maduresse both from the religious and cultural perspectives.⁴²

That shifting of concept also aims as an effort to maintain the ideal family system or so called *rampak naong*. This kind of effort which is done consciously and well based on a concept, according to

⁴¹ See the discussion about *maqâshid 'ammah* in Thahir Ibnu 'Ashur, *Maqâshid al-Syarî'ah al-Islamiyah*, (Kairo: Dâr Kutub al-Misri, 2011), 80-84.

⁴² The contradictory between the benefit connecting to the soul must be prioritized than those of connected to the goods. In this research context, the problem in the family unity and avoiding the *mafsadat* family controversy because of the unfair division must be maintained first than those of property division. 'Izzuddîn Ibnu Abd Salâm, *Mukhtashar al-Fawâid fî Ahkâm al-Maqâshid al-Ma'rûf bi al-Qawâid al-Sughrâ*, (Arab Saudi: Daar al-Furqan, 1997), 146.

maqâshid syarî'ah through its system approach, is a practice of *purposefulness* feature. In other words, the purpose of the legacy understanding and its shift to the grant concept has no contradiction with the *nash* as explained above.

Based on the research data compiled, the values of Maduresse traditional legacy are the close relation of cultural, religious and social values that creates the unique traditional legacy practice. The values consist of the obedience on the religious teaching, family unity maintenance, and cultural preservation and economic improvement through the strong character and *malo* culture. The complicated relation model then creates a compromise legacy division that creates which fact could frame and represent the feature of *interrelated hierarchy*.

The last feature is *multi dimensionality* which involves many kinds of dimensions. Basically, this feature has two main concepts, rank and level. The rank concept in multidimension way of thinking explains the kinds of dimensions in a discussed object. Meanwhile, the level concept explains some levels that might be found in a dimension. Any normal thinking concept tends to find one dimension and two levels in a context. Therefore, it makes a contrary phenomenon because a *fâqih* only sees from a dimension and his conclusion should be different from the result of any normal thinking concept procedures. The practice of Maduresse traditional legacy can be seen through this multidimensional model as it makes not easy to contradict the existed legacy concepts. For example, the portion of a son should be two times higher than a daughter. According to this model, it is not contrary with the concept of fair among local people and the role of each child in the family. This specific point of view which consider all aspects ranging from social, culture and religion is appropriate to the Maduresse people's condition, mainly the position of women with more responsibility in maintaining the family's unity.

From all explanations above, it is crystal clear about Maduresse people's *ijtihad* on traditional legacy system they have applied for long. The effort of producing a compromise law product integrated with many life aspects for avoiding the contrary and fighting of each Moslem is religiously recommended. This is also the real practice of religion suggestions to be kind for each other through doing *sulh* in

many matters especially the worldly matter⁴³ to get the society's material benefits.⁴⁵

Conclusion

For Maduresse people, women have more responsibilities than men in maintaining the continuity and unity of the family. The women's task and position make their legacy be compromised with Maduresse cultural values so it can be fair with the men's part, even much more than what men could get. The law product of this compromise is formulated through unusual pattern of *ijtihad* using *maqâshid syariah* through its system features as the main analysis of Maduresse traditional legacy phenomenon.

Bibliography

- Abd Salam, 'Izzuddin Ibnu, *Mukhtashar al-Fawaid fi Ahkam al-Maqashid al-Ma'ruf bi al-Qawaid al-Sughra*, Arab Saudi: Dar al-Furqan, 1997
- Absori, "Transformation of Maqashid al-Syari'ah (an Overview of the Development of Islamic Law in Indonesia), in *al-Ihkâm*, vol 11, No I Juni 2016.
- Auda, Jasser, *Maqâshid al-Shari'ah as Philosophy of Islamic Law: a Systems Approach*, London: The International Institute of Islamic Thought, 2007
- 'Ashur, Thâhir Ibnu, *Maqashid al-Syari'ah al-Islamiyah*, Kairo: Dar Kutub al-Misri, 2011
- 'Âsyûr, Muḥammad Thâhir Ibnu, *Tafsîr al-Tahrîr wa al-Tanwîr*, Tûnisia: al-Dâr al-Tûnisiyah li al-Nasr, s.a
- al-Sayuti, *al-Dzurr al-Manthûr al-Tafsir bi al-Ma'tûr*, Kairo: Markaz lil Buhûs wa al-Dirâsah al-'Arabiyyah wa al-Islamiyah, 2003
- al-Yubî, Saad Ahmad, *Maqâshid al-Syari'ah al-Islamiyah wa Alâqatihâ bi al-Adillah al-Syar'iyyah*, Saudi Arabiya: Dâr Hijrah li an-Nasr wa al-Tawzî', 1993
- al-Khin, Mustafâ, dkk, *al-Fiqh al-Manhajî alâ Madzhab al-Imâm al-Syafi'i*, Vol V, Damaskus: Dâr Qalam, 1992
- Danandjaja, James, *Antropologi Psikologi: Teori, Metode, dan Sejarah Perkembangannya*, Jakarta: Rajawali, 1988

⁴³ Mustafâ al-Khin, et.al, *al-Fiqh al-Manhajî alâ Madzhab al-Imâm al-Syafi'i*, Vol. VI, (Damaskus: Dâr Qalam, 1992), 169

- Geertz, Clifford, *Kebudayaan dan Agama*, transl: Fransisco Budiman Hardiman, Yogyakarta: Kanisius, 1992
- Hanafi, Hasan, *al-Ijtihād al-Kalāmī*, Lebanon: Dar al-Hadi, 2002
- Hallaq, Wael B., *An Introduction to Islamic Law*, (USA: Cambridge University Press, 2009
- Khalaf, 'Abdul Wahāb, *Ilmu Ushūl Fiqh*, Jakarta: Dār Kutub al-Islamiyah, 2010
- Maulana Surya Kusumah, "Sopan, Hormat, dan Islam Ciri-ciri Orang Madura", in *Kepercayaan, Magi, dan Tradisi dalam masyarakat Madura*, Jember: Penerbit Tapal Kuda, 2003
- Maulidi, "Paradigma Progresif dan Maqashid Syariah: Manhaj Baru Menemukan Hukum Responsif", in *Asy-Syir'ah: Jurnal Ilmu Syariah dan Hukum*, Vol. 49 No. 2, Desember 2015
- Mustafā al-Khin, dkk, *al-Fiqh al-Manhajī al-Madzhab al-Imām al-Syafī'i*, Vol VI, Damaskus: Dār Qalam, 1992
- Mutakin, Ali, "Teori Maqashid al-Syariah dan Hukubungannya Dengan Metode Istimbath Hukum" in *Kanun Jurnal Ilmu Hukum*, Vol. 19 No. 3, August 2017
- Nasution, Bahder Jihan, "Kajian Filosofis tentang Keadilan Daba Hukum (Dari Pemikiran Klasik Hingga Modern)", in *al-Ihkam*, Vol. 11, No. 2 December 2016
- Rahman, Fazlur, *Islam*, (London: Chicago University, 1979
- Rifa'i, Mien, *Manusia Madura*, Jakarta: Pillar Media, 2007
- Sadari, "Qur'anic Studies: Ber-ushul Fiqh dengan Maqashid Syariah sebagai Metode dalam Prespektif Adian Wahyudi, in *Shahih*, Vol 3 No. 1 January 2018.
- Syam, Nur, *Islam Pesisir*, Jogjakarta: LkiS, 1995
- Syafe'i, Rachmat, *Ilmu Ushul Fiqih*, Bandung: Pustaka Setia, 2015
- Syuwa'ih, 'Adil, *Ta'līl al-Ahkām fī al-Syarī'ah al-Islamiyyah*, Thanta: Dār Basyīr li al-Tsaqāfah wa al-'Ulūm, 2002
- Thabrani, Abdul Mukti, "Maqashid Revitalization in Global Era: Istidlal Study from Text to Context" in *al-Ihkam*, Vol. 13 No.2 December 2018.
- Tibi, Bassam, *Islam and the Cultural Accomodation of Social Change*, America: Wastview Press, 1991
- Wiyata, Latief, *Mencari Madura*, Jakarta: Bidik-Phronesis Publishing, 2013

The Study of Maqâshid Syari'ah Toward Maduresse Traditional

Zuhaylî, Wahbah al-. *al-Tafsîr al-Munîr: Fi al-'Aqîdah wa al-Syari'ah wa al-Manhaj*, Damaskus: Dâr Fikr, 2003



al-Ihkam: Jurnal Hukum dan Pranata Sosial, 14 (1), 2019: 72-98
ISSN: 1907-591X, E-ISSN: 2442-3084
DOI: <http://doi.org/10.19105/al-ihkam.v14i1.1893>

The Transformation of *Ijârah*: From *Fiqh* to Sharia Banking Products

Hasanudin

*Faculty of Sharia, IAIN Purwokerto, Jl. Ahmad Yani No. 40A Purwokerto 53126
Banyumas Jawa Tengah*

Email: hasanudin@iainpurwokerto.ac.id

Ainul Yaqin

*Faculty of Sharia, IAIN Purwokerto, Jl. Ahmad Yani No. 40A Purwokerto 53126
Banyumas Jawa Tengah*

Article history: Received: 26 September 2018, Accepted: 27 Juni 2019, Published: 11 Juli 2019

Abstract:

Ijârah begins from the concept of classical *fiqh* as a transaction that sustains the development of Islamic banking. The wide range of banking products produced from the concept of *ijarah* is the basis for developing the concept of jurisprudence from classical *fiqh* contact to banking products in the form of financing. These developments can be seen from a large number of banking products that use *ijârah* contracts, especially those related to services. This development lies in the merger of *ijârah* contracts with several other contracts such as *wakâlah*. Another development that exists in the path to *ijarah* financing is seen from the foundation. In classical *fiqh* concept, *ijârah* is a product of *fiqh ijtihâd* which is *zanni* or not binding. Every Muslim may practice the concept of jurisprudence from many scholars as *ijtihâd*. However, in the financing of the surcharge, it is a combination of several contracts and is based on the DSN-MUI fatwa which is more binding for Islamic financial institutions on the recommendation of the Islamic banking law.

Keywords:

Ijârah Financing; Transformation; Sharia Banking; *Fiqh*

Author correspondence email: hasanudin@iainpurwokerto.ac.id
Available online at: <http://ejournal.iainmadura.ac.id/index.php/alihkam/>
Copyright (c) 2019 by al-ihkam. All Right Reserved



Abstrak:

Ijârah yang berawal dari konsep fikih klasik merupakan salah satu transaksi yang menopang perkembangan perbankan syariah. Luasnya cakupan produk perbankan yang dihasilkan dari konsep *ijarah* menjadi dasar bagi pengembangan konsep *ijârah* dari kontak fikih klasik menuju produk perbankan dalam bentuk pembiayaan. Perkembangan tersebut dapat dilihat dari banyaknya produk perbankan yang menggunakan akad *ijârah* terutama yang berkaitan dengan jasa. Perkembangan tersebut terletak dari penggabungan kontrak *ijârah* dengan beberapa kontrak yang lain seperti *wakalah*. Perkembangan lain yang ada pada *ijârah* ke pembiayaan *ijarah* adalah dilihat dari dasar pijakan. Dalam konsep fikih klasik, *ijârah* merupakan produk ijtihad fikih yang bersifat *dzanni* tidak mengikat. Setiap orang Islam boleh mengamalkan konsep *ijârah* dari ulama manapun yang bersifat ijtihad. Namun dalam pembiayaan *ijârah* selain merupakan gabungan dari beberapa akad dan berpijak pada fatwa DSN-MUI yang lebih mengikat bagi lembaga keuangan syariah atas anjuran dari undang-undang perbankan syariah.

Kata Kunci:

Pembiayaan *Ijârah*; Transformasi; Perbankan Syariah; Fikih

Introduction

The development of knowledge and technology has brought positive impacts for the advancement of the world's economy. This is proven by the development of various services provided by financial institutions, either banks or non-banks. Equally matching the conventional ones, sharia banks have also developed the services and products they provide, keeping in track with what the needs of people who have longed for the sharia-based economy.

As a quite mature financial institution,¹ banks have successfully attracted people's sympathy and taken control of the financial institution market as compared to other financial institutions. From

¹ The banking business firstly began only from Babylonia era and it continued to the ancient Greek and Roman era. However, at that time, the main task of banks was just as a place to exchange money. The well-known banks in European era eventually spread to Asia. Among these famous banks in Europe continent was Bank of Venice in 1171. Kasmir, *Bank dan Lembaga Keuangan Lainnya* (Jakarta: Raja Grafindo Persada, 2014), 28.

this fact, it is fair to say that banking financial institutions have grown and played an active role in running the people's finance-based activities in both Islam and non-Islam worlds.²

Judging from the development of financial institutions in the world, it can be seen that the financial institutions' products circulating in the community are those *ribâ*- or usury-based ones in the perspective of most (*jumhûr*) *fuqahâ*.³ Considering the currently developing phenomenon, Islam followers or Muslims begin to realize the importance of returning to an economic model which is distant from the usury-based principles. The suffocating usury trap has been the trigger for a financial institution expected to keep themselves away from usurious practices in both bank and non-bank financial institution forms such as *Baitul Mal wat Tamwil* (BMT). Using Law No. 10 Year 1998 and strengthened with the issuance of Law No. 21 Year 2008 as its bases, sharia banking has had a robust existence in Indonesia. Bank Muamalat Indonesia (BMI) as the pioneer of sharia banking presence in Indonesia has served the role of promoting the conventional banks to establish a sharia branch called *assharia* business unit.⁴

² This can surely be seen from the rapid banking growth, be it private or state-owned banks.

³ *Jumhûr fuqahâ'* forbids bank interest. This prohibition has something to do with the moral value in it which contains an injustice element. Nevertheless, a Syrian politician, Doualibi, distinguishes productive-and consumptive-based interests. He suggests that an interest of financing for consumptive purpose is *haram* (forbidden) and the one of productive-based financing is *halâl* (allowed). This opinion is based on verses in al-Quran related to the prohibition of *ribâ*. He said that the verses which forbid *riba* were revealed in the context of releasing the poor from suffering. See Absullah Saeed, *Menyoal Bank Syariah*, translation: Arif Maftuhin (Jakarta: Paramadina, 1996), 60-65. Also see Ummi Kulsum, "Riba dan Bunga Bank dalam Islam (Analisis Hukum dan Dampaknya Terhadap Perekonomian Umat), *Jurnal Al-'Adl*, Vol. 7 No. 2 Juli 2014, 67-83.

⁴ As the first sharia banking institution as well as its pioneer in Indonesia, BMI received a support from the government of Indonesia. This bank whose slogan is *pertama murni syariah* (the first purely sharia) can compete with various products offered by conventional banks. Meanwhile, Bank Rakyat Indonesia Syariah itself was initially a branch of Bank Rakyat Indonesia established on November 17, 2008. See admin, "tentang muamalat" at <http://www.bankmuamalat.co.id/profil-bank-muamalat>, accessed 17 April 2018. Also see admin, "sejarah BRI Syariah" at <https://www.brisyariah.co.id/accessed> 17 April 2018.

One of state-owned Sharia banking institutions is BRI Syariah. BRI Syariah was initially a sharia business unit which eventually parted ways with Bank Rakyat Indonesia (BRI) and became an independent bank on December 19, 2008 and effectively operated as of January 1, 2009. It was from this separation that BRI Syariah became an independent bank and was expected to be an independent and developed sharia bank. In running its business, BRI Syariah has various *ijârah*-based products to offer. Several sharia products that BRI Syariah has to rely on include *Kepemilikan Multifaedah PURNA* (KMF Purna BRISyariah iB) or Multi-purpose Ownership PURNA, *Kepemilikan Multifaedah PRAPURNA* (KPM Pra PURNA BRISyariah iB) or Multi-purpose Ownership PRAPURNA, and *Financing Kepemilikan Multifaedah* or Multi-purpose Ownership Financing, all of which have their roots from *ijârah* financing products.⁵

Not too much different from BRI Syariah, BNI Syariah as a bank which obtained its permit to operate on June 19 2010 and referred to as Bank Umum Syariah (BUS) had officially been operating. This bank whose mission is "To be a people's choice sharia bank people with superior service and performance" has undergone rapid development. BNI Syariah also has their featured products as *ijârah*-based financing products. One of these various products is iB Hasanah multi-purpose financing.⁶

Unlike productive banking products such as *mudlârabah*, *ijârah* financing is a product to transfer the right of use or benefit of a goods or service based on *ijârah* transaction. The issuance of *Dewan Syariah Nasional Majelis Ulama Indonesia* (DSN-MUI) or National Sharia Board of Indonesia Ulema Council's verdict no: 09/DSN-MUI/IV/2000 has

⁵ In essence, *ijârah* financing is a modification to a lease payment method paid in advance. In this case, the bank serves as the goods owner and the customers serve as the lessee. However, in this financing, the customers pay in installment to the bank for the lease financing paid by the bank in advance. Ascarya, *Akad & Produk Bank Syariah* (Jakarta: Raja Grafindo Persada, 2011), p 223-224. Also see Harun Santoso and Anik, "Analisis Financing Ijarah pada Perbankan Syariah", *Jurnal Ilmu Ekonomi Islam*, Vo. 1 No. 2 Juli 2015, 106-116.

⁶ Admin, "Profil BNI Syariah" at <https://www.bnisyariah.co.id/id-id/> accessed 19 April 2018.

served as a robust basis for sharia banks in implementing their *ijârah* products in the form of financing.⁷

Ijârah itself comes from الأجر⁸ which means fee for a job. Terminologically, *ijârah* means: a covenant of ownership of a good benefit in return for a reward.⁹ Thus, there are at least four things which serve as the pillars or *rukun* for this *ijârah* deed to manifest. They are the lessee, the lessor, the goods or benefit of goods serving as the lease object, and a covenant or *akad*.¹⁰ Zakariyâ al-Anshârî added fee as another *ijârah* pillar.¹¹ In fiqh perspective, these five *ijârah* covenant pillars should be fulfilled to gain the 'validity' in making this transaction. Meanwhile, *ijârah* financing is in principle consumptive financing where a bank will finance the customers for their consumptive needs and impose the payment to the customer with an additional profit margin for the bank or the financial institution.¹²

Judging from the mechanism above, the banks or financial institutions only provide fund and it is given directly to the customers with an additional profit margin for the banks. From this definition, it is obvious that basically, this *ijârah* financing is just another term of debt with additional profit and such a transaction is clearly classified as *riba*. Additionally, the fee as a pillar of *ijârah* payable by the service users is also not found in this contract and what is more visible is the provision of the fund with profit. In addition, judging from its context, the *ijârah* financing product in sharia banks derives from the

⁷ The services which can be used through *ijârah* financing scheme are usually those of consumptive nature yet not in an aspect which can be traded, such as medication fee in hospitals, nursing fee, tuition fee etc. However, *Ijarah* financing can also be applied to an *Ijarah* Contract which ends up with a purchase under an *al-ijârah al-muntahiyah bi al-tamlîk* covenant.

⁸ Abû al-'Abbâs, Aḥmad ibn Muhammad ibn 'Alî al-Fayyûmî, *al-Mishbâh al-Munîr fi Gharîb al-Syarh al-Kabîr* (Beirût: al-Maktabah al-'Ilmiyyah, s.a.), 5.

⁹ Kementrian Wakaf dan Urusan keislaman Negara Kuwait, *al-Mawsu'ah al-Fiqhiyah al-Kuwaitiyah*. (Kuwait: Dar al-Salasil) Vol. 1 352.

¹⁰ *Ibid.* Vol. 1 354, Also see Mahkamah Agung RI, Pusdiklat Teknis Peradilan, *Kompilasi Hukum Ekonomi Syariah*, 2009, 65.

¹¹ Zakariyâ al-Anshârî. *Fath al-Wahhâb bi al-Syarh al-Manhâj*, Vol. 1 (Semarang: Karya Toha Putra, s.a), 246.

¹² Ascarya, *Akad & Produk Bank Syariah* (Jakarta Utara: Raja Grafindo Persada, 2011), 223-224

ijârah contract as specified in fiqh concept. Nevertheless, from the mechanism of how it is implemented in sharia banks, there is a significant modification in it. The modification can be seen from the role played by the sharia banks as the service providers which merely provide an amount of fund to their customers, rather than contributing directly to providing the said service. The customers then use the fund provided by the sharia banks along with predetermined *ujrah* to pay the service. This transformation eventually poses a big question for the society regarding the contract legality status as seen from *fiqh muamalah*.

Based on this introduction, the writer is interested in a further study on the covenant of *ijârah* financing in sharia financial institutions. The questions to be answered include: (1) how is transformation process of *ijârah* contract in *fiqh* concept into the financing contract in the said sharia banks, and (2) Does this process comply with the rules of Islamic law or does it deviate from the rules where the *ijârah* financing which supposedly serves as a solution yet it turns into a boomerang for the users of this service.

Research Method

This research used qualitative approach by investigating the practice of *ijârah* financing in Sharia Banks, particularly BRI Syariah Purwokerto, Banyumas, Central Java which was used to provide a real picture of financing practices in banks. Interviews were made with the bank manager, legal and marketing staff. The data obtained from the bank were compared against the verdicts issued by the National Sharia Board of Indonesia Ulema Council (DSN-MUI) and Law No. 21 Year 2008 concerning Sharia Banking for finding the meeting points between these rules, verdicts and the practices implemented. Additionally, the *ijârah* concept in classical fiqh was also consulted with in order to figure out its transformation from classical fiqh to a banking product.

The data in this research were analyzed after all variables which should be available from the fiqh concept, sharia banking law, verdicts from DSN-MUI and the data from interview with the sharia bank obtained. These data were then analyzed according to their respective positions for withdrawing conclusions.

Islamic Law and Social Change

Islamic Law itself can be called as *sharia* Islam (*al-Syarī'ah al-Islâmiyyah*) or *fiqh* Islam (*al-Fiqh al-Islâmî*). The term *al-Syarī'ah* terminologically derives from the word "*Syara'a, yasyra'u, syar'an wa syuru'an, syariat*".¹³

The word *al-Syarī'ah* itself has been absorbed into Indonesian language and becomes *syariat*.¹⁴ Etymologically speaking, *sharia* contains two meanings. *Firstly*, it means the flowing water which can be used for the drink. The use of *sharia* in this sense is in line with the expression "*syara'tu al-ibil idza waradat syari'at al-ma'* (I give the camel water when it comes to the water container).¹⁵ The *second* meaning is the straight and clear way (*al-thâriqal-mustaqim wa al-wadlih*) as mentioned in Q.S al-Jâtsiyah 45: 18.¹⁶

Meanwhile, from the terminology perspective, *sharia* was anything revealed to the messenger Muhammad *Rasulullah* in the form of revelations, be it written in al-Quran and the hadith uttered by *Rasulullah* to his companions and believed as valid.¹⁷ The *fuqaha* define *sharia* even in narrower sense. In their opinion, *sharia* is any command related to human behaviors other than behavior or characters. This way, *sharia* is another name of Allah's laws of *amaliyah* (practical) nature which have nothing to do with *akhlak*.¹⁸

Meanwhile, the term *fiqh* is tightly related to the term *sharia*. *Fiqh* itself occupies the practical definition of *sharia*. The word *fiqh* comes from the word "*faqih*-*yafqahu*-*faqihan*" which means to understand or comprehend deeply.¹⁹ Judging from its terminology,

¹³ Muḥammad Idris Abd al-Rauf al-Marâbî, *Qâmûs al-Marbawî* (Mesir: Mushthafâ al-Bâbî al-Halabi wa Awladuh, 1350), 318.

¹⁴ Departemen Pendidikan Nasional, "*Kamus Bahasa Indonesia*" (Jakarta: Pusat Bahasa, 2008), 1402.

¹⁵ Muhammad Ali Jum'ah, *al-Madkhal ilâ Dirasat al-Mazâhib al-Fiqhiyyah* (Kairo: Dâr al-Salam, 2004), 305.

¹⁶ Aḥmad Ali Ilyan, *Târikh al-Tasyrî' wa al-Fiqh al-Islâmî* (Riyadl: Dâr Ishbili, 2001), 11. Also see Abdul Wahab Abd. Muhaimin, "Aktualisasi Syariah dan Fikih dalam Menyelesaikan Pelbagai Persoalan Hukum", *Ahkam*, Vol. XV, No. 2 Juli 2015, 241-248.

¹⁷ Amir Syarifuddin, *Ushul Fikih I* (Jakarta: Kencana, 2011), 1.

¹⁸ *Ibid.*, 2.

¹⁹ Abu al-Fadl Muḥammad ibn Mukrim ibn 'Ali Ibn Manzur, *Lisan al-'Arab* (Beirût: Dâr Sadir, 1414 H.), XIII: 522.

the word *fiqh* means the science related to sharia laws of *amaliyah* nature, taken from detailed propositions.²⁰

While the term Islamic Law can be used in both sharia Islam and *fiqh* senses, though they are fundamentally different. The difference between the two can be seen from their initial uses. In essence, sharia comes from the *Khâlik* or Creator Allah and the messenger Rasulullah (*al-Syâri*). Meanwhile, *fiqh* itself is one of sharia products formulated by Islamic law experts commonly known as *mujtahid*, or *fuqaha*. Thus, it is clear that sharia is the Islamic law which will always be applicable forever, and *fiqh* is the concrete formulation of Islamic law to make it practicable to a certain case, in a certain place, under a certain circumstance and at a certain time. They can be distinguished yet cannot be separated. It is important to note this as an attempt to re-emphasize the meaning of Islamic law itself, to prevent any ambiguity between the two, both as a teaching of a permanent nature and as a result of interpretation by classical *mujtahid* which is still debatable.

Based on the explanation above, it can be concluded that in Islamic law, there are two important elements, namely the *tsubût* or permanent legal element which will neither change nor be subjected to any change, and the *tathawwur* (dynamic and developing) which can change to keep up with certain time, condition and place where the law is implemented. The *tsubût* or permanent legal element means that it is impossible for it to change or to accept any change or update. This permanent legal element is usually explained in al-Quran or Hadith explicitly and detailed to which no further interpretation is needed. Such a legal element is beyond the area of *ijtihad*. This *tsubût* or permanent Islamic law must not change. This is because if this permanent law to undergo a change, imbalance and damage will occur to human life. Furthermore, this legal element usually deals with primary or *daruriyyah* needs. On this basis, *mujtahid* have formulated a *fiqh* rule *la ijtahada ma'a nashsh*, meaning it is not allowed to make *ijtihad* or no *ijtihad* shall be made on cases which

²⁰ Abd Allah ibn Yusuf ibn 'Isa, *Taysir Ilm Usul al-Fiqh* (Beirut: Muassasah al-Risalah, 1997), 11.

have been *manshush* (problems which have *nash*).²¹ Therefore, *ijtihad* cannot be made to problems whose rules have been explicitly established by definitive propositions (*qath'i*) *al-wurud waal-dalalah*.

Meanwhile, the legal provisions of *tathawwur* (dynamic and developing) nature can be classified into two, namely; *firstly*, the laws withdrawn from propositions of speculative or *zhanni* nature which is still possible to change according to the time and place. *Secondly*, the laws extracted through *ijtihad* as a result of the current development which surrounds a certain case.²²

As suggested by *mujtahid* through an *ushul fiqh* rule, *ijtihad* can only be made in certain areas; *firstly*, the propositions come with definitive (*qath'i*) *al-wurud* yet its *dalalah* is *zhanni*- (speculative); *secondly*, the propositions are speculative (*zhanni*) *al-wurud* yet its *al-dalalah* is definitive (*qath'i*); *thirdly*, the propositions with speculative (*zhanni*) *al-wurud* and *dalalah*; and, *forthly*, to cases which have no legal propositions.

The understanding of *fuqaha* to the elasticity of Islamic law as a result of changes in era, condition and place accords to a number of legal experts, such as: *Linant de Ballefonds* and majority of reformers as well as contemporary Islamic law scholars that Islamic laws can undergo changes as a consideration of various aspects, including the aspect of *maslahah* or benefits. The matching and elasticity of Islamic laws in practice from time to time indicate that social changes can result in a change to the previously implemented Islamic laws. Islamic laws have a characteristic of being capable of adjusting itself and being dynamic based on the applicable development of time, condition and place. Thus, if no attempt to change and reform is made to Islamic laws, people will then find it difficult to implement them in the future.²³

²¹ Fathurrahman Azhari, "Dinamika perubahan Sosial dan Hukum Islam". Dalam *Jurnal al-Tahrir* Vol. 16. No. 1 Mei 2016. 197-221. Also see Moh. Mufid, "Qath'i dan Zanni dalam Pemikiran Islam (Memahami Teks dan Konteks Secara Proporsional)", *Jurnal Al-Hikmah* Vol. XV, No. 2, 2014, 232-250.

²²*Ibid.*

²³*Ibid.* Also see Iswahyudi, "Majelis Ulama Indonesia dan Nalar Fatwa-fatwa Ekstrem", *Al-Ihkam*, Vol. 11 No. 2 Desember 2016.

The goodness of human life is the main goal for the establishment of Islamic laws.²⁴ Thus, the existence of Islamic laws should be a solution and guideline for human life. This can take form of Islamic law establishment as an answer to a problem or conflict arising out in the community or as a guideline in the form of regulations to support the life. Based on this, Islamic laws are constantly demanded to be able to give a solution to problems within a community according to the changes in social life. Therefore, it is highly urgent to reactualize Islamic laws.

The process of change on Islamic laws from a time to another (classical era to contemporary one) has been suggested by *qawâid fiqhiyyah* as established by *fuqaha: la yunkar taghayyural-ahkâm bi taghayyur al-azmân*²⁵ (It is undeniable that Islamic laws can change as a result of changes in time). Even Ibn Qayyim al-Jawzzyiah made a *fiqh* rule which read: *تغيّر الفتوى، واختلافها بحسب تغيّر الأزمنة والأمكنة والأحوال والنيات والعوائد* (Verdict might change as the time, place, circumstance, intention and custom change).

Social Changes and Islamic Laws

Interaction is the word deemed appropriate to describe the relationship between laws and social changes. In other words, the social change in the community has some impact on the changes in laws and vice versa, i.e. changes in laws significantly affect the change in the community. It is important to note that, in the social system order, the social life and laws as its subsystems respectively go according to their function. Yet, as a system, both have relatedness and dependence. Thus, the social changes occurring in the community will have some influence or bring about a change in laws and vice versa, any change to the laws will result in social changes.

These relationship and interrelatedness between social life and laws match Talcott Parsons's cybernetics theory. This theory suggests that a social system is an interaction between interrelated social subsystems. Thus these subsystems have their own dependence and relatedness. The behavior or action of each individual or a social

²⁴ Amir Syarifuddin, *Ushul Fiqh I*, 231.

²⁵*Ibid.*

action of personal nature is not a biological behavior, yet it should be viewed from a structured behavior. This behavior of personal nature should be put more widely as divided into subsystems.²⁶

Just like other laws, Islamic laws can also change the society, provided that they have been implemented and complied with and become the custom for the society. Additionally, Islamic laws can also change the community's social life if they have been absorbed into positive laws and enacted. In many historical studies related to laws, it has been clear that the existing and applicable laws can change the community's social life. During the classical era, for example, Rasulullah in addition to being a head of state, he was also a role model in practicing the religion. Thus, what Rasulullah said as the head of state became rules for the activities of all Muslims.

Abu al-Hasan al-Nadwi had described the social life of ancient Arab society or *Arab jahiliyah* with value degradation within themselves. This degradation was pictured by their indulgence in gambling, drinking liquor, and doing brutal actions such as burying female infants alive and putting women in the lowest degree. Meanwhile, their men were entitled to and freed to wed and marry many women with no clear limitation. The ego and interest of tribes became something they had to maintain at whatever cost. As a result, the blood was frequently shed between them, and some even took that as a pride. For nearly 23 years, the sharia brought by Rasulullah PBUH to govern the order of life of *Arab Jahiliyah* both as an individual and a group and related to (noble) characters or *akhlak*, creeds (*aqidah*) and worship (*ibadah*) had succeeded in changing the behavior of Arab people who used to be *jahiliyah* (ignorant) into the one which complied with the laws taught by Rasulullah.²⁷

The same happened during the era of *Khulafâ' al-Râsyidîn* as the successors of the Prophet Muhammad PBUH, in which they succeeded in changing the social order of people at that time. The reign of Umar ibn al-Khaththâb could serve as a good example. When he was in charge, many people played the *talaq* (divorce) enunciation and even

²⁶ Munir Fuady, *Sosiologi Hukum Kontemporer Interaksi Hukum, Kekuasaan, dan Masyarakat* (Bandung: Citra Aditya, 2007), 61.

²⁷ Fathurrahman Azhari, "Dinamika perubahan Sosial dan Hukum Islam". *Jurnal al-Tahrir* Vol. 16. No. 1 Mei 2016. 197-221.

passed the triple *talaq* at once. In response to such a social circumstance, Umar ibn al-Khaththâb then took legal action by making *ijtihad* and established that triple *talaq* at once should mean the passing of three *talaqs* as well. This statement was made as a response to the random use of *talaq* in the community at that time. Thus, in Umar ibn al-Khaththâb's opinion, such a social habit should be prevented by establishing the rule that triple *talaq* should mean the passing of three *talaqs* as well. The issuance of Umar ibn al-Khaththâb's verdict brought a positive impact as indicated by the discouragement of many men to enounce multiple *talaq* or even triple *talaq* at once to their wives.²⁸

Based on the legal system followed, countries are divided into two, Islam and non-Islam countries. Islam countries mean those implementing Islamic laws in administering their countries in which Islamic laws will govern anything related to behavior, position, and structures as what happens in Saudi Arabia and other Islam countries. Meanwhile, in non-Islam countries, Islamic laws do not suddenly change the social order of people in them.

In a non-Islam country, Islamic laws can actually change the social order of its people, provided that these laws are enacted or absorbed into positive laws like the case of, for example, Indonesia. One of Islamic laws absorbed into positive laws is Law No. 1 Year 1974 concerning Marriage. Prior to the issuance of this Law No. 1 Year 1974, many Indonesians were married underage. Later, upon the issuance of this Law, particularly as specified in chapter 2 article 7, which read "marriage is allowed only when the bridegroom has been 19 years old and the bride has been 16 years old," the social order of people in Indonesia changed. People were forced to comply with the law on marriage or wedding. Also prior to the issuance of Law No. 1 Year 1974, some people in Indonesia easily enounced divorce or *talaq* to their wives, and these wives had unequal position with their husbands in their households. However, after Law No.1 Year 1974 was enacted, a divorce was no longer deemed as a valid one unless it was enounced before a court. Additionally, wives were also entitled to sue for divorce against their husbands when violations were made to the Law No. 1 Year 1974 in their households. To strengthen and reinforce the position of this Law No. 1 Year 1974 concerning Marriage, an

²⁸*Ibid.*

Islamic Law Compilation or Kompilasi Hukum Islam (thus KHI) was prepared to govern the social life of a community in regard to marriage. Another change also occurred in the economic field where the issuance of Law No. 21 Year 2008 brought a social change in *mu`âmalah* field. The provisions for running business in sharia banking field were governed in this law.

Concerning with this, William Dahl suggested that law was the main instrument of social engineering which was eventually used as the basis for the formation of a prosperous society. This is because the various rules which were created and implemented were actually addressed for the creation of order and balance in the society's life. Therefore, the law could create changes to social life and order of the society or at least could trigger social changes to the society.

Based on the function of law theory as used above, the law can change the social order of community. When the law deals with social change occurring in the community, it will occupy one of two functions. *Firstly*, it can serve as a social control instrument. In this case, the law is deemed as a reference or even a means to create and maintain the community's social stability. *Secondly*, it can also function as *wasilah* or means to change the community. This way, the law and apparatus within it play a highly important role to bring a social change towards a new unprecedented social order to the community.²⁹

Social Change Leading to Islamic Law Change

Nashsh from al-Quran and Hadith are highly limited, yet the social problems keep on developing and new cases keep on occurring. This social change can be in the form of changes in socio-cultural and socio-economic orders or other changes related to the social life of the community. Therefore, Islamic laws with the limited religious texts should be capable of responding to the social changes occurring and developing in the community.

Social changes do demand changes in the law. Soekanto suggested that the interaction between social change and law change

²⁹ GibtiahYusida Fitriat, "Perubahan Sosial dan Pembaruan Hukum Islam Perspektif Sadd al-Dzari'ah", *Jurnal Nurani*, Vol. 15 No. 2, Desember 2015, 108-109.

is real and possible.³⁰ The social change occurring in the community can trigger the development of Islamic laws which suit the development of the community.³¹ An example of how a change in the law is affected by a social change is the public whipping punishment for those who drink liquor. Rasulullah punished those who drank liquor by whipping them 40 times. However, this changed during the reign of Umar ibn al-Khaththâb ra. He decided to pass an 80-time whipping punishment for those who drank liquor and it was supported by the full agreement from the companions and thus it became an *ijmâ'*.³² The decision made by `Umar was different from what Rasulullah did. In this case, it was obvious that Umar ibn al-Khaththâb had his own reason, i.e. the trend for the community at that time where they began to take the implemented laws lightly. This phenomenon demanded a new law which made the community more compliant with the rules applicable in the society.

Another example can be seen in varied responses from *fuqaha* in determining the law based on the social changes occurring during their time. One of the concrete evidence recorded in the history of *mazhab* is the birth of *qawl al-qadîm* and *qawl al-jadîd* of al-Syafi`î. *Qawl al-Qadîm* (old opinions) were those opinions by al-Syafi`î related to the laws when he was in Iraq, and *qawl al-jadîd* or new opinions when he had moved to Egypt. One of the causes for these different opinions was the social change in the communities in Egypt which was different from that in Iraq.³³

The products of Islamic law explained by classical *mujtahid* are not the absolute ones which do not accept any change. Moreover, as time goes, an Islamic law which was established in the past might be counterproductive and even no longer unsuitable with the current development and in need of review. Therefore, the meeting point

³⁰ Soerjono Soekanto, *Beberapa Permasalahan dalam Kerangka Pembangunan di Indonesia* (Jakarta: Yayasan Penerbit UI, 1975), 139–40.

³¹ Lahmuddin Nasution, *Pembaharuan Hukum Islam dalam Mazhab Syafi'i* (Bandung: PT. Remaja Rosdakarya, 2001), 254.

³² Muḥammad ibn Isma'îl ibn Shalâh ibn Muhammad, *Subûl al-Salâm* (Beirut: Dâr al-Hadîts, s.a.), Vol. II, 444.

³³ Fathurrahman Azhari, "Dinamika perubahan Sosial dan Hukum Islam" *Jurnal al-Tahrir* Vol. 16. No. 1 Mei 2016, 197-221.

between Islamic law and social problems of the community has always led to re-thinking of the classical Muslim scholars' intellectual works in the past.

The social change of community from classical to contemporary eras surely required the law to change, and Islamic law was not excluded. The banking community, particularly sharia banking is required to comply with the contemporary *muamalah* concept issued by the National Sharia Board of Indonesia Ulema Council or *Dewan Syariah Nasional Majelis Ulama Indonesia* (DSN-MUI). DSN-MUI itself has issued verdicts related to classical covenants which had transformed into sharia banking products. In addition, Indonesian Muslim scholars have also given birth to Sharia Economic Law Compilation or *Kompilasi Hukum Ekonomi Syariah* (KHES), as a reference for sharia banking. Basically, the covenant products in classical *fiqh* and DSN-MUI's verdicts are the same. However, they receive some modifications according to the contemporary needs, particularly the ones in sharia banking field. One example of this is the combination of two covenants in one transaction. In the classical *fiqh* literature, this practice was forbidden and deemed invalid. However, as the social life of community changes, the implementation of two covenants in one transaction becomes inevitable. This triggers the birth of a new covenant referred to as the combined covenant (*al-uqudal-murakkab*).

In the study of Islamic law, the changes in socio-cultural life and geographical location become highly important variables and make some contribution in changing the law. The *mujtahidin* of classical *fiqh* of Islam formulated a *fiqh* rule which read *la yunkaru taghyyur al-ahkâm bi taghayyur al-azmân* (It is undeniable that changes in laws might be influenced by changes in time). Ibn Qayyim al-Jauziyyah stated similarly or even more specifically. He said that the social factors which changed the law could be formulated into four. They include: *firstly*, current situation, *secondly*, place, *thirdly*, condition and wish and *fourthly* customs or tradition. These four factors are summarized in one *fiqh* rule he explained using the following sentence: *تعير الفتوى،*

واختلافها بحسب تعير الأزمنة والأمكنة والأحوال والنيات والعوائد (the change of

a verdict -in Islamic law- can be influenced by changes in time, place, condition and customs).

Verdicts are the result of *mujtahid* or *mufti's* contemplation through an *ijtihad* process in relation to social cases or problems of the community asked to them.³⁴ Verdict itself is dynamic. This is because a verdict is a response to what happens in the community which is new and in need for a solution. Thus, for each new case which is unheard of and no specific verdict is known for it, a verdict needs to be immediately found as answer to that very exact problem. Judging from this explanation, it is obvious that changes in law need to be made. This is because a product of *ijtihad* is always relative in nature. Therefore, the answer to new problems should also be new, provided that it does not contradict al-Quran and Hadith.

***Ijârah* in Classical *Fiqh* Concept**

Ijârah is one of covenant concepts which has long been formulated by initial Muslim scholars. However, as people's needs develop, *ijârah* covenant also undergoes a transformation. In order to understand the transformation of *ijârah* covenant, it is important to first understand the *ijârah* covenant in the classical *fiqh* concept. *Ijârah* comes from the word *al-ajru* (الجر) which means fee. The word *al-ajru* can also mean divine reward.³⁵ This definition of *ijârah* linguistically is in line what is suggested by al-Zuhaylî.³⁶ Meanwhile, terminologically, *ijârah* is a covenant of a goods benefit in exchange of fee.³⁷ And the covenant of the addressed goods can be utilized and allowed according to sharia with a clear fee.³⁸

Amir Sayrifudin suggested that *ijârah* in a simple sense is defined as a transaction of benefit or service with certain reward. If the object of the benefit comes from a tangible goods then it is called *ijârah al-'ain* (rent). This includes house rent to be occupied, building rent for an event or so forth, vehicle rent to be used as a means of

³⁴ Abû Adb Allâh Muhammad ibn Abû Bakr ibn Ayûb, *'Ilâm al-Muwaqqi'în 'an Rabb al-'Alamîn* (Riyadl: Dâr ibn al-Jauzî, s.a.), I: 48.

³⁵ Al-Sayyid Sâbiq, *Fiqh al-Sunnah* (Beirût: Dâr al-Kurub al-'Ilmiyyah, 1977), III/177.

³⁶ Wahbah al-Zuhaylî, *al-Fiqh al-Islâmi wa Adillatuh* (Beirût: Dâr al-fikr, s.a.), V/3804.

³⁷ Al-Sayyid Sâbiq, *Fiqh al-Sunnah*, III/177.

³⁸ Al-Zuhaylî, *al-Fiqh al-Isâmî*, V/3804.

transportation. However, if the object of *ijârah* is a service of a person's work or benefits not in the form of goods, then it is called *ijârah al-zimmah*.³⁹

Muslim scholars agree that *ijârah* was allowed, except Abû Bakar al-Asham, Ismâ'il ibn 'Ulaiyah, Hasan al-Bashri, al-Qâsânî, al-Nahrawî, and ibn Kîsan. They argued that *ijârah* is a transaction of a goods' benefit and this benefit was not there when the transaction was made, thus it could not be said as valid according to Islamic law.⁴⁰

The initial Muslim scholars agreed that *ijârah* covenant was allowed. This agreement was based on al-Quran, Hadith and Ijma'. Surah al-Thalâq verse 6.: , فَإِن أَرْضَعْنَ لَكُمْ فَآتُوهُنَّ أُجُورَهُنَّ» , and al-Qashash verses 27-28: «قَالَتْ إِحْدَاهُمَا: يَا أَبْتَ اسْتَأْجِرْهُ، إِن خَيْرٌ مِّنْ اسْتَأْجَرْتِ الْقَوِيُّ الْأَمِينِ. قَالَ إِنِّي أُرِيدُ أَنْ أَنْكِحَكَ إِحْدَى ابْنَتَيَّ هَاتَيْنِ عَلَى أَنْ تَأْجُرَنِي ثَمَانِي حِجَجٍ، فَإِنِ اتَّمَمْتَ عَشْرًا فَمِنْ عِنْدِكَ» [القصص: ٢٦-٢٧]

Ijârah in *fiqh* concept as suggested by al-Zuhailî was divided into two, namely *ijârah* of a goods' benefit and *ijârah* of a work or service. Each of these two *ijârah* has their own provisions.⁴² *Ijaârah* of a goods' benefit such as a house, shophouse, vehicle rents and the likes should be in the benefits allowed by Islamic law. Thus, any *ijârah* of benefit which is forbidden by Islamic law such as blood or dead body rents is prohibited.⁴³ Meanwhile, *ijârah* of a work or service is a transaction of a work or service and this work should be known and valuable as to be discussed in the requirements of this *ijârah* covenant. Workers or service providers in this *ijârah* covenant are divided into two. They are *ajîr khash* in which the lessor works for one person and must not serve

³⁹ Amir Syarifudin, *Garis-Garis Besar Fikih*, 215-216.

⁴⁰ Wahbah al-Zuhaylî, *al-Fiqh al-Islâmi wa Adillatuh* (Beirût: Dâr al-fikr, s.a.), V/3801.

⁴¹ «قَالَتْ إِحْدَاهُمَا: يَا أَبْتَ اسْتَأْجِرْهُ، إِن خَيْرٌ مِّنْ اسْتَأْجَرْتِ الْقَوِيُّ الْأَمِينِ. قَالَ إِنِّي أُرِيدُ أَنْ أَنْكِحَكَ إِحْدَى ابْنَتَيَّ هَاتَيْنِ، فَإِن أَرْضَعْنَ لَكُمْ فَآتُوهُنَّ أُجُورَهُنَّ» [القصص: ٢٦-٢٧] «أَعْطُوا الْأَجِيرَ أَجْرَهُ قَبْلَ أَنْ يَجِفَّ عُرْفُهُ» رواه أبي هاتين على أن تأجرتي ثمانين حجاج، فإن أتممت عشرًا فمن عندك» [القصص: ٢٦-٢٧] هريزة. lihat Wahbah al-Zuhaylî, *al-Fiqh al-Islâmi wa Adillatuh* (Beirût: Dâr al-Fikr, 1985)

Vol. 4. 730.

⁴²*Ibid*, Vol 4. 759.

⁴³*Ibid*.

others, and *ajir musytarak* where the workers or service providers work not just for one person, rather they work for the public.⁴⁴

To meet the criteria of a legal *ijârah*, several requirements and pillars for forming the covenant should be fulfilled. In *ijârah* transaction, the pillars which should be fulfilled include the parties (lessee and lessor), *sîghat (ijâb qabûl)*, fee and benefit of a good. In addition, the requirements of this pillars should also be fulfilled. Some requirements of *ijârah* include the willingness of parties to the transaction, the object of *ijârah* should take the form of a benefit, it should be clear and valuable and its use is allowed in Islam's perspective.⁴⁵

***Ijârah* in DSN-MUI's Verdicts and Sharia Banking**

By the time this paper was finished, 125 DSN-MUI's verdicts have been issued from 2000. Most of these verdicts discussed the covenant or contract of classical *fiqh* which had undergone transformation into a sharia banking product. This indicates the consistency and commitment of DSN-MUI in paying attention to the development of Islamic value-based financial institutions.

Of these many verdicts issued by DSN-MUI, at least six have something to do with *ijârah*. *Firstly*, in 2000 DSN-MUI issued a verdict number: 09/DSN-MUI/IV/2000 on *ijârah* Financing. This verdict explained the Pillars and Requirements of *ijârah* in *fiqh* concept which were then adopted into the verdict product of *ijârah* used in sharia financial institutions with not much significant transformation.⁴⁶ The *second* verdict related to *ijârah* is verdict number: 72/DSN-MUI/VI/2008 in 2008 on Government Islamic Securities *Ijârah Sale and Lease Back*. In this verdict, DSN-MUI gave a green light for the legalization of Government Islamic Securities using *ijârah* mechanism. Judging the bases of this verdict on SBSN, it could be seen that not many changes were made to the other verdicts related to *ijârah*.⁴⁷ The *third* one is the verdict number: 76/DSN-MUI/VI/2010 on SBSN

⁴⁴*Ibid*, Vol 4. 766.

⁴⁵*Ibid*, jld 4. 731.

⁴⁶ Fatwa DSN-MUI No. 09/DSN-MUI/IV/2000 About Financing *Ijârah*.

⁴⁷ Fatwa DSN-MUI No. 72/DSN-MUI/VI/2008 About Surat Berharga Syariah Negara *Ijârah Sale and Lease Back*.

Ijârah Asset to be Leased. This verdict still has something to do with SBSN above. It is just the specifications of object of *ijârah* in this verdict which have been determined and some of the object of *ijârah* has been there when the covenant was made. Nevertheless, the handover of object of *ijârah* entirely is made in the future as agreed upon. This verdict refers more to contemporary Islamic scholars in relation to the same issue.⁴⁸ The *fourth* is the verdict number: 101/DSN-MUI/X/2016 on *Al-Ijârah al-Maushufah fi al-Dzimmah*.⁴⁹ The *fifth* one is the verdict number: 102/DSN-MUI/X/2016. However, this verdict is addressed to house ownership financing or PPR-indent. The construct of *ijârah* used in this verdict is the covenant of *al-ijârah al-muntahiyah bi at-tamlîk*.⁵⁰

The concept of *ijârah* financing conceptualized of DSN-MUI's verdicts brought fairly significant change as compared to the classical *fiqh*-based *ijârah* concept. This change is acceptable since the bank itself is not a social institution, rather it is an entity in the form of financial institutions. Meanwhile, *ijârah* is a rent or service contract made between persons, not between financial institutions. Several *ijârah* financing products have been featured products in sharia banking. As observed by the writer, at least 4 Sharia banking products are offered by sharia banks in the form of *ijârah*-based financing. The four products are KPR BRIS iB, KMF Purna BRISyariah iB, KMF Pra Purna BRISyariah iB, and KMF BRI Syariah iB.⁵¹

These four products are divided into two types of *ijârah muntahiyah bi al-tamlîk* covenants or frequently called as IMBT. The four also have nearly similar application mechanism. Among the requirements to apply for this *ijârah* financing is the obligation for customer to apply for the financing by completing the application with copies of Family Card and ID Card, paycheck for civil servants or employees who have cooperated with BRI Syariah. Furthermore, BRISyariah will check the file completeness and see the potential

⁴⁸ Fatwa DSN-MUI No. 76/DSN-MUI/VI/2010 About SBSN *Ijârah Asset to be Leased*.

⁴⁹ Fatwa DSN-MUI No. 101/DSN-MUI/X/2016 About *al-Ijârah al-Maushufah fi al-Zimmah*.

⁵⁰ Fatwa DSN-MUI No. 102/DSN-MUI/X/2016 About *al-Ijarah al-Maushufah fi al-Zimmah* Untuk Produk financing Pemilikan Rumah (PPR)-Inden.

⁵¹ Interview with Oki Kurnita as *Account officer* at BRISyariah, Purwokerto branch on Tuesday, August 21, 2018.

customer's track record. Upon completing all of the requirements, the customer will be enlightened on some matters regarding the financing they apply for. These include the amount of financing installment and the costs payable by the customer after the financing money is received by the customer.⁵²

In regard to the amount of financing and duration of installment, the customer can apply for the amount of financing they want with their desired financing term. For example, a customer applies for KPR financing amounting to Rp. 300,000,000.- for 15 years. The term within which the customer should make the payment depends on their ability and agreement between the customer and the bank.⁵³

As a profit-oriented financial institution, sharia banks also provide services which are not free. Profit becomes the main goal of sharia bank establishment. This can be seen from the installment of the financing that the customer applies for. For example: If a customer applies for financing for consumptive purchase such as motorcycle at an amount of Rp. 16,000,000.- using an installment payment scheme at Rp. 512,000,000.- per month for 48 months, then the total amount of payment that the customer will make by the end of the term is Rp. 24,576,000.-. It inevitably raises a question on how the actual financing fund of only Rp.16,000,000.- should be paid, even if using the installment method, by the customer at Rp. 24,576,000.-. This clearly means that additional payment has to be made by the customer.

The costs of course have been calculated seriously by the sharia bank who should comply with both the state and Islamic laws at the same time. The addition of those costs is considered inappropriate in payments due to the new system. One of them is insurance which includes life insurance to minimize the non-performing loan risk caused by the customer's death. In addition to life insurance in the form of *takaful*, fire insurance is also added to cover the costs which may rise from possible fire or accident insurance if the application is for motor vehicle financing.

⁵² Interview with Oki Kurnita as *Account officer* di BRISyariah, Purwokerto branch on Tuesday, August 16, 2018.

⁵³ Interview with Oki Kurnita as *Account officer* di BRISyariah, Purwokerto branch on Tuesday, August 21, 2018.

Also, the profit margin is added based on BI rate which has been mandatory for banks to comply with. Thus, if these costs are summed, the total amount of payment above is found. If it is to be associated with *ijârah* covenant, the form of *ujrah* (rent fee) which should be paid by the customer is in the form of additional margin of the amount which has been determined based on the amount of financing fund and payment term. Additionally, what makes it different from other covenants such as *bay' al-murabahah* is that the financing based on *ijârah Muntahiyah bi al-Tamlîk* has a descending installment mechanism. This means if the installment in the first month is Rp. 512,000.-, then the installment for the last month can be only Rp. 100,000.-.

Installment mechanism. This means if the installment in the first month is Rp. 512,000.-, then the installment for the last month can be only Rp. 100,000.-.

Transformation of *Ijârah*: Islamic Law Perspective

In order to fulfill the market demand, sharia banking financial institutions should be capable of competing and winning their customers' hearts. This is important since sharia banks would not make any progress if they fail to innovate and keep up with the conventional banking market development. Thus, various strategies and new products should be made to face the challenges and market demand, particularly in the banking world. However, on the other hand, the products they offer should be different and more interesting to make them more attractive to the market.

As a product many people are attracted to, *ijârah* contract is also expected to compete in the banking world. As an institution in full charge of developing sharia economy-based product, Indonesia Ulema Council or *Majelis Ulama Indonesia* (MUI) is obligated to safeguard the development of sharia banking products in Indonesia. It is where MUI plays its role in developing classical *fiqh* contract-based verdict which is then developed into a sharia banking product in the form of verdicts issued by the National Sharia Board of Indonesia Ulema Council or *Dewan Syariah Nasional Majelis Ulama Indonesia* or DSN-MUI for short.

By the time this paper was finished, DSN-MUI has issued 125 verdicts related to sharia banking activities and economy. Six of them

are associated with *ijârah*. The high market demand for service lease product in the banking field and global competition are thought of as logical reasons for the issuance of *ijârah*-based verdicts.

The first *ijârah* verdict was issued in 2000 under number: 09/DSN-MUI/IV/2000 on *Ijârah* Financing. This verdict explained the pillars and requirements of *ijârah* in *fiqh* concept which were then adopted in *ijârah* financing verdict product. In its process, this verdict serves as a reference for sharia financial institutions which wish to offer lease/service product based on sharia rules. Judging from the provisions in this verdict, initially, DSN-MUI wished to inform that classical covenants could be applied to sharia banking. However, this verdict does not elaborate the mechanism to be implemented considering that the issued verdict did not give significant transformation. The concept offered by this verdict was still exactly the same as that offered by the classical *fiqh* on *ijârah* covenant.⁵⁴

What made the *ijârah* contract conceptualized in classical *fiqh* and in sharia banking different was the involvement of *wakâlah* covenant in several financing applied for. The inclusion of this *wakâlah* covenant was mandated to bridge the gap between the ideal contract based on sharia and the banking, while banks was a financial institution which was highly unlikely to purchase and sell goods. Thus, the use of other verdicts related to *wakâlah* became inseparable. It seems that DSN-MUI has also anticipated this by issuing DSN-MUI verdict number: 113/DSN-MUI/IX/2017 on *Wakalah bi Al-Ujrah* and verdict number: 10/DSN-MUI/IV/2000 on *Wakalah*. Upon the issuance of these verdicts, sharia financial institutions now have the basis in issuing a banking product in the form of financing by referring to DSN-MUI verdicts which have been stipulated as the mandate of Sharia Banking Law.

The involvement of *ijârah* in many DSN-MUI verdicts is not baseless at all. DSN-MUI based its verdicts on various accountable *nash* both from al-Quran, Hadith and opinions of *mujtahidîn*. The *nash* from al-Quran which was used as the basis for issuing this verdict was al-Quran surah Yûsuf verse 55 on Prophet Yûsuf's mandate, al-Nisâ verse 58 on mandate and justice, al-Mâidah verse 2 on helping each other and the first verse on promise fulfillment. Meanwhile, one

⁵⁴ Fatwa DSN-MUI No. 09/DSN-MUI/IV/2000 About Financing *Ijârah*.

hadith used as the basis in the verdict was the one narrated by al-Tirmizi from Amr ibn Auf al-Muzani *الصلح جائز بين المسلمين إلا صلحا حراما* (shulh -amicable dispute settlement- can be done between Muslims except *shulh* which forbids what is *halal* (allowed) or allows what is *haram* (forbidden)). In addition, this verdict also heeded al-Zuhaylī's statement on *wakalah bil ujrah*. In his opinion, *wakalah* could be with *ujrah* (fee) or without *ujrah*. If *wakalah* was done with *ujrah*, then the provisions of *ijârah* should apply in it.⁵⁵

As an institution upholding the mandate given by the law, sharia banks always rely its decision on the DSN-MUI verdict which is issued according to the need. These verdict serve as the basis to make banking products as needed by community without removing the sharia value which should be present in each product. As the time goes and the community's need keeps on developing, sharia banking products shall also change in many aspects. This includes the change in financing mechanism and the payment of *ujrah* and profit margin. The change in covenant construct which is a combination of many covenants cannot be separated from the role played by DSN-MUI Verdict which sets forth the pattern, reference and mechanism of various agreements which are then translated into a banking product by the sharia bank. These numerous provisions of covenant construct are established in the hope that they will anser the community's economic need, particularly in sharia banking field.⁵⁶

Viewed from Islamic law, the establishment of banking products has deviated from what it is supposed to to refer to classical ulema's *fiqh* study and turned to refer to the verdicts issued by the National Sharia Board which is the main reference for sharia banks in Indonesia.⁵⁷ The position of the verdict itself binds stronger than the

⁵⁵ See Fatwa DSN-MUI No: 113 DSN-MUI/IX/2017 About *Wakâlah bi al-Ujrah*

⁵⁶ Fatwa DSN-MUI No: 09/DSN-MUI/IV/2000 About Financing *Ijârah*, No: 10/DSN-MUI/IV/2000 About *Wakalah*, No: 101/DSN-MUI/IX/2016 About *Akad al-Ijârah al-Maushufah fi al-Dzimmah*, No: 102/DSN-MUI/IX/2016 About *al-Ijârah al-Maushufah fi al-Dzimmah*, Untuk Produk Pembiayaan Pemilikan Rumah (PPR)-Inden, No: 1 1 2/DSN-MUI/IX/2017 About *Akad Ijârah*, serta No: 113/DSN-MUI/IX/2017 Tentang *Akad wakalah bi al-Ujrah*. Undang-undang Perbankan Syariah No: 21 tahun 2008 tentang Perbankan Syariah.

⁵⁷ Undang-undang Perbankan Syariah No: 21 tahun 2008 tentang Perbankan Syariah.

classical *fiqh* concept. This is because MUI with its DSN occupies the place of an institution authorized to issue verdicts related to economic law. Meanwhile, it is mentioned in sharia banking law particularly in its general provisions that sharia principles are those Islamic law principles in banking activities based on the verdicts issued by the authorized institution. The authorized institution, in this case, is the *National Sharia Board of Indonesia Ulama Council (DSN-MUI)*. Additionally, the function of the verdict for the community, in general, is to be a proposition for the problems arising among them. Thus, it is not exaggerating to say that verdict *fi Haqqi al-'Ami ka al-Adillah fi Haqq al-Mujtahid*, means that the position of verdicts for most people is like the proposition for *mujtahid*.⁵⁸

Also, verdicts are the result of *ijtihad* made by experts who are capable of exploring sharia Islam. Therefore, the existence of verdicts serves as a strong basis to answer the contemporary problems which keep on developing. Hence, it is highly reasonable to say that the advancement or regression of a Muslim community, in exploring their tenets depends on the verdict and *ijtihad* of ulema during their time. In the absence of verdict and *ijtihad*, Islam teaching will be less developed or even nearly static. This is because, as we all know, the pure inspiration in exploring Islam teachings themselves ideally comes from the *ijtihad* process which matches the current condition which is then manifested in the form of established and accountable religious verdicts.

Conclusion

Ijârah began with classical *fiqh* concept and now it is one of transactions which support the development of sharia banking. The wide scope of banking products produced from *ijârah* concept becomes the basis for developing *ijârah* concept from a classical *fiqh* contract into a banking product in the form of financing. This development can be seen from many banking products which use *ijârah* covenant, particularly those related to services. This development lies in the combination of *ijârah* contract with several other contracts such as *wakâlah*. Another development in *ijârah* concept to *ijarah* financing is seen from its basis. In classical *fiqh*

⁵⁸ Zainuddin Ali, *Hukum Ekonomi Syariah* (Jakarta: Sinar Grafika, 2008), 127

Hasanudin, Ainul Yaqin

concept, *ijârah* is a product of *ijtihad fiqh* of *zhanni* and non-binding nature. Every Muslim may implement the concept of *ijârah* from any ulama which is *ijtihadiah* in nature. However, in *ijârah* financing, in addition to being a combination of several covenants, it uses DSN-MUI verdicts which are binding the sharia financial institutions more strongly for the mandate given by sharia banking law.

Bibliography

- Abdulsyani. *Sosiologi Skematika: Teori, dan Terapan*. Jakarta: PT. Bumi Aksara, 2007.
- Abdul Wahab Abd. Muhaimin, "Aktualisasi Syariah dan Fikih dalam Menyelesaikan Pelbagai Persoalan Hukum", *Ahkam*, Vol. XV, No. 2 Juli 2015, 241-248.
- Admin, "Profil BNI Syariah" in <https://www.bnisyariah.co.id/id-id/> accessed on April 19, 2018.
- Admin, "sejarah BRI Syariah" in <https://www.brisyariah.co.id/> accessed on April 17, 2018.
- Admin, "tentang muamalat" in <http://www.bankmuamalat.co.id/profil-bank-muamalat>, accessed on April 17, 2018.
- Al-Fayyûmî, Abû al-'Abbâs, Ahmad ibn Muḥammad ibn 'Alî. *Al-Mishbâh al-Munîr fi Gharîb al-Syarh al-Kabîr*. Beirut: al-Maktabah al-'Ilmiyyah, s.a.
- Ali, Zainuddin. *Hukum Ekonomi Syariah*. Jakarta: Sinar Grafika, 2008.
- Anshârî, Zakariyâ al-. *Fath al-Wahhâb bi al-Syarh al-Manhâj*. (Semarang: Karya Toha Putra. s.a.
- Ascarya. *Akad & Produk Bank Syariah*. Jakarta Utara: Raja Grafindo Persada, 2011.
- Azhari, Fathurrahman. "Dinamika perubahan Sosial dan Hukum Islam". Dalam *Jurnal al-Tahrir*. Vol. 16. No. 1 May 2016.
- Departemen Pendidikan Nasional. *Kamus Bahasa Indonesia*. Jakarta: Pusat Bahasa, 2008.
- Fatwa DSN-MUI No. 09/DSN-MUI/IV/2000 Tentang Pembiayaan Ijârah.
- Fatwa DSN-MUI No. 101/DSN-MUI/X/2016 Tentang *al-Ijârahal-Mawshûfah fi al-Zimmah*.
- Fatwa DSN-MUI No. 102/DSN-MUI/X/2016 Tentang *al-Ijârahal-Mawshûfah fi al-Zimmah* untuk Produk Pembiayaan Pemilikan Rumah (PPR)-Inden.
- Fatwa DSN-MUI No. 72/DSN-MUI/VI/2008 Tentang Surat Berharga Syariah Negara *Ijârah Sale and Lease Back*.
- Fatwa DSN-MUI No. 76/DSN-MUI/VI/2010 Tentang SBSN *Ijârah Asset to be Leased*.
- Fatwa DSN-MUI No: 09/DSN-MUI/IV/2000 Tentang Pembiayaan Ijârah Undang-undang Perbankan Syariah No: 21 tahun 2008 tentang Perbankan Syariah.

- Fitriat, Gibtiah Yusida. "Perubahan Sosial dan Pembaruan Hukum Islam Perspektif Sadd al-Dzari'ah". *Jurnal Nurani*, Vol. 15 No. 2, December 2015.
- Fuady, Munir. *Sosiologi Hukum Kontemporer Interaksi Hukum, Kekuasaan, dan Masyarakat*. Bandung: Citra Aditya, 2007.
- Harun Santoso dan Anik, "Analisis Pembiayaan Ijarah pada Perbankan Syariah", *Jurnal Ilmu Ekonomi Islam*, Vo. 1 No. 2 July 2015.
- Ibn Manzur, Abu al-Fadl Muḥammad Mukrim ibn 'Ali. *Lisân al-'Arab*. Beirut: Dâr Sâdir, 1414 H.
- 'Isa, Abd Allâh Yusuf. *Taysir Ilm Usul al-Fiqh*. Beirut: Muassasah al-Risalah, 1997.
- Iswahyudi, "Majelis Ulama Indonesia dan Nalar Fatwa-fatwa Eksklusif", *Al-Ihkam*, Vol. 11 No. 2 Desember 2016.
- Ibn Qayyim, Abû Adb Allâh Muhammad Abû Bakr Ayub. *'Ilam al-Muwaqqi'în 'an Rabb al-'Alamîn*. Riyadl: Dâr ibn al-Jauzî, s.a.
- Ibn Rusyd, Abû al-Walid Muhammad ibn Ahmad ibn Muhammad ibn Ahmad. *Bidâyah al-Mujtahid wa Nihâyah al-Muqtashid*. Kairo: Dâr al-Hadits, 2004.
- Ilyan, Ahmad Ali. *Taârikh al-Tasyri' wa al-Fiqh al-Islâmi*. Riyadl: Dâr Ishbili, 2001.
- Jum'ah, Muhammad Ali. *al-Madkhal ilâ Dirasat al-Mazâhib al-Fiqhiyyah*. Kairo: Dar al-Salam, 2004.
- Kahlâni. Muhammad Isma'il Shalâh Muhammad al-. *Subul al-Salâm*. Beirut: Dâr al-Hadits, s.a.
- Kasmir. *Bank dan Lembaga Keuangan Lainnya*. Jakarta: Raja Grafindo Persada, 2014.
- Kementrian Wakaf dan Urusan keislaman Negara Kuwait. *al-Mawsû'ah al-Fiqhiyah al-Kuwaitiyah*. Kuwait: Dar al-Salasil, 1994.
- Mahkamah Agung RI. *Kompilasi Hukum Ekonomi Syariah*. Jakarta: Pusdiklat Teknis Peradilan 2009.
- Marabi, Muḥammad Idris Abd al-Rauf al-. *Qâmuûs al-Marbawî*. Mesir: Mushthafâ al-Bâbi al-Halabi wa Awladah, 2000.
- Mas'adi, Ghufron A. *Pemikiran Fazlur Rahman tentang Metodologi Pembaharuan Hukum Islam*. Jakarta: RajaGrafindo Persada, 1997.
- Mas'ud, Muhammad Khalid. *Filsafat Hukum: Studi Tentang dan Pemikiran Abû Ishâq al-Syâthibî*. Bandung: Pustaka, 1999.

- Moh. Mufid, "Qath'i dan Zanni dalam Pemikiran Islam (Memahami Teks dan Konteks Secara Proporsional)", *Jurnal Al-Hikmah* Vo. XV, No. 2, 2014.
- Nasution, Lahmuddin. *Pembaharuan Hukum Islam Dalam Mazhab Syafi'i*. Bandung: PT. Remaja Rosdakarya, 2001.
- Sabiq, al-Sayyid. *Fiqh al-Sunnah*. Beirut: Dâr al-Kurub al-'Ilmiyyah, 1977.
- Saeed, Abdullah. *Menyoal Bank Syariah*, transl: Arif Maftuhin. Jakarta: Paramadina, 1996.
- Soekanto, Soerjono. *Beberapa Permasalahan dalam Kerangka Pembangunan di Indonesia*. Jakarta: Yayasan Penerbit UI, 1975.
- Syarifuddin, Amir. *Ushul Fikih I*. Jakarta: Kencana, 2011.
- Syarifudin, Amir. *Garis-Garis Besar Fikih*. Bogor: Kencana, 2003.
- Zuhailî, Wahbah al-. *al-Fiqh al-Islami wa Adillatuh*. Beirut: Dâr al-fikr, s.a.
- Zuhaylî, Wahbah al-. *al-Fiqh al-Islâmî wa Adillatuh*. Beirut: Dâr al-fikr, s.a.
- Umni Kulsum, "Riba dan Bunga Bank dalam Islam (Analisis Hukum dan Dampaknya Terhadap Perekonomian Umat)", *Jurnal Al-'Adl*, Vol. 7 No. 2 Juli 2014.



al-Ihkam: Jurnal Hukum dan Pranata Sosial, 14 (1), 2019: 99-123
ISSN: 1907-591X, E-ISSN: 2442-3084
DOI: <http://doi.org/10.19105/al-ihkam.v14i1.2290>

Specific Treatment of Elderly Pilgrims on *Hajj* According to Hadith; The Approach of *Mukhtalif Ahadis*

Masyithah Mardhatillah

IAIN Madura, Jl. Panglegur KM. 4, Pamekasan-69317

Email: masyithah.mirza@gmail.com

Article history: Received: 13 Mei 2019, Accepted: 27 Juni 2019, Published: 11 Juli 2019

Abstract:

Most of Indonesian *hajj* pilgrims are elderly due to approximately 23 years waiting period. This paper aims to elaborate specific treatment of elderly pilgrims according to the hadith. Some hadith imply indirect prohibition to perform *hajj* by themselves while others still motivate the *hajj* in a hard condition. Using the approach of *mukhtalif ahâdits*, this paper seeks to answer three questions. *First*, how did hadith say about specific treatment of elderly *hajj* pilgrims. *Second*, how to deal with two groups of hadith which slightly look different. *Third*, how is proper contextual interpretation on the hadith in Indonesian contemporary life. The data compilation is through literature reviews and interviews. Then, the two groups of hadith are compromised using a method called *al-jam'u wa al-tawfiq*. It turns out that the first hadith applies for those who can't really perform the *hajj* while another is for those with physical problems but could still stand for *hajj* using some facilities and policies. Those all lead to an inevitable need for a special *hajj manasik* for elderly so they could perform the *hajj* with better preparation.

Keywords:

Elderly Hajj Pilgrims; Hadith; Mukhtalif Ahâdits; Manasik

Author correspondence email: masyithah.mirza@gmail.com

Available online at: <http://ejournal.iainmadura.ac.id/index.php/alihkam/>

Copyright (c) 2019 by al-ihkam. All Right Reserved



Abstrak:

Dengan waktu tunggu keberangkatan kurang lebih 23 tahun, sebagian besar jama'ah haji Indonesia adalah lansia. Penelitian ini mendiskusikan pandangan hadist soal perlakuan khusus terhadap jama'ah lansia. Beberapa hadist menyiratkan imbauan untuk tidak melaksanakan haji secara langsung, sedang beberapa lain tetap memotivasi pelaksanaan haji dalam keadaan sulit sekalipun. Dengan pendekatan *mukhtalif ahâdits*, penelitian ini fokus menjawab tiga persoalan. *Pertama*, bagaimana pandangan hadist terhadap jamaah lansia. *Kedua*, bagaimana mengompromikan dua (kelompok) hadist yang sekilas tampak berbeda. *Ketiga*, bagaimana interpretasi kontekstual hadist-hadist tersebut dalam konteks Indonesia dewasa ini. Data penelitian didapat melalui penelusuran pustaka dan wawancara. Dua kelompok hadist kemudian dikompromikan dengan metode *al-jam'u wa al-tawfiq*. Hasilnya menunjukkan bahwa hadist pertama berlaku bagi jama'ah yang benar-benar tidak bisa melaksanakan haji, sedang yang kedua adalah bagi mereka dengan kemampuan fisik yang minim namun masih memanfaatkan fasilitas dan kebijakan yang ada. Dari situ, adanya sebuah *manasik* (kelas haji) khusus lansia di Indonesia menjadi keniscayaan agar jama'ah lansia dapat semakin maksimal mempersiapkan dan melaksanakan haji.

Kata Kunci:

Haji Lansia; Hadist; Mukhtalif Ahâdits; Manasik

Introduction

As the last pillar of Islam, performing *hajj* is the most challenging one as it needs various 'abilities' ranging from financial, physical and social aspect even knowledge mastery. In Indonesia, the challenge is also about the quota and the long waiting period which can take place, at maximum, 30 years right after the registration.¹ This makes very much sense to happen in the world's largest Moslem country. Together with other relating factors, those play a big role in segmenting the *hajj* pilgrims. Most of them, about 60% at 2018, come

¹The most recent waiting period is 23 years counting from the registration date. Interview with Mr. Afandi, Former Chair of *Hajj* Division, Pamekasan Branch of Ministry of Religious Affair, at his office, Jl. Brawijaya, Pamekasan, August 27, 2018.

from elderly who typically suffer various types of health problem.²

In fact, the situation of *hajj* requires every pilgrim to maintain good health as it would determine on how they perform the series of worship. Meanwhile, the huge people from all over the world coming to the single place for the same purpose make the crowd unbearable. The heat climate of Mecca and its surrounding makes the condition even more challenging so not every pilgrim may do the same as they have different health condition.³ Therefore, specifically to the elderly or those who have serious physical problems, some facilities and system are well prepared to help them performing the *hajj* well.

Considering the healthy and physical problem, at very least, elderly have two main choices in performing the *hajj*, either by performing by themselves along with their physical limitation or by appointing someone else to do on behalf of him/her. So far, there is no rigid rule about this very specific thing and it refers to personal preference. Therefore, it is important to know how religious source, particularly hadith, speaks about this matter which is also a constant problem arising in every *hajj* session year by year. Hadith, in this extent, is the considerable source to note as it elaborates general thing into specifics and explore the living story of Prophet Muhammad lively. Moreover, previous researches on elderly pilgrims were more

²Redaksi, "60 Jama'ah Haji Indonesia 2018 Didominasi Lansia", in "<https://haji.okezone.com/read/2018/04/25/398/1891271/60-jamaah-haji-indonesia-2018-didominasi-lansia>". (Accessed on August 01, 2018). A study found that the majority (79%) of hospitalized patients during the 1423 Hijriyah *hajj* session were up to 40 years and more than 1/3 of them were up to 60 years. See Tariq A. Madani (*et al*), "Causes of Hospitalization of Pilgrims during the Hajj Period of the Islamic Year 1423 (2003)," *Ann Saudi Med*, Vol. 26, No. 5, (September-October 2006), 349. Another study mentioned pneumonia as the major cause of serious illness during the session of *hajj*. See Yaseer Mandourah (*et al*), "Clinical and Temporal Patterns of Severe Pneumonia Causing Critical Illness during Hajj", *BMC Infectious Disease* Vol. 12 (117), (2012), 7. In addition to those two, there also found the respiratory tract infections as the common illness of *hajj* pilgrims. See Abdulaziz H. Alzeer, "Respiratory Tract Infection during Hajj", *Annals of Thoracic Medicine*, Vol. 4, No. 2 (Apr-Jun 2009), 50.

³There found some factors beyond the extreme circumstances of *hajj* session. They are physical exhaustion, exposure to foreign strains of organism and overcrowding (around 2 million pilgrims in the restricted area). A. Alzeer, "Tuberculosis is the Commonest Cause of Pneumonia Requiring Hospitalization During Hajj (Pilgrim to Makkh)," in *Journal of Infection*, Vol. 36, No. 3 (1998), 305.

about medical, social or psychological views instead of religious approach.

Among others, there found, at minimum, two directly related hadith on elderly in *hajj*. *First* is about the permission to perform *hajj* on behalf of an elderly who is not physically eligible to perform the *hajj*. The *second* contains some alternatives for those who have physical difficulties in *hajj* to still perform it by themselves, including elderly, *such as* to ride any 'vehicle' like camel as the traditional characteristic of Arabic peninsula at that time.

The first group of hadith implies that the elderly is permitted not to perform *hajj* due to physical condition and for his/her own good. However, the second group indicates that it is still strongly urged to perform *hajj* by themselves considering some special 'policies' and 'facilities' available. Therefore, what this paper aims to do is to find out the proper contextual and critical interpretation on this problem based on the hadith as the relevant source using the theory of *mukhtalif ahadis*. This is done through three questions to answer; *First*, how did hadith say about specific treatment of elderly *hajj* pilgrims? *Second*, how to deal with two groups of hadith which slightly look different? *Third*, how is the proper contextual interpretation of the hadith in Indonesian contemporary life?

Research Method

This is a qualitative research based on a mixed library and field data compilation technique. The primary library source consists of some main hadith compilation books, while the secondary contains books, journal articles, dissertation and website contents talking about the *hajj* specifically related to the elderly. The field data comes from interviews to three respondents which had played a roles as a member of *hajj* team, while one of which also served as the former chair of *hajj* division at the local branch of ministry of religious affair. The interviews were in semi structured one with the prepared questions arranged before.

Meanwhile, the analysis is based on the theory of *mukhtalif ahadis* which is a branch of *matn* (textual) critic clusters. It mainly focuses on the text or word of hadith. However, this does not mean that another component of hadith, *sand* or the transmission chain is fully ignored. When two difference hadith are found, for example,

and one of them is known to have a very weak chain, then it would not be considered to apply the *mukhtalif ahadis* anymore.⁴ Therefore, a requirement to apply the theories and rules of this cluster is valid when both hadith have same strong and good chain of transmission.⁵ The status of hadith must be either *sahih* or *hasan*.⁶

Etymologically, *mukhtalif* means those which are different. It derives from *ikhtalafa yakhtalifu* and serves as *isim fa'il* or those who do any action. In its root, it means position at the back as the opposite of the position at the front.⁷ Meanwhile, *hadith* could mean saying of someone or the new thing as the opposite of the word 'old'. However, it is more popular as a term used to describe anything, including saying, action, agreement, psychological or physical character of Prophet Muhammad pbuh.⁸

In principle, as a cluster of *ulum al hadith* (sciences of hadith), *mukhtalif ahadis* aims to pay very much attention on each hadith right from the text to context to make sure there is no 'trashed' to throw away. Difference between hadith does not directly mean that one of them is accepted while another is rejected provided that both of them have the same quality of the chain transmission. Therefore, this cluster is worth very much to learn and practice as the differences among some Islamic sources, not only among hadiths, are unbearable because of the different context of each.

At general, the methods to deal with different hadith (es) are: *First* is *al-jam'u wa al-tawfiq* (to gather and to compromise). *Second* is *tarjih* (to prioritize one among another). *Third* is *naskh* (to eliminate one over another). *Fourth* is *tawaqquf* or *tasaquth* (not to consider both

⁴Automatically, when the condition occurs, the weaker one is not used right away. Arif Wahyudi mentioned that the different hadith should be *maqbul* or eligible as *hujjah syar'i*. Additionally, he said that differences must be between or among some hadith, not between hadith and the Qur'an or logical thinking. See, Arif Wahyudi, "Kontroversi Hadist-hadist Menangisi Mayit," *Al-Ihkam*, Vol. 9, No. 1 (June, 2014), 82.

⁵Other requirements, according to Arif Wahyudi, are as follow. *First*, the differences happen in the same context. *Second*, the difference is clear, such as when a hadith implies allowance while another shows prohibition. *Third*, the differences are in the same condition. See Arif Wahyudi, "Kontroversi Hadist-hadist...", 84.

⁶Edi Safri, "Al-Imam Al-Syafi'i; Metode Penyelesaian Hadist-Hadist Mukhtalif", *dissertation* unpublished, IAIN Jakarta, 1990, 129.

⁷Ibnu Mandzur, *Lisan Al-Arab* vol. IX (Beirut: Dar Shadr, s.a), 82.

⁸Imam Syafi'ie, *Al-Risalah* (Beirut: Dar al-Kutub al-Ilmiyyah, s.a), 342.

of them). The arrangement of mentioning those four also shows hierarchical scale. Meaning to say, when it is still possible, the first method would be applied as it would accommodate two different hadith(es) so there would be no hadith over another. It makes the perfect compromise of the slightly different hadith.

Meanwhile, the second and the third method need some requirement as it would put one hadith over another so it could not be done randomly right away. Some requirement for the second method are as follow; the lack of the clear text (*naskh sharih*) relating to the problem, the impossibility to find the compromise point, and the good quality of both hadith either it is *mutawatir* or *sahih*.⁹ Shalahuddin Al-Adlabi added that in this method, there are some techniques to do including *taqyid*, *takhsis*, *nasih mansukh*, *ta'wil*, and *asbab al wurud*.¹⁰ The same condition applies for the fourth method as it would not use both of hadith because of unbreakable differences. The requirement, therefore, is the lack of possibility to apply any method because of the real and big differences between.

Hajj of Prophet Muhammad

Hajj is one of ritual worships that does not originally come from Mohammad era for the first time.¹¹ Long before his time, in the era of Abraham,¹² *hajj* had been performed by those who believe in Allah (or

⁹Syaraf al-Qudhat, *'Ilmu Mukhtalif Ahadis: Ushuluhu wa Qawa'iduhu* (Amman: Al-Jami'ah Al-Urduniah, 2001), 60.

¹⁰Shalahuddin bin Ahmad al-Adlabi, *Menalar Sabda Nabi; Menerapkan Metode Kritik Matan dalam Studi Hadist* transl. Ita Qonita, (Yogyakarta: Bintang Pustaka Abadi, 2010), 325.

¹¹Philip K. Hitti mentioned that at very first, *hajj* or pilgrimage is a rite of worship to the God of the Sun. Once, it was performed at the autumn and believed as a farewell ceremony to the God of the Sun as well as the welcoming party to the God of Rain. In the pre-Islamic era, he added that an annual celebration of North Arabia was performed together with the *hajj* rite heading to Ka'bah and Arafah in *Zul Hijjah*. Phillip K. Hitti, *History of the Arabs* transl. Cecep Lukman Yasin & Dedi Slamet Riyadi, (Jakarta: Serambi, 2006), 168-169.

¹²In relation to *hajj*, Ali Syari'ati mentioned Abraham or Ibrahim as the oldest and the most rebellious man of history as he denied all idols on the earth, greatly loved and obeyed Allah, then (along with Ismail, his son) built the Ka'bah whose structure symbolizes Him in the world. Ali Shari'ati, *Hajj; The Pilgrimage*, (s.l: Free Islamic Literature, 1980), 31 and 44.

hanif religion)¹³ although later, some changes inevitably happened. Historical notes from pre-Islamic Arab described that *Ka'bah*, or the House of God, was full of idols which imply the deviation of faith in significant way. Apart from political side and other factors, this showed that the *Ka'bah* itself still played his old role as a worship house.

Therefore, though it needs verification, it makes sense if some sources noted that before and other than *hajj wad'* or farewell of *hajj*, Prophet Muhammad had ever performed the *hajj*.¹⁴ Considering the fact about deviation or the abuse of *Ka'bah* and the condition of Mecca before the *hijrah*, however, if that was true, it could be strongly predicted that the *hajj* was performed in a different way as what Prophet Muhammad and Moslems performed afterward. The command to perform *hajj* was later officially revealed to Prophet Muhammad when the condition allowed him to do so and there were no threat of Kafir Quraisy of Mecca anymore.¹⁵ Some said it was on fifth, sixth even ninth year of *hijrah*.¹⁶

Other than *hajj*, at seventh year of *hijra*, Prophet Muhammad had performed *umra* to the Mecca before the *hajj wada'*. It closely relates to the Testament of Hudaibiyah which allowed Moslems to perform the *umra* that year after the ban in the previous year.¹⁷ Meanwhile, the *hajj wada'* was on the tenth year of *hijrah*. This arose a question considering that *Fath Makkah*, a moment that signified victory of Islam at the Mecca, occurred two years before, the eighth of

¹³Peter Webb, "The Hajj before Muhammad: Journeys to Mecca in Muslim Narratives of Pre-Islamic History", in Venetia Porter and Liana Saif, *The Hajj: Collected Essays*, (Hockley: British Museum, 2013), 7-8.

¹⁴M. Quraish Shihab, *Membaca Sirah Nabi Muhammad SAW dalam Sorotan Al-Qur'an dan Hadist-hadist Shahih*, (Jakarta: Lentera Hati, 2012), 818. A note from Imam Ja'far Shadiq even mentioned that the *hajj* after *hijrah* of Prophet Muhammad was only once but before that, he often performed the *hajj* (about 20 times) and *umrah* (about three times) along with his companions. Muhammad Solikhin, *Keajaiban Haji dan Umrah; Mengungkap Kedahsyatan Pesona Ka'bah dan Tanah Suci* (Jakarta: Erlangga, 2013), 63.

¹⁵See for example, *Al-Baqarah*: 196 and *Ali Imran*: 97.

¹⁶M. Quraish Shihab, *Membaca Sirah Nabawiyah*, 817-818.

¹⁷Khaled Abdelhay Elsayed and Kamaruzaman Yusoff, "The Implication of Peace Treaties in Disseminating Da'wah Islamiyah (the Islamic Call) among non-Muslims: A Special Reference to Hudaibiya Treaty", *Australian Journal of Basic and Applied Science*, Vol. 6 No. 7, (2012), 209.

hijrah. It is mainly about why Prophet Muhammad postponed the agenda of *hajj* that long if the condition had allowed him to perform the *hajj* earlier.

Fath Makkah closely relates to the Hudaibiyah Treaty. History notes that in fact, the visit to Mecca was not well planned, since it was a kind of reaction from Moslem at Madina to the break of Hudaibiyah Treaty. To be short, the story began when the clan of *Bakr* which politically engaged to Meccan Quraish attacked the clan of *Khuza'ah* which was the companion of Madinan Moslems. This attack was based on the consideration that Madinan Moslem had been badly defeated in fighting the Roman army before ward so it was assumed there would have had been no power anymore.¹⁸

The attack to the *Khuza'ah* happened unbalanced as they were totally not prepared to offend the attack. This led them to run and finally reached the Mecca. According to the Hudaibiyah Treaty, there should not been any fight in *haramayn*, but this point was disobeyed and gave Rasulullah and Madinan Moslem no other option but to come to Mecca for a fight.

On the way to Mecca with about 10000 armies, Rasulullah got some additional key persons who declared faith and converted to Islam. They were Abbas bin Abdul Muthallib, Abu Sufyan bin Harist and Abdullah bin Abu Umayyah. Among them, Abu Sufyan as the political leader of Mecca had specific mission to do diplomacy in order Rasulullah and his armies not attack Mecca violently. This mission was successful as among the four groups of armies coming to the Mecca from different directions, there was only a group from the East which could not avoid the violent fight. Rasulullah could come to the Mecca peacefully with no blood. He visited the Ka'ba and did seven round *tawaf* which was later known as the *tawaf* of victory. Later, at the main door of Ka'ba, he addressed in front of Meccan Quraish and gave them full amnesty. He performed prayer together with Usamah and Bilal before walking around and destroying all the idols, paintings and pictures hang in all areas of The *Ka'ba*.¹⁹

¹⁸Akhmad Siddiq Thabrani, *Di Tengah Pusaran Ka'bah; Sejarah, Keajaiban, Mitos dan Mistik* (Depok: Keira Publishing, 2014), 120-122.

¹⁹Simeon Petroni, "Mecca, The Blessed Heart of Islam", in Silvio Ferrari and Andrea Benzo (ed), *Between Cultural Diversity and Common Heritage: Legal and Religious Perspectives on the Sacred Places of the Mediterranean* (London: Routledge, 2014), 322.

Considering this, Rasulullah had actually got a chance to perform *hajj* right after the event because of the safe condition at specific and bilateral connection with Mecca at general, yet he 'waited' until the tenth year of *hijra*. It is strongly predicted that reason for Prophet Muhammad to perform the *hajj* that late covers; *First*, to accentuate the obligation for *hajj* once in a lifetime. *Second*, to imply a sign that the death of Prophet Muhammad was coming. *Third*, to indicate that the tenth year of *hijrah* is a good time after the series of battle following *Fathu Makkah* could be gone through.

Apart from historical dispute about how many times Prophet Muhammad performed the *hajj* during his life, notes about *hajj* recorded in both hadith (es) and prophetic history generally come from the event of *hajj wada'*. It becomes important not only because the event happened when the condition is really safe, but also because it signifies a farewell *hajj* implying that the due date of Prophet's last days was approaching.

Hadith(es) on Hajj for Elderly

Hadith on *hajj* are easily found in special chapters in some compilation hadith books. This chapter usually contains some subchapters which specifically classify the hadith based on more special themes. At general, most of the hadith on *hajj* describe the situation around the *hajj wada'* from the very first step until the end. Other than that, the hadith about *hajj* show the strong motivation to perform *hajj*. *Hajj*, for example, is said as one of five pillars of Islam, considered as honored as doing *jihad* (war for the sake of Allah),²⁰ could erase the previous sinful deed and so on.²¹

Slightly, these hadith imply motivation for all Moslem to perform the *hajj* in any condition, although The Koran itself firmly notes that *hajj* is compulsory for those who can afford the way (*man istatha'a ilaihi sabila*).²² However, there found a few hadith which

²⁰Ahmad Ibnu Ali Ibnu Hajar Al-Asqalani, *Fathul Bari* vol. 3 (Kairo: Al-Maktabah Al-Tawfiqiyah, 2008), 492.

²¹See, for example, the first subchapter of *kitab al hajj*, which is *bab wujub al hajj wa fadhlihi*. Ahmad Ibnu Ali Ibnu Hajar Al-Asqalani, *Fathul Bari* vol. 3..., 488. See also Imam Bukhari, *Shahih Bukhari* vol. 1 (Istanbul: Darul Fikr, s.a), 140.

²²Ali Imron, 96-97. Furthermore, it is explained that Moslems are categorized into two in the sense of obligation to perform the *hajj*. First is those who are obliged, and

mention special policy for certain persons not to perform the *hajj* by themselves when any condition occurs. This, for example, happens on those who have been elderly when the command to perform *hajj* had been revealed. As an alternative, a member of family or other person in charge would perform the *hajj* on behalf of them.

Some of them, in not totally same diction and wording, are narrated by Bukhari (number 1513, chapter *hajj* on the ride), Muslim (number 1334, chapter *hajj* for the weak) Ibnu Majah (number 2906, 2908, 2909, 5390, 5391, 5392), Abu Dawud (number 1809, chapter performing *hajj* on behalf of others), Tirmidzi (number 2909, chapter on *hajj* for elderly and the late men) and Nasa'i (2635, 2641, 2642).

The hadith reported a conversation between Prophet Muhammad and a woman in *hajj wada'* period. The woman asked Prophet Muhammad whether she could perform the *hajj* on behalf of her father who, in the time when the revelation of *hajj* came and the *hajj wad'* period, later, was disable to perform the *hajj* even when riding on the mount. Prophet Muhammad permitted her to do so.

The hadits is as follows²³

حدثنا عبد الله ابن يوسف اخبرنا مالك ابن شهاب عن سليمان بن يسار عن ابن عباس رضي الله عنهما قال جاءت امرأة من خثعم عام حجة الوداع قالت يا رسول الله إن فريضة الله على عباده في الحج أدركت أبي شيخا كبيرا لا يستطيع أن يستوي على الراحلة فهل يقضي عنه أن أحج عنه قال نعم

Another series of hadith with almost same diction and redaction is as follows²⁴

second is those who are not. The later refers to those who are not eligible because of either early ages or physical (or financial) ability. Ahmad Ibnu Ali Ibnu Hajar Al-Asqalani, *Fathul Bari...*, 489. Relating to this, a hadith narrated by Tirmidzi mentioned that what makes *hajj* obliged for anyone is that when h/he has money (*zaad*) and vehicle (*rahilah*). Hadith number 813. Imam Tirmidzi, *Al-Jami' Al-Sahih Sunan Tirmidzi* vol. 3 (Lebanon: Dar Kutub Al-Ilmiyyah, 2011), 6.

²³Hadith number 1513. Ahmad Ibnu Ali Ibnu Hajar Al-Asqalani, *Fathul Bari...*, 488. Compare to al-Bukhari, *Shahih Bukhari* vol. 1 (Istanbul: Darul Fikr, s.a), 140.

²⁴http://library.islamweb.net/newlibrary/display_book.php?idfrom=3937&idto=3939&bk_no=53&ID=586 (Accessed on September 10, 2018).

حَدَّثَنَا يَحْيَى بْنُ يَحْيَى، قَالَ: قَرَأْتُ عَلَى مَالِكٍ، عَنِ ابْنِ شَهَابٍ، عَنْ سُلَيْمَانَ بْنِ يَسَارٍ، عَنْ عَبْدِ اللَّهِ بْنِ عَبَّاسٍ، أَنَّهُ قَالَ: كَانَ الْفَضْلُ بْنُ عَبَّاسٍ رَدِيفَ رَسُولِ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ، فَجَاءَتْهُ امْرَأَةٌ مِنْ خَثْعَمٍ تَسْتَفْتِيهِ، فَجَعَلَ الْفَضْلُ يَنْظُرُ إِلَيْهَا وَتَنْظُرُ إِلَيْهِ، فَجَعَلَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ يَصْرِفُ وَجْهَ الْفَضْلِ إِلَى الشَّقِيِّ الْأَخْرَى، قَالَتْ: يَا رَسُولَ اللَّهِ، إِنَّ فَرِيضَةَ اللَّهِ عَلَى عِبَادِهِ فِي الْحَجِّ، أَذْرَكَتْ أَبِي شَيْخًا كَبِيرًا لَا يَسْتَطِيعُ أَنْ يَثْبُتَ عَلَى الرَّاحِلَةِ، أَفَأَحُجُّ عَنْهُ؟ قَالَ: «نَعَمْ»، وَذَلِكَ فِي حَجَّةِ الْوُدَاعِ

It is informed in one of *syarh* books (*Tuhfat Al-Ahwadzi*) that the father was actually a newly convert to Islam who was rich, so financially, he could afford to perform the *hajj*. However, his health problem did not allow him to even do a ride because he would not be stable on it.²⁵ Meanwhile, *Fathul Bari* author mentioned that the main point of this hadith is not about the vehicle or instrument to perform the *hajj*, but physical and financial ability. Meaning to say, if anyone could not perform the *hajj* because the lack ability of either physical or financial, this policy applies.²⁶

Another *syarh* book mentioned that this hadith indicates the permission to perform *hajj* for a woman on behalf of a man, moreover as a service of a daughter to the parents. Furthermore, she is allowed to perform the *hajj* without any *mahrom* if she believes she could be ok. It is also explained that the obligation for *hajj* still applies for those who can afford the cost materially but physically ill.²⁷

Other versions of this hadith explained other related things, such as the same policy and rule for those who had been passed away yet need to pay the *nazr* to perform the *hajj* even *umroh*. The *nazr* was considered just like a debt and *ahl waris* (heir) of the man/woman is responsible to pay it, whether or not the late parents told and gave them *wasiyyah* (a message spoken before a man passes away).

²⁵<http://hadithportal.com/hadith-sharh-928-21662&book=3> (Accessed on September 10, 2018).

²⁶Ahmad Ibnu Ali Ibnu Hajar Al-Asqalani, *Fathul Bari...*, 489.

²⁷Yahya bin Syarif Abu Zakariyya An-Nawawi, *Syarh Nawawi 'ala Muslim*, (sl: Darul Khair, 1996), 97.

However, some schools required the request from the elderly/or the late to perform the *hajj* on behalf of themselves, so this initiative could not come from the person in charge only. It is clearly described in the explanation (*syarh*) of hadith number 927 at Tirmidzi's hadith compilation.²⁸

Those two cases indicate that doing *hajj* on behalf of other person is allowed in some specific condition. At general, it implies that elderly who could not bear to perform the *hajj* even by riding any supported vehicle is one of the privileged groups because anyone else could perform the *hajj* on behalf of him/her. Another part is the one who had died but had promised (*nazr*) to perform the *hajj*. His/her descent is even obliged to perform the *hajj* on behalf of him/her just like the obligation to pay back the debt he/she borrowed from anyone else.

However, other hadith imply the obligation for elderly or those with physical problems to still perform the *hajj* by using special policy that Prophet Muhammad mentioned. Some other hadith even suggest those who are not physically ill to facilitate the elderly or the sick by helping them in providing good facilities and chance in performing all series of *hajj* worship. Those policies refer, but not limited to, some of this condition:

First, Prophet Muhammad gave permission for Saudah to leave *Muzdalifah* first to avoid the crowd due to her physical condition.²⁹ The almost same condition happened to Asma binti Abu Bakar (when she stayed in *Muzdalifah*) who did the same, particularly leaving just after the dawn to Mina. To her slave, she explained that her action had been permitted by Prophet Muhammad.³⁰ In another moment, Rasulullah ordered Ummu Salamah to do *tawaf* behind other *hajj*

²⁸Imam Tirmidzi, *Al-Jami' Al-Sahih Sunan Tirmidzi...*, 74-75.

²⁹A hadith narrated by Aisyah shows that in *Muzdalifah*, one of Prophet Muhammad wives, Saudah, permitted to leave to Mina first considering her physical condition (fat and heavy to carry her body). She planned that by doing so, she would be able to perform the *jumrah* rites not in any big crowd. Hadith number 812, chapter *hajj*, subchapter *sunnah* to prioritize the weak and women before the crowd. Fu'ad Abdul Baqi, *Mutiara Hadits Shahih Bukhari-Muslim Al-Lu'lu' wal Marjan* transl. Salim Bahreisy, (Surabaya: Bina Ilmu, 2005),. 418-419.

³⁰Hadith number 813, Fu'ad Abdul Baqi, *Mutiara Hadits Shahih...*, 419.

pilgrims while riding due to her sickness.³¹ Not only women, Prophet Muhammad also gave special policy to Ibnu Abbas and some member of his (prophet's) family to leave first to Mina at the Muzdalifah night.³²

Second, Prophet Muhammad once did a ride in *hajj*³³ then stood on it.³⁴ Particularly in the *tawaf* rite, on his camel, he gave a mark on his hand then say *takbir* everytime he performed the *rukn*.³⁵ Additionally, he also rode in throwing *jumrah* although in another moment, he did it by walking.³⁶ It is also reported that he once put his belonging, including the food, on the camel he rode.³⁷

However, those do not mean that riding automatically becomes obligation or requirement for those who perform the *hajj*. In fact, walking on foot is preferable for those who are able to do so, while riding is the second alternative. It is worth to take a note that there still found a dispute on the preferability between riding and walking on foot.³⁸ Performing *hajj* on the ride was also narrated in other places and persons. One of them was about Prophet's comment to Aisyah *bint* Abu Bakar who said that she did not perform *umrah* yet when others had made it. Rasulullah then ordered Abdurrahman, her brother, to accompany her and leave for Umrah from Tan'im. At that

³¹Hadit number 1633. Ahmad Ibnu Ali Ibnu Hajar Al-Asqalani, *Fathul Bari...*, 630. Doing *tawaf* beyond other pilgrims while riding is for the safety of the rider.

³²Hadith number 814, Fu'ad Abdul Baqi, *Mutiara Hadits Shahih...*, 419.

³³Hadith number 1517, Ahmad Ibnu Ali Ibnu Hajar Al-Asqalani, *Fathul Bari...*, 491. This was intended to see other pilgrims and welcome them if they have something to ask to him, according to a hadith narrated by Muslim from Jabir. Ahmad Ibnu Ali Ibnu Hajar Al-Asqalani, *Fathul Bari...*, 631. The same hadith was found at Sunan Tirmidzi, hadith number 865. Imam Tirmidzi, *Al-Jami' Al-Sahih Sunan Tirmidzi...*, 38.

³⁴Imam Bukhari, *Shahih Bukhari* vol. 1., 141.

³⁵Hadith number 1633, Ahmad Ibnu Ali Ibnu Hajar Al-Asqalani, *Fathul Bari...*, 630.

³⁶Hadith number 895-896. Imam Tirmidzi, *Al-Jami' Al-Sahih Sunan Tirmidzi...*, 51.

³⁷Ahmad Ibnu Ali Ibnu Hajar Al-Asqalani, *Fathul Bari...*, 492. This became role model for those who performed *hajj* before Utsman Ibnu Affan, for the very first time, did not put any belonging on his ride.

³⁸Ahmad Ibnu Ali Ibnu Hajar Al-Asqalani, *Fathul Bari...*, 490-491. Another thing to consider in riding a camel is about the dirt or faces of camel. Therefore, some Islamic scholars prohibit riding in a *hajj* without any reasonable cause or so called *uzr*. Ahmad Ibnu Ali Ibnu Hajar Al-Asqalani, *Fathul Bari...*, 631. Compare to the explanation of Tirmidzi which quoted Asy-Syafi'ie's opinion in it. 38.

time, Aisyah rode the camel then performed the *umra*.³⁹

The permission of Prophet Muhammad to perform *hajj* in different policies was also claimed by Ibnu Umar who was used to prioritize the weak from his family in performing *hajj*, particularly when they were going to reach Mina. Usually, the family would be located in *Masy'aril Haram* at the night to do *dhikr* so they could arrive at Mina early at the dawn to do *jumrah*. Ibnu Umar confirmed that his action was under the permission of Rasulullah.⁴⁰

In short, the second group consists of hadith which imply that in any hard condition, it is still recommended to perform the *hajj* by selves. Certainly, this applies by utilizing some 'facilities' and using strategies, such as riding on any compatible vehicle, avoiding the big crowd, setting the schedule and so on and so forth. Motivation to perform *hajj*, to sum up, according to the second group of hadith, is still accentuated.

Considering the theories of *mukhtalif ahâdits*, hadith about elderly pilgrims could be compromised using the first method, which is *al jam'u wa al-tawfiq* (to gather and to compromise). It relates to the good quality of the hadith which could be seen from the compilation book on which they come from. Furthermore, the difference between or among two is the slight difference instead of the contradiction. To sum, at last, the first hadith are more about pilgrims with really serious health problem, either because of age or any disease. Meanwhile, the second hadith describe non-emergency condition in which pilgrims can still stand to do all series of *hajj* worship using some facilities and helping tools such as wheelchair, the help of the guide or by relying on some health facilities and other special policies for elderly.

This first method makes it possible to take two hadith all the way around without putting a side one of both. The first hadith apply in certain condition, while another applies in other condition. To avoid any double standard consideration in determining whether a next pilgrim's condition could be categorized into the first or the two, it would be adequate to pay attention to the health policy and through

³⁹Hadith number 1516 and 1518. Ahmad Ibnu Ali Ibnu Hajar Al-Asqalani, *Fathul Bari...*, 491. Compare to Imam Bukhari, *Shahih Bukhari* vol. 1..., 140-141.

⁴⁰Hadith number 816. Fu'ad Abdul Baqi, *Mutiara Hadits Shahih*,. 420.

diagnostic result of medical team, as applied in Indonesian *hajj* system.

Hajj of Elderly in Indonesia

In Indonesia, the management of *hajj* belongs to authority of the Ministry of Religious Affair by its special division called *Direktorat Jenderal Penyelenggaraan Haji and Umrah* or General Directorate for *Hajj* and *Umrah*. It operates through some branches in every district which directly serves the next pilgrims since the step of registration process to the departure even arrival time. At the time of registration, the next pilgrims are required to pay a desk posted cost about 25 million IDR. Later, they would pay the rest of the cost in the close time before the departure. Additionally, they also need to show the identification cards along with doctor certificate from local hospital at the registration time.⁴¹

Mr. Afandi, the former chair of *hajj* division of Indonesian Ministry of Religious Affair of Pamekasan Branch, mentioned that next pilgrims are supposed to wait about 23 years after the registration time for the departure. However, he added, the waiting period does not apply to all next pilgrims because there found a special policy for elderly so they do not need to wait that long. Three or four years after the registration, the district branch could recommend a number of elderly to depart for *hajj*. Elderly category is based on the age, i.e. 75 years at minimum, instead of health condition.⁴² It was also informed that elderly up to 83 years deserve for the rest of national quota.⁴³ This implies that a healthy elderly would be more prioritized to depart first to perform the *hajj* rather than the sick younger next pilgrims. Moreover, there was no maximum age limit for the next pilgrims. It is even found a minimum

⁴¹Interview with Mr. Afandi,... in his office, Jl. Brawijaya, Pamekasan, on August 27, 2018, 15.00-16.00.

⁴²Interview with Mr. Abd. Halik Yadi, an experienced guide who served as an officer of TPHI (Tim Pemandu Haji Indonesia, Indonesian *Hajj* Guide Team) at 1998 and 2006 and the chief of pilgrim group or as know as *ketua rombongan* at 2016. The interview in his office at IAIN Madura, August 05, 2018. in his office at IAIN Madura, August 05, 2018.

⁴³Mario Effendi, "Usia 83 Tahun ke Atas Berhak Mendapat Sisa Kuota Nasional," in <https://haji.kemenag.go.id/v3/content/usia-83-tahun-ke-atas-berhak-mendapat-sisa-kuota-nasional> (Accessed on August 18, 2018).

age for *hajj*, which is 12 years.⁴⁴

When the recommendation gets approval from the central *hajj* committee, the elderly could depart and perform the *hajj* right away in the closest *hajj* session. This policy makes much sense on why in almost every pilgrimage season, elderly dominated the whole pilgrims in number.⁴⁵ The same policy even also applies for the one who accompany the elderly, such as children and other family members. This applies although in the formal regulation, there is no need for elderly—as well as women—to have a company in performing the *hajj*.⁴⁶

However, they would not be permitted to leave or are supposed to delay the departure one year ahead when the health check-up process diagnosed something serious. It is commonly known that the aging closely relates to various types of disease, so the check-up process is also performed more intensive for elderly other than regular pilgrims.⁴⁷ The same condition applies for pregnant women as the permission to perform the *hajj* only applies before 14 weeks or after 26 weeks pregnancy. In addition to elderly or pregnant women, in the close time before departure, all the next pilgrims are required to show a letter called *isthitha'ah* (means good health condition letter) as one of requirements before paying the rest cost of *hajj*.⁴⁸ If there found any serious disease or health problem, it would be considered to postpone the departure one year ahead.

However, Mr. Abd. Halik Yadi, an experienced guide who served as an officer of TPHI (Tim Pemandu Haji Indonesia,

⁴⁴Interview with Mr. Afandi,... in his office, Jl. Brawijaya, Pamekasan, on August 27, 2018, 15.00-16.00.

⁴⁵There found even a rumor at the last 2013, it would be considered to manage a special group flight for elderly. Redaksi, "Pemerintah Pertimbangkan Rancangan Kloter Khusus Lansia", <https://haji.kemenag.go.id/v3/node/1082> (Accessed on August 18, 2018).

⁴⁶Interview with Mr. Afandi,... in his office, Jl. Brawijaya, Pamekasan, on August 27, 2018, 15.00-16.00.

⁴⁷One of common diseases of *hajj* pilgrims is diabetes as the prevalence of diabetes increases with age. See. Mahmoud Ibrahim (et all), "Recommendations for Management of Diabetes and Its Complications during Hajj (Muslim Pilgrimage)", *Clinical Medicine*, Vol. 11, No. 3 (June, 2011).

⁴⁸Interview with Mr. Afandi,... in his office, Jl. Brawijaya, Pamekasan, on August 27, 2018, 15.00-16.00.

Indonesian *Hajj* Guide Team) at 1998 and 2006 and the chief of pilgrim group or as known as *ketua rombongan* at 2016, mentioned that if the disease or health problem could still be managed at the close time, then it would be well cared and observed whether the next pilgrim could depart that year.⁴⁹

Before leaving for *hajj*, next pilgrims would also experience two times of *hajj manasik* (procedural education on doing *hajj*). The first is held by sub district office of The Ministry of Religious Affair and the second is by the district office. Some private KBIH (Kelompok Bimbingan Ibadah Haji; *Hajj Guide Team*), which is not popular anymore today, often hold the *manasik hajj* additional program.⁵⁰ One of the important materials in the *manasik* is about facilities and policies for elderly pilgrims which, unfortunately, is typically not well mastered by elderly pilgrims so they tend to miss the things they deserve for.⁵¹ In fact, Indonesian *hajj* committee had prepared many facilities and supporting systems to make sure that the health of pilgrims, particularly elderly or those with serious health problems could be well maintained during the *hajj*. This does not only relate to the previous disease history, but also the hot weather, tiring schedule of *hajj* performance as well as the big crowd at some main points of *hajj* rite spots. The special treatment ranges from facilities from hometown to the destination.

At general, there found *hajj* teams which consist of *karu* (*ketua regu*, chair of group, leading 10 pilgrims) and *karom* (*ketua rombongan*, chair of flight group, leading for groups). This is actually more than adequate to ensure all the process run well. In addition to it, every flight group (consisting of about 400 pilgrims) is equipped by a health team called TKHI (*Tim Kesehatan Haji Indonesia* or Health Service Team of Indonesian *Hajj*) consisting of 3 persons. One of them is a

⁴⁹Interview with Mr. Abd. Halik Yadi,... in his office at IAIN Madura, August 05, 2018.

⁵⁰Interview with Mr. Afandi,... in his office, Jl. Brawijaya, Pamekasan, on August 27, 2018, 15.00-16.00.

⁵¹The idea to set special class for elderly in *hajj manasik* had become an issue, yet it had not given much influence yet at national level. Redaksi, "Kemenag Yogyakarta Siap Buka Kelas Bimbel Manasik Berbasis Lansia dan Disabilitas", in <https://haji.kemenag.go.id/v3/content/kemenag-yogyakarta-siap-buka-kelas-bimbel-manasik-berbasis-lansia-dan-disabilitas> Accessed on August 18, 2018.

doctor and the two are paramedics.⁵² The main jobs of TKHI are; checking up the health condition of *hajj* pilgrims, maintaining the health condition, serving any health complaints, observing the disease suffered and creating a healthy environment for the pilgrims.⁵³

Meanwhile, specifically, some facilities for elderly pilgrims are as follow. *First*, the existence of BKHI which stands for *Balai Kesehatan Haji Indonesia* (Indonesian Health Center of *Hajj*). It is such a local hospital for Indonesian pilgrims who deal with health problem. This hospital is under the management of KKHI, *Kantor Kesehatan Haji Indonesia* (Health Office of Indonesian *Hajj*) and located in three cities; Jeddah, Mecca and Madina. Serving as the first destination for Indonesian patients, this hospital would send patients with serious health problem that it can't handle and manage with to Arab Saudi hospital.⁵⁴

Second, the role of non-flight group team. This team works during 70 work days to deal with various problems, specifically what can't be handled by flight group team. The example is the sick who are not recovered until the return date of *hajj* pilgrims. Therefore, this team is known as the fullest work team as they depart at the earliest period and return home at the latest period.⁵⁵ This team works at three airports in Jeddah, Mecca and Madina. They were qualified in speaking '*ammiyah*' Arabic to give maximum help for the pilgrims. Relating to the treatment of elderly or the sick, they serve to record the data and take them to Indonesian hospital of PKHI at the airports. Sometimes, the members of this team like to push the wheelchair of the pilgrims.⁵⁶

Third, some units of wheelchair are available for elderly pilgrims on their way to the plane, the hotel and during the *hajj* process until they come back home. Pilgrims could bring it by themselves or use

⁵²Interview with Mr. Abd. Halik Yadi,... in his office at IAIN Madura, August 05, 2018.

⁵³See, "Pertanyaan yang Paling Sering Ditanyakan," in https://haji.kemenag.go.id/v3/ragam/faq-haji?body_value=&page=1 Accessed on August 18, 2018.

⁵⁴Interview with Mr. Afandi,... in his office, Jl. Brawijaya, Pamekasan, on August 27, 2018, 15.00-16.00.

⁵⁵Interview with Mr. Halik Yadi and Mr. Afandi.

⁵⁶Interview with Ayis Mukholik, a member of non-flight team of Indonesian *hajj* 2018 via WhatsApp messenger, May 29, 2019.

public facility provided by Indonesian *hajj* committee and hotel they stay in.⁵⁷ Recently, in *hajj* season 2018, P3JH, *Pertolongan Pertama pada Jemaah Haji* or First Aid Team of *Hajj* Pilgrims, provide some units of wheelchair and stretcher in the area of Mina.⁵⁸ Additionally, each airport provides wheelchair facilities, yet some pilgrims prefer to buy the wheelchair at either Mecca or Madina because they need wheelchair right after staying at the both cities although before at the departure time, they did not.⁵⁹

Fourth, a policy of TPIHI (*Tim Pemandu Ibadah Haji Indonesia*, Indonesian *Hajj* Guiding Team) for elderly or those with high risk problem not to perform all un-cumpulsary series of worships, such as in Muzdalifah and Mina. In *wuquf* series, those who can't bear to do regular *wuquf* at Arafah would perform so called *wuquf safar* in an ambulance-look vehicles.⁶⁰

Fifth, facilities to perform *sa'i* and *thawaf*. It comes in special lanes to perform both two so that the elderly pilgrims or those with physical limitation would not be trapped in a very big crowd like regular pilgrims. This policy and facility belong to Arab Saudi *hajj* committee. They provide special lanes for both *sa'i* and *tawaf* which are mainly set and designed for elderly with wheelchair or those who want to avoid the big unbearable crowd of people.⁶¹

However, Mr. Halik mentioned that for *thawaf*, pilgrims usually do not prefer this lane—located at the upper floor—because it takes much more time to go through the lane. They also do not find any chance to approach the black stone (*hajar aswad*). In fact, this three-floors lane is made to ensure certain pilgrims, elderly, among others, could do *tawaf* enjoyfully and safely, although it is open for all types

⁵⁷Interview with Mr. Afandi,... in his office, Jl. Brawijaya, Pamekasan, on August 27, 2018, 15.00-16.00.

⁵⁸Muhammad Subarkah, "Layanan Kursi Roda bagi Jama'ah Haji Disiapkan", in <https://www.republika.co.id/berita/jurnal-haji/berita-jurnal-haji/18/06/08/pa0jm5385-layanan-kursi-roda-bagi-jamaah-haji-disiapkan/>

⁵⁹Interview with Ayis Mukholik,... via WhatsApp messenger, May 29, 2019.

⁶⁰Interview with Mr. Abd. Halik Yadi,... in his office at IAIN Madura, August 05, 2018.

⁶¹Interview with Mr. Abd. Halik Yadi,... in his office at IAIN Madura, August 05, 2018.

of pilgrims.⁶² As an alternative, those with wheelchair have exclusive schedule to perform *tawaf* in the evening starting from 21.00 till 03.00.⁶³ Different from the *tawaf* lane which is open for any pilgrim, lane for *sa'i* is only for elderly or those with wheelchair and serious health problem. The guide—either family member or person in charge—is also permitted to enter the lane along with the pilgrims.⁶⁴

Sixth, the facility of local vehicles operating between *Masjidil Haram* and hotel as the alternative of *Salawat Bus* which only operates in the range of 2000 meters. The bus operates 24 hours and could reach hotel in sector 7 and 8 at the location of *Jarwal* which is out of *Salawat Bus* route and becomes the first vehicle to ride before the *Salawat Bus*.⁶⁵

Seventh, the use of special accessories (bracelet) designed for elderly or those with high risk health condition. There are mainly two types of bracelet. The first is bracelet for every pilgrim and the second is for those with high risk health condition and elderly.⁶⁶ There was once a trial of GPS bracelet use for elderly in the last 2016, yet it did not work continuously due to the big cost.⁶⁷

Eighth, the room arrangement at the hotel. At the hotel or popularly known as *maktab*, the elderly are usually set to stay at the first floor, or at maximum at the seventh floor so the health team could be nearby.⁶⁸ This will make them easier to go upstairs or downstairs although facilities like lift are usually available. The

⁶² Interview with Mr. Abd. Halik Yadi,... in his office at IAIN Madura, August 05, 2018.

⁶³In the last 2013, it was informed that Arab Saudi government set the evening schedule for those with wheelchair to do *tawaf*. Redaksi, "Tawaf Jamaah Pakai Kursi Roda Dijadwalkan Malam Hari," in <https://haji.kemenag.go.id/v3/node/1399> . Accessed on August 18, 2018.

⁶⁴Interview with Mr. Halik Yadi,... in his office at IAIN Madura, August 05, 2018.

⁶⁵Redaksi, "PPIH Siapkan Transportasi Khusus Jemaah Haji", in <https://haji.kemenag.go.id/v3/content/ppih-siapkan-transportasi-khusus-jemaah-haji-lansia>. Accessed on August 18, 2018.

⁶⁶Interview with Mr. Afandi,... in his office, Jl. Brawijaya, Pamekasan, on August 27, 2018, 15.00-16.00.

⁶⁷Diaz, "Musim Haji 2016 Kemenag akan Uji Cob Gelang GPS", <https://haji.kemenag.go.id/v3/content/musim-haji-2016-kemenag-akan-uji-coba-gelang-gps> (Accessed on August 18, 2018).

⁶⁸Interview with Mr. Abd. Halik Yadi,... in his office at IAIN Madura, August 05, 2018.

almost same arrangement also applies in a flight group (popular as *kloter*, stands for *kelompok terbang*, a flight group) which was set in consideration of some factors and one of which is the age of pilgrims. Other considering factors are cultural background, education level, religious knowledge and the health condition.⁶⁹

Eighth, the medicine available for pilgrims. The standard medicine is provided, yet it could not cover any specific medicine for certain diseases. Therefore, the pilgrims themselves need to provide it by themselves.⁷⁰

Ninth, the obligation for every next pilgrims to have meningococcal vaccine before the departure as recommended by Saudi Arabian government. Furthermore, the pneumococcal vaccine is currently recommended for Indonesian pilgrims older than 65 years old.⁷¹

Additionally, some non-government organization also offer service for so called *badl hajj*, which literally means a service for those who can't physically perform the *hajj*, either elderly or those with serious health problem.⁷² The customer of *badl hajj* would pay for someone who performs all the process of *hajj* on behalf of him/her by mentioning his/her name in the *niyyah* of *hajj*. This is usually done by so called *muqimin*, Indonesians who temporarily live in Mecca and surrounding for work or study and make the *badl hajj* as secondary occupation.

Conclusion

Hadith(es) on *hajj* of elderly are generally split into two categories. The former implies suggestion to delegate the *hajj* to someone else, while the latter urges them to still perform the *hajj* by themselves. These slighty-look-different hadith(es) find the

⁶⁹M. Julius St, *Manajemen Perjalanan Haji Reguler*, (Malang: UB Press, 2011), 8.

⁷⁰ Interview with Mr. Afandi,... in his office, Jl. Brawijaya, Pamekasan, on August 27, 2018, 15.00-16.00.

⁷¹See Harunor Rashid (*et al*), "The Potential for Pneumococcal Vaccination in Hajj Pilgrims: Expert Opinion" *Travel Medicine and Infectious Disease*, Vol. 11, No. 5, (2013), 291.

⁷²Among others, *badl hajj* is clearly explained in Said Agil Husin Al Munawar and Abdul Halim, *Fikih Haji; Menuntun Jama'ah Mencapai Haji Mabrur*, (Jakarta: Ciputat Press, 2003),. 194-212.

compromise point using the method of *al jam'u wa al-tawfiq* (to gather and to compromise) considering of both contexts. The suggestion applies for those with very serious health problem, while the command is for those who still can cope with the health condition while using supportive facilities and policies.

In Indonesia with the majority of *haji* pilgrims comes from elderly, special *haji manasik* for this group is worth to consider to ensure some existing related policies well understood and properly used. Both policies and facilities are fairly adequate, though some improvement and evaluation are still needed. However, without the segmented *haji manasik* held in a small class and intensive learning condition, it would be hard to maintain healthy and independent elderly pilgrims with the good knowledge or information mastery.

Bibliography

Books, Journals and Dissertation

- A. Alzeer (et al), "Tuberculosis is the Commonest Cause of Pneumonia Requiring Hospitalization During Hajj (Pilgrim to Makkh)," *Journal of Infection*, Vol. 36, issue 3 (May 1998).
- Al Munawar, Said Agil Husin and Abdul Halim. *Fikih Haji; Menuntun Jama'ah Mencapai Haji Mabruur*. Jakarta: Ciputat Press, 2003.
- Al-Adlabi, Shalahuddin bin Ahmad. *Menalar Sabda Nabi; Menerapkan Metode Kritik Matan dalam Studi Hadist* transl. Ita Qonita. Yogyakarta: Bintang Pustaka Abadi. 2010.
- Al-Asqalani, Ahmad Ibnu Ali Ibnu Hajar. *Fathul Bari* vol. 3. Kairo: Al-Maktabah Al-Tawfiqiyyah, 2008.
- Al-Qudhat, Syaraf. *Ilmu Mukhtalif Ahadis: Ushuluhu wa Qawa'iduhu*. Amman: Al-Jami'ah Al-Urduniah, 2001.
- Alzeer, Abdulaziz H. "Respiratory Tract Infection during Hajj", *Annals of Thoracic Medicine*, Vol. 4 (2) (Apr-Jun 2009).
- An-Nawawi, Yahya bin Syarif Abu Zakariyya. *Syarh Nawawi 'ala Muslim*. sl: Darul Khair, 1996.
- Baqi, Muhammad Fu'ad Abdul. *Mutiara Hadits Shahih Bukhari-Muslim Al-Lu'lu' wal Marjan* transl. Salim Bahreisy. Surabaya: Bina Ilmu, 2005.
- Bukhari, Imam. *Shahih Bukhari* vol. 1. Istanbul: Darul Fikr, s.a.
- Elsayed, Khaled Abdelhay and Kamaruzaman Yusoff, "The Implication of Peace Treaties in Disseminating Da'wah

- Islamiyah (the Islamic Call) among non-Muslims: A Special Reference to Hudaibiya Treaty", *Australian Journal of Basic and Applied Science*, Vol. 6 (7), (2012).
- Ferrari, Silvio and Andrea Benzo (ed), *Between Cultural Diversity and Common Heritage: Legal and Religious Perspectives on the Sacred Places of the Mediterranean*. London: Routledge, 2014.
- Hitti, Phillip K. *History of the Arabs*. transl. Cecep Lukman Yasin & Dedi Slamet Riyadi. Jakarta: Serambi, 2006.
- Ibrahim, Mahmoud (*et al*), "Recommendations for Management of Diabetes and Its Complications during Hajj (Muslim Pilgrimage)", *Clinical Medicine*, Vol. 11 (3) (June, 2011).
- M. Julius St. *Manajemen Perjalanan Haji Reguler*. Malang: UB Press. 2011.
- Mandourah, Yasser (*et al*), "Clinical and Temporal Patterns of Severe Pneumonia Causing Critical Illness during Hajj", *BMC Infectious Disease*, Vol. 12 (117), (2012).
- Mandzur, Ibnu. *Lisan Al-Arab*. Beirut: Dar Shadr, s.a.
- Porter, Venetia and Liana Saif. *The Hajj: Collected Essays*. Hockley: British Museum, 2013.
- Rashid, Harunor (*et al*), "The Potential for Pneumococcal Vaccination in Hajj Pilgrims: Expert Opinion" *Travel Medicine and Infectious Disease*, vol. 11 (5) (June 2013).
- Safri, Edi. "Al-Imam Al-Syafi'i; Metode Penyelesaian Hadist-Hadist Mukhtalif", *dissertation*, IAIN Jakarta, 1990.
- Shari'ati, Ali. *Hajj; The Pilgrimage*. s.l: Free Islamic Literature, 1980.
- Shihab, M. Quraish. *Membaca Sirah Nabi Muhammad SAW dalam Sorotan Al-Qur'an dan Hadist-hadist Shahih*. Jakarta: Lentera Hati, 2012.
- Solikhin, Muhammad. *Keajaiban Haji dan Umrah; Mengungkap Kedahsyatan Pesona Ka'bah dan Tanah Suci*. Jakarta: Erlangga, 2013.
- Syafi'ie, Imam. *Al-Risalah*. Beirut: Dar al-Kutub al-Ilmiyyah. s.a
- Tariq A. Madani (*et al*), "Causes of Hospitalization of Pilgrims during the Hajj Period of the Islamic Year 1423 (2003)," in *Ann Saudi Med*, Vol. 26(5), (September-October 2006).
- Thabrani, Akhmad Siddiq. *Di Tengah Pusaran Ka'bah; Sejarah, Keajaiban, Mitos dan Mistik*. Depok: Keira Publishing, 2014.

Tirmidzi, Imam. *Al-Jami' Al-Sahih Sunan Tirmidzi* vol. 3. Lebanon: Dar Kutub Al-Ilmiyyah. 2011.

Wahyudi, Arif. "Kontroversi Hadist-hadist Menangisi Mayit," *Al-Ihkam*, vol 9, numb. 1 (June, 2014).

Internet Websites

Diaz, "Musim Haji 2016 Kemenag akan Uji Cob Gelang GPS", <https://haji.kemenag.go.id/v3/content/musim-haji-2016-kemenag-akan-uji-coba-gelang-gps> (Accessed on August 18, 2018).

<http://hadithportal.com/hadith-sharh-928-21662&book=3>

http://library.islamweb.net/newlibrary/display_book.php?idfrom=3937&idto=3939&bk_no=53&ID=586

Redaksi, "60 Jama'ah Haji Indonesia 2018 Didominasi Lansia", in "<https://haji.okezone.com/read/2018/04/25/398/1891271/60-jamaah-haji-indonesia-2018-didominasi-lansia>.

Redaksi, "Kemenag Yogyakarta Siap Buka Kelas Bimbel Manasik Berbasis Lansia dan Disabilitas", in <https://haji.kemenag.go.id/v3/content/kemenag-yogyakarta-siap-buka-kelas-bimbel-manasik-berbasis-lansia-dan-disabilitas>

Redaksi, "Pemerintah Pertimbangkan Rancangan Kloter Khusus Lansia", <https://haji.kemenag.go.id/v3/node/1082>

Redaksi, "Pertanyaan yang Paling Sering Ditanyakan," in https://haji.kemenag.go.id/v3/ragam/faq-haji?body_value=&page=1

Redaksi, "PPIH Siapkan Transportasi Khusus Jemaah Haji", in <https://haji.kemenag.go.id/v3/content/ppih-siapkan-transportasi-khusus-jemaah-haji-lansia>.

Redaksi, "Tawaf Jamaah Pakai Kursi Roda Dijadwalkan Malam Hari," in <https://haji.kemenag.go.id/v3/node/1399>.

Subarkah, Muhammad. "Layanan Kursi Roda bagi Jama'ah Haji Disiapkan", in <https://www.republika.co.id/berita/jurnal-haji/berita-jurnal-haji/18/06/08/pa0jm5385-layanan-kursi-roda-bagi-jamaah-haji-disiapkan>

Interview

Interview with Mr. Halik Yadi, an experienced guide who served as an officer of TPHI (Tim Pemandu Haji Indonesia, Indonesian *Haji*

Guide Team) at 1998 and 2006 and the chief of pilgrim group or as know as *ketua rombongan* at 2016. The interview in his office at IAIN Madura, August 05, 2018.

Interview with Mr. Afandi, the former chair division of *hajj*, The Ministry of Religious Affair, Pamekasan district, in his office, Jl. Brawijaya, Pamekasan, on August 27, 2018, 15.00-16.00.

Interview with Ayis Mukholik, a member of non-flight team of Indonesian *hajj* 2018 via WhatsApp messenger, May 29, 2019.



al-Ihkam: Jurnal Hukum dan Pranata Sosial, 14 (1), 2019: 124-145
ISSN: 1907-591X, E-ISSN: 2442-3084
DOI: <http://doi.org/10.19105/al-ihkam.v14i1.2197>

The Contract of the Social Security Agency for Employment (BPJS Ketenagakerjaan) in The Perspective of Sharîa Economic Law

Bahjatul Imaniyah

*Universitas Nurul Jadid, Jl. P.P. Nurul Jadid, Karanganyar, Probolinggo
Email: bahjatulimaniyah16@gmail.com*

Article history: Received: 13 Maret 2019, Accepted: 27 Juni 2019, Published: 11 Juli 2019

Abstract:

In providing social security, the government requires all Indonesian workers to become members of the BPJS Employment. However, because the majority of the population is Muslim who live based on the laws of the Quran and Sunnah, it is necessary to review whether the BPJS Employment has fulfilled the sharia economic law or not. By applying the method of normative legal research and interview techniques to parties concerned, this study concludes that the contract of the BPJS Employment program does not deviate from the sharia economic law (Islamic economic law) because, in the compensation on accident during the work program (JKK) it can be categorized as *tabarru'* contract which only applies to virtue. The Death Insurance program (JKM) is an implementation of *al-ta'mîn al-ta'âwuni*, which is *ta'âwun* in a *tabarru'* contract. As for the Old Age security program (JHT), it's concept is similar to the contract of *mudlârabah musytarakah*. The same goes for the Pension Insurance (JP) program as a transition from the contract for *wârîts*.

Keywords:

Employment BPJS; Contract; Sharia Economic Law

Abstrak:

Untuk semua instansi maupun individu yang bekerja di negara Indonesia diwajibkan untuk menjadi anggota Badan

Author correspondence email: bahjatulimaniyah16@gmail.com
Available online at: <http://ejournal.iainmadura.ac.id/index.php/alihkam/>
Copyright (c) 2019 by al-ihkam. All Right Reserved



Penyelenggara Jaminan Sosial (BPJS) Ketenagakerjaan untuk menjamin hidupnya saat bekerja. Indonesia yang mayoritas penduduknya muslim mempertimbangkan kembali akad yang ada di BPJS Ketenagakerjaan tersebut. Dengan menggunakan metode kualitatif, tulisan ini ingin mengetahui akad yang terjadi dalam BPJS Ketenagakerjaan guna menjawab beberapa pertanyaan masyarakat Indonesia terkhususnya yang beragama Islam (Muslim). Berdasarkan hasil pembahasan, akad program BPJS Ketenagakerjaan tidak menyimpang dari hukum ekonomi *syari'ah* (hukum ekonomi Islam) karena, pada program Jaminan Kecelakaan Kerja (JKK) termasuk akad *tabarru'* yang hanya dilaksanakan pada hal kebajikan saja. Pada program Jaminan Kematian (JKM) merupakan implementasi dari *al-ta'mîn al-ta'âwunî* yaitu *ta'âwun* dalam akad *tabarru'*. Untuk program Jaminan Hari Tua (JHT), program ini memiliki konsep seperti akad *mudlârabah musytarakah*. Begitu pula dengan program Jaminan Pensiun (JP) sebagai peralihan dari akad *wârîts*.

Kata Kunci:

BPJS Ketenagakerjaan; Akad; Ekonomi Syariah; Kesejahteraan

Introduction

Islam is a religion which is based on the laws of the Qur'an and Sunnah, so that in worshipping the God, and in social and economic matters a Muslim will follow the established law. In everyday life, there are halal and haram terms which are included in the scope of the economy which are also closely related to law and sharia. To this point, economic activities which are based on Islamic law aimed at obtaining happiness are needed. There are some characteristics of sharia economics, namely: a) Divine values that make people grateful for the pleasure they enjoy b) Basic value of ownership (*al-milkiyah*) in the sense that the pleasures experienced by humans are entrusted from God. This is because the ownership by human is relative and not absolute which tends to squander wealth. c) Balance value (*al-muwâzanah*) which is a value that is contrary to capitalist economic value. With the value, humans will consider individual and universal interests, worldly and the hereafter interests, rights and obligations, as well as the circulation of wealth. d) Basic values of brotherhood and togetherness (*al-ukhuwwâh wa al-isytirâkiyyah wa al-jamâ'ah*). This

value makes the wealth needed by the community globally taken over by the government to prevent community disputes and disputes from different races, ethnicities and religions. e) Basic value of freedom (*al-istiqlâliyyah*). This value respects human freedom in utilizing assets but still restricts things that are prohibited by Islamic law. f) Basic values of justice (*al-'adâlah*), fairness in this case means caring for the needy, the poor and *dhu'afâ*, and oppressed people.

Therefore, in Islam there are *zakat*, *infaq* and *shâdaqah* which might help the economy or the needs of the community. In this case, the government develops and maximizes the National Board of Zakat (BAZNAS) for the poor and / or the needy.¹ In the social sphere, what is related to the Islamic economy has been implemented since the time of the Prophet Muhammad.² The sharia also discusses and considers human life in its capacity as a "worker" and of course contains principles, rules and conceptions of "work" and teachings to always "work" ³ or what is more commonly referred to as employment. This is reinforced by the nature of human beings as *khalifah* on earth who must carry out their duties correctly and earnestly to get the blessing of Allâh in other word, man should work to get the blessing. The sharia considers human life as a worker who certainly will not deviate from the principles and rules with the teachings to always work.⁴ Desires and needs for both one's own needs and those of others can be fulfilled by working. Prosperous life is a life dreamed by all humans, regardless of differences in religion, ethnicity, nation, and others.⁵

Having reached the community welfare, the Indonesian state which is a developing country establishes the Agency Providing Social Security for employment which then will be called as BPJS

¹ Syarifah Gustiawati Mukri, "Langkah Strategis Optimalisasi Sistem Ekonomi Syariah", *Salam: Jurnal Filsafat dan Budaya Hukum*, Vol. 1, No. 1 (June, 2014)

² Adiwarman A. Karim, *Ekonomi Mikro Islami*, 5th edn (Jakarta: Rajawali Pers, 2016), 25.

³ Yunus Assagaf, "Ketenagakerjaan dalam Konsepsi Syari'at Islam", *Jurnal Ilmiah Al-Syir'ah*, Vol. 3, No. 1 (2016), 10.

⁴ Helly F. Kolondam, Anna Feberina Ginting, Salmin Diego, "Implementasi Program Jaminan Sosial Ketenagakerjaan Di Kota Manado", *Jurnal Administrasi Publik*, Vol. 3, No. 400 (October, 2016), 10.

⁵ Nur Kholis, "Kesejahteraan Sosial Di Indonesia Perspektif Ekonomi Islam", *Akademika: Jurnal Pemikiran Islam*, Vol. 20, No. 2 (October, 2015), 244.

Employment which is for all Indonesian workers⁶ The program is believed to influence national development and increase national productivity commonly referred to as the HDI (Human Development Index).⁷ In addition to influencing national development and increasing national productivity, the protection provided by the government in the form of BPJS is a manifestation of increasing welfare and public services for the Indonesian people fairly and equally.⁸ The protection of labor is actually regulated in chapter IV, Article 9 of Act No. 14 of 1969 concerning the main points of labor before the existence of the BPJS Act. on Article 27 of Act number 3 of 1992 and in the Act Number 24 of 2011 state that the control of the social security program is carried out by the BPJS under the President.⁹

BPJS is actually the responsibility of the state as said by the Prophet "*Sayyid al-qawm khâdimukum*", meaning that the leader is a servant of the people¹⁰ which is then used as one of the concepts of Indonesia as stated in the fifth principle of the *Pancasila* (the Five Principles) "social justice for all Indonesian people. So, in article 13 number 1 of the Act number 40 of 2004 concerning the National Social Security System (SJSN) as a continuation of an effort for people's

⁶ Before the establishment of the BPJS, in Indonesia, there was already an insurance institution to protect the life of the people of Indonesia as stated in the Republic of Indonesia Law Number 40/2004 concerning the National Social Security System and the Republic of Indonesia Law Number 24/2011 concerning the Social Security Organizing Agency. The Act then replaces some existing social security in Indonesia programs, such as the health insurance which was better known as PT Askes Indonesia, which is then changed into the Social Security Organizing Agency (BPJS) Health and employment insurance which is then turned into BPJS Employment, which is directly accountable to the President of the Republic of Indonesia.

⁷ Jemikan, "Kajian Yuridis Terhadap Pelaksanaan Bpjs Ketenagakerjaan Di Lingkungan Yayasan Perguruan 17 Agustus 1945 Surabaya", *DIH Jurnal Ilmu Hukum*, Vol. 14, No. 27 (February, 2018), 110.

⁸ Joyce Jacinta Rares Anggi Chrisye Piteradja, Masje Silija Pangkey, "Implementasi Program Jaminan Hari Tua Di Badan Penyelenggara Jaminan Sosial Ketenagakerjaan Kota Manado", *Jurnal Administrasi Publik*, Vol. 4, No. 49, (February, 2017), 01.

⁹ See the Law of the Republic of Indonesia Number 40/2004 concerning the National Social Security System and the law Number 24/2011 concerning the Social Security Organizing Agency

¹⁰ Muḥammad Syakir Sula, *Asuransi Syari'ah (Life and General): Konsep Dan Sistem Operasional*, ed. by Harlis Kurniawan, 1st edn (Jakarta: Gema Insani, 2004), 460.

welfare, all employers are required gradually to register their employees as members of the BPJS Employment according to the program followed.¹¹ If the employer ignores these rules, sanctions will be imposed according to the Government Regulation number 86 of 2013 concerning the imposition of administrative sanctions for agencies (employers) and workers both as permanent wage earners or non-permanent wage earners (individuals) and premium recipients.

The regulations regarding BPJS are the BPJS Law and the government regulation number 86/2013. the regulation has not provided clear rules regarding the imposition of sanctions in Article 9 of the government regulation.¹² On the other hand, not all employers can employ workers permanently, such as a building worker who does not always get fixed contracts while the premium must be paid regularly every month, otherwise, he would be fined for the late payment of 2% of the premium. This problem also affects non-wage workers as the protection policy covers all residents working in Indonesia. They are are required to become members of the BPJS employment.

As stipulated in law number 40 of 2004 concerning the SJSN in Chapter VI Number 1 of the Social Security Program article 18 concerning the types of social security programs, they include working accident protection, old age insurance, life insurance, and health insurance.¹³ As a program directly under control of the President of Indonesia as an the agency providing social security, BPJS Employment has added Pension Insurance since July 1, 2015 and so, BPJS covers 5 programs. In addition to health insurance, there are 4 programs in BPJS Employment.¹⁴ The implementation of the five

¹¹ M Arif Hakim, "Analisis Aplikasi Akad Tabarru ' Dalam Asuransi Syari'ah : Studi Kasus Pada AJB Bumiputera 1912 Syari'ah Cabang Kudus", *Jurnal Muqtasid*, V. 3, No. 2, (December, 2012), 11.

¹² I Putu Yogi Indra Permana, I Nyoman Suyatna, & Kadek Sarna, "Implementasi Undang-Undang Nomor 24 Tahun 2011 Tentang Badan Penyelenggara Jaminan Sosial Terkait Pendaftaran Peserta Program Jaminan Sosial Ketenagakerjaan Di Kabupaten Gianyar" *Kartha Negara*, Vol. 5, No. 2, (April, 2017), 08.

¹³ See the Sharia Nasional Council of the Indonesian Ulema Council, *Fatwa Dewan Syari'ah Nasional-Majelis Ulama Indonesia*.

¹⁴ Ulfa Luthfiana, "Perlindungan Hukum Terhadap Pekerja/Buruh Penerima Upah Dalam Suatu Perusahaan Yang Tidak Diikutsertakan Dalam Keanggotaan Bpjs

social security programs is expected to be evenly distributed to all Indonesian workers as both in the formal and informal sectors so that basic needs and decent living can be fulfilled.

However, the need for protection through the BPJS Employment for all workers in Indonesia certainly draws attention of Muslims who are the majority of Indonesian population to review from the perspective of sharia economic law. The real example is what happened in Bondowoso, East Java, in which there are residents who quit participating in the BPJS Employment program¹⁵ because of its services and they thought that the transactions are not in accordance with the sharia economic law. This situation certainly becomes a serious problem that needs to be studied more deeply as the National Sharia Council - Indonesian Ulama Council (DSN-MUI) stipulates the MUI DSN fatwa 21/DSM-MUI /X/2001, because BPJS employment concerns all workers in Indonesia. From the aforementioned background, it is important to analyze the contract of the BPJS employment program in the context of sharia economic law, when the SJSN is implemented to all Indonesian people regardless of class, religion, and ethnicity.

Research Method

This study applies normative legal research methods or library research that examines documents such as legislation and legal theories¹⁶ relating to labor social security. This method is applied to analyze BPJS Employment more deeply. The data sources used are secondary data that have been available from existing data, namely the 1945 Constitution, Laws, Government Regulations, Presidential Regulations, Presidential Decrees, BPJS Employment Regulations, DSN-MUI *Fatwa*, Pancasila, and books. In addition to the secondary data sources, it is necessary to have material that explains or informs the data sources, namely tertiary data sources such as legal language dictionaries, encyclopedias, magazines, bibliographies, mass media both printed and electronic media.

Ketenagakerjaan Ditinjau Dari Undang-Undang Nomor 24 Tahun 2011 Tentang BPJS¹⁵, *Hukum Progresif*, Vol. 10 No. 1, (June, 2016), 1661.

¹⁵ Interview with Abdul Halim and Mursidi, residents from Sumber Anom, Tamanan district, Bondowoso on Monday November 5, 2018

¹⁶ Peter Mahmud Marzuki, *Penelitian Hukum*, (Jakarta: Kencana, 2010), 35.

Data collection technique applied in this study is interview which is done directly or indirectly¹⁷ (by utilizing sophisticated electronics, respondents of this study do not have to be visited at work or where they live). Interviews done by the the researcher in a structured and unstructured way.¹⁸ However, the researcher unstructured interviews are done more often to find specific problems in asking for ideas or opinions from respondents related to BPJS Employment in providing social security for workers. The interviews are done to the relevant BPJS Employment personels, members of the BPJS Employment and non-members of the BPJS Employment. The collected data are then analyzed descriptively¹⁹, which are expected to answer the problem comprehensively. Which is expected to answer the problem comprehensively. Another result expected from this research is that it can answer the problem or become the right solution that can be applied in real life.

Discussion

The word transaction is inseparable from human life, in their daily lives. This is because, transactions are buying and selling good activities²⁰ which are needed by humans in the economic sphere. The economic activities would be safe and stable with the existence of an agreement (contract) as a basis or law Therefore, every society, especially in Indonesia, with a Muslim majority, should be able to understand it so that every transaction done in accordance with sharia.²¹ This is because a contract is an important part in a transaction and need to be undertaken in carrying out all activities to gain the blessing of Allāh. The problem is that the perceptions of the government and the people are not always in line with in everyday life.²² Muslims who want to be able to carry out the religious laws set

¹⁷ Sugiyono, *Metode Penelitian Kualitatif*, (Bandung: Alfabeta, 2017), 111.

¹⁸ John W. Creswell, *Research Design: Pendekatan Metode Kualitatif, Kuantitatif, dan Campuran*, (Yogyakarta: Penerbit Pustaka Pelajar, 2018), 276-277.

¹⁹ Achmad Fawaid, *Pengantar Penulisan Akademik*, (Yogyakarta: Pustaka Pelajar, 2016), 225.

²⁰ Pius Partanto, & M. Dahlan Barry, *Kamus Ilmiah Populer*, (Surabaya: Penerbit Arkola Surabaya, 2001), 20.

²¹ FORDEBI & ADESy, *Ekonomi Dan Bisnis Islam: Seri Konsep Dan Aplikasi Ekonomi dan Bisnis Islam*, ed. by Ahim Abdurahim et al., 1st edn (Jakarta: Rajawali Pers, 2016), 169.

²² Nur Kholis, "Kesejahteraan Sosial Di Indonesia Perspektif Ekonomi Islam".,255.

in the Qur'an and Sunnah (in this case the sharia economic law) should be more careful, especially, with the increasingly rapid technological progress which may overrides the existence of *halâl* and *haram* (legitimate and illegitimate) transactions in the context of Islamic economic law.

In syarî'ah economic law, there is a contract that underlies a transaction.²³ In Arabic, the contract is termed as "*al-'aqd*" which means agreement or bound. In *fiqh* (islamic jurisprudence) terminology, contract means *ijâb qabûl* (offer and acceptance) which are in accordance to sharia done by two or more parties with the stipulated provisions.²⁴ Veithzal Rivai and Andi Buchari say that a contract (bound, connection and agreement) is a statement about a bound desired by the first party with a statement of acceptance from the second party which is often referred to as *ijâb qabûl* without deviating from sharia law.²⁵ So, it can be understood that a contract is a statement of *ijâb qabûl* (offer and acceptance) with an agreement in a transaction done by two or more people in accordance with sharia law.²⁶

The View of Syarîa Economic Law on the Contract of BPJS for Employment Program

To realize the welfare of the people of Indonesia, the state provides rights for workers to social security ²⁷ regarding the risks

²³ Mu'amalah is interaction and communication amongst human beings related to assets and economic or business activities. see Imam mustofa, *Fiqh Mu'amalah Kontemporer*, (Jakarta: Rajawali Pers, 2016), 6.

²⁴ Nasrun Haroen, *Fiqh Muamalah*, (Jakarta: Penerbit Gaya Media Pratama, 2007), 97.

²⁵ Veithzal Rivai & Andi Buchari, *Islamic Economics (Ekonomi Syarî'ah Bukan Opsi, Tetapi Solusi)*, (Jakarta: Bumi Aksara, 2009), 344.

²⁶ There are several pillars of contract that must be fulfilled so that the contract is done in accordance with Islam. As has been set by number of fiqh scholars, namely: a) *Ijâb qabûl*, b) the parties concerned, and c) The object of the contract. See Nasrun Haroen, *Fiqh Muamalah*, 97.

²⁷ In the 1945 Constitution article 28 H paragraph 3, it is emphasized that everyone has the right to obtain social security for himself as a dignified human being. Likewise, in paragraph 2 of the 1945 Constitution, it is stated that social security has been developed for all Indonesian people who less fortunate. See Matias Siagian, "Tingkat Kepuasan Karyawan Perusahaan Swasta dalam Pelayanan Jaminan Sosial Tenaga Kerja (Jamsostek)", *Kesmas: Jurnal Kesehatan Masyarakat Nasional*, Vol. 7, No. 5, (December, 2012), 200.

that will be taken or have been taken by workers at work. Social security is one of the needs and hopes of both poor and rich communities to overcome the risks occur, such as accidents, death, being fired and others.²⁸ This is based on labor rights according to Chaudry quoted by Sri Herianingrum and Tika Widiastuti which include:²⁹ *First*, workers must get health care or medical treatment costs from the employer which will then be refined by the government if they are sick at that time. *Second*, employers should provide provisions for pension funds for elderly workers from the contributions of both (workers and employers) as aid funds. *Third*, to stabilize the domestic wage level, the employer must provide security to workers when they no longer work (stop working). *Fourth*, when an accident occurs at work, the employer must give compensation for the workers adequately. *Fifth*, the availability of accommodation must be sufficient so that the health of the workforce and efficiency of work are at maximum level.

Based on the labor rights explained above, the protection is done by the government for the future of the people by deducting a portion of wages during work monthly, quarterly, or adjusted periods.³⁰ The four social security programs³¹ from the government are in the form of Work Accident Protection (JKK), Death Insurance (JKM), Old Age Insurance (JHT), and also Pension Insurance (JP) which are under the program of BPJS for employment.³²

²⁸ Ahmad Nizar Shihab, "Hadirnya Negara Di Tengah Rakyatnya Pasca Lahirnya Undang-Undang Nomor 24 Tahun 2011 Tentang Badan Penyelenggara Jaminan Sosial (The Presence Of The State Among People After The Declaration Of Law Number 24 Year 2011 Concerning Social Security Administeri)", *Jurnal Legislasi Indonesia*, Vol. 9, No. 2, (2018), 177.

²⁹ FORDEBI & ADESy, *Ekonomi Dan Bisnis Islam: Seri Konsep Dan Aplikasi Ekonomi dan Bisnis Islam*, 231-232.

³⁰ Adiwarmam A. Karim, *Fikih Ekonomi Islam*, ed. by Abu Umar Basyir, IV (Jakarta: Dârul Haq, 2013), 274.

³¹ These four programs can be enjoyed by wages recipients whose location, working hours and total income are fixed, in contrast to the lower middle class people who do not have workplace, working hours, fixed income and uncertain business continuity who is called Non-Recipient Wages (BPU). see www.bpjsketenagakerjaan.go.id Retrieved January 10, 2019.

³² The BPJS employment is engaged in social insurance which was previously known as PT Jamsostek (Persero) as stated in the Law No. 40/2004 concerning national social security security system and the Law No. 24/2011 on BPJS.

a. Work Accident Protection Program (JKK)

Risk at work cannot be anticipated or interpreted when it occurs. All organizations must have equip themselves with both a defense or action to avoid dangers that might occur, such as protection tools, supervisory actions, procedures and regulations applied in the organization.³³ In this case, workers have been registered with the Social Security Agency (BPJS) for employment at the outset to work by deducting a portion of the workers' salary to pay contributions as premium for future risks. As stated in the Law of the Republic of Indonesia Number 40 /2004 concerning National Social Security System chapter IV National Social Security Council, article 17 number (2) Every employer is obliged to collect contributions from workers, in addition to his contribution which is his obligation and pay the contributions to BPJS periodically, dan pada No. (3) and in number (3) The amount of the premium is set for each type of program on a regular basis in accordance with the development of social, economy and decent basic needs of life.

The danger at work can occur when leaving for work, going home from work, or when working or diseases found in the work environment. As stated in the law of the Republic of Indonesia number 13/2003 concerning employment in article 86 paragraph (2) that "Work safety and health efforts are intended to provide security to workers when there is a risk or danger while working with treatment and rehabilitation".³⁴ In this case, the JKK program applies so that participants get protection in the form of cash compensation or healthcare as protection against the risks they have experienced.³⁵

³³ Priska Yunita Maria Carolina Tolala, Vanda Doda, Johan Josephus, "Implementasi Layanan Jaminan Kecelakaan Kerja BPJS Pada Tenaga Kerja Bongkar Muat Di Pelabuhan Laut Manado", *Paradigma*, Vol. 4, No. 3, (2016), 47.

³⁴ See Himpunan Lengkap Undang-Undang Ketenagakerjaan, Ed. 1 (Jogjakarta: Buku Biru, 2013),167.

³⁵ Suparwi Endang Setiowati, Suharno, "Pelaksanaan Bpjs Ketenagakerjaan Bagi Karyawan Di Kota Surakarta Pada Kantor Cabang Bpjs Ketenagakerjaan Kota Surakarta", *Seminar Nasional Perlindungan Hukum Terhadap Tenaga Kesehatan Dan Pasien Dalam Perspektif UUU No. 36 Tahun 2014'*, 2017.,157-167.

The amount of premium of the JKK program³⁶ is divided into several groups based on how much risk taken by participants at work, namely: 1) Group I: 0.24% of monthly wages 2) Group II: 0.54% of the wages 3) Group III: 0.89% of monthly wages 4) Group IV: 1.27 the wages 5) Group V: 1.74% of wages per month.³⁷ The basis of the social security program is an effort to help each other amongst those who are registered as members of the BPJS for Employment for the welfare of other participants.³⁸ Therefore, all fellow workers are encouraged to maintain the culture which is the characteristic of Indonesia, namely cooperation, and mutual assistance, to help those in need. As Allāh said in Q.S al-Maidah 5: 2 which means:

“ And cooperate in righteousness and piety, but do not cooperate in sin and aggression...”

The word help in this verse is in terms of virtue or piety, that is, all forms and kinds of things that bring benefit to the world and or in the hereafter, things that do not lead to disaster even to people who are not believers.³⁹ It is clear that mutual help in Islam known as *ta'âwun*⁴⁰ is highly recommended and required in this life, such as helping our brothers to fulfill their needs or alleviating burden of their life and making them prosperous.⁴¹ In the context of *ta'âwun*, M. Arif Hakim states that in guaranteeing the welfare of the community, which is known as insurance, in Islamic law *ta'âwun* constitutes one of the main principles of *mu`âmalah* (interaction and transaction). This is because, with mutual help those in need would be assisted by the

³⁶ Payment of premiums in the work accident insurance program is fully borne by the employer. Workers do not have to pay their own premiums that are deferred to BPJS Employment because employers must be responsible for the safety of their workers.

³⁷ See the complete set of laobr law. 203.

³⁸ Abdul Manan, *Hukum Ekonomi Syari'ah: Dalam Perspektif Kewenangan Peradilan Agama*, 1st edn (Jakarta: Kencana Prenada Media Group, 2012), 238.

³⁹ M. Quraish Shihab, *Taafsir Al-Misbah (Pesan, Kesan Dan Keserasian Al-Qur'an) Vol. III* (Jakarta: Lentera Hati, 2002), 10.

⁴⁰ *Ta'âwun* is a form of cooperation on lawful way in gaining benefits permitted by Islamic law.

⁴¹ Surya Vandiantara, "Tinjauan Hukum Islam Terhadap Proses Pengelolaan Dan Konsep Investasi Dana Premi BPJS Ketenagakerjaan", *Jurnal Balance*, Vol. XIV, No. 1, (January, 2017), 119.

wealthy in order to be able to get life welfare through *tabarru'* fund mechanism.⁴²

In terms of contract, it is clear that the concept of JKK includes the *tabarru'* contract, which is all forms of contract based on goodness in order to help each other and not for commercial purposes. The aim to do the *tabarru'* is an alternative way that is permissible according to sharia to avoid *gharar* practices. *Tabarru's* premium paid is nothing but a donation given to other participants who are in need.⁴³

b. Death Insurance Program (JKM)

The death insurance program, hereinafter referred to as JKM, provides benefits in the form of cash for active worker participants who die not because of accidents at work.⁴⁴ The funds of the JKM program is a benefit for heirs to ease the burden on the family and heirs in the form of both cash compensation and compensation for funeral expenses.⁴⁵

The employer bears premium of 0.3% for life insurance⁴⁶ with death insurance claims given including: 1) Compensation in the form of cash in the amount of Rp16,200,000.00; 2) Periodic compensation for 2 years, as much as $24 \times \text{Rp. } 200,000.00 = \text{Rp. } 4,800,000.00$; 3) Funeral expenses of Rp. 3,000,000 4) Scholarship for one child for participants

⁴² M. Arif Hakim, "Analisis Aplikasi Akad *Tabarru'* Dalam Asuransi Syari'ah: Studi Kasus Pada AJB Bumiputera 1912 Syari'ah Cabang Kudus", *Jurnal Muqtasid*, Vol. 3, No. 2, (December, 2012), 240.

⁴³ Ulfa Luthfiana, "Perlindungan Hukum Terhadap Pekerja/Buruh Penerima Upah Dalam Suatu Perusahaan Yang Tidak Diikutsertakan Dalam Keanggotaan Bpjs Ketenagakerjaan Ditinjau Dari Undang-Undang Nomor 24 Tahun 2011 Tentang BPJS", 245.

⁴⁴ The death insurance program only applies to participants who die not due to accidents at work. However, participants who die due to accidents at work are covered by work accident insurance program (JKK).

⁴⁵ See www.bpjsketenagakerjaan.go.id/ Program Jaminan Kematian, retrieved January 10, 2019.

⁴⁶ The statement has been stated in article 46 of the Law number 40/2004 concerning the National Social Security System. The amount of premium of the death insurance for the wage recipient participant (fixed salary worker) is determined based on a certain percentage of wages or income and the amount of premium of the death insurance for non-wage participants (non-fixed income workers) is determined based on a certain amount paid by the participants. The provisions referred to are further stipulated in Government Regulations.

who have reached minimum of 5 (five) years of premium up to Rp.12,000,000.00.

The total amount of JKM benefits received by the family and the heirs of the participants are IDR 36,000,000.00.⁴⁷ With such amount of funds, it is expected that it could help the family and the heirs. The concept of *al-ta'mîn al-ta'âwunî*, namely *ta'âwun* in the contract of *tabarru'* as stated in the Qur'an to protect each other can be found not only in the accident at work insurance, but also in the death insurance program.⁴⁸ In Islamic economics, the JKK and JKM programs are included in the type of *takâful* insurance because participants do not intend to get benefits from other participants but are equally willing to cover up the shortcomings that they have experienced, that is, to cope with disaster together and to help face dangers.⁴⁹

c. Old Age Insurance (JHT)

Old Age Insurance, abbreviated as JHT, aims to give protection at time of termination of employment, retirement age⁵⁰, having permanent total disability (disability that causes a person unable to work or return to work) and or death.⁵¹ participants still receive wages taken from funds that have been saved when they were working.⁵² This is as stated in the law of the Republic of Indonesia number 40 /2004, chapter VI, part 4, point 2 on old age insurance. The JHT program is one unit with JKK which is required for each participant with a saving system. While the JKK program aims at anticipation of treatment when a risk occurs, JHT program is intended

⁴⁷ See [https://www.bpjsketenagakerjaan.go.id/page/Program-Jaminan-Kematian\(JKM\).html](https://www.bpjsketenagakerjaan.go.id/page/Program-Jaminan-Kematian(JKM).html), retrieved January 10, 2019

⁴⁸ Zaky Al Hamzah, "BPJS dan Jaminan Sosial *syari'ah*", *Republika*, January 17, 2014: <https://republika.co.id/berita/koran/news-update/14/01/16/mzi35n-bpjs-dan-jaminan-sosial-syariah>, retrieved January 11, 2019

⁴⁹ Adiwarmanto A. Karim, *Fikih Ekonomi Islam*, 273-283.

⁵⁰ Retiring person is someone who no longer works, aged around 57 years old. This old age insurance program also applies to workers who stop working (to a company) even though they have not reached age to retire.

⁵¹ See the Act. No. 40/2004 on National Security System and the Act. no. 24/2011 on the Social Security Agency. 20. By submitting a claim to the BPJS Employment, the participant can withdraw funds while he was working

⁵² By submitting a claim to the BPJS Employment, the participant can withdraw funds while he is working.

to anticipate future funding needs when participants no longer work.⁵³

This savings system is not entirely from labor contributions, but also from the contributions of the employers and also claims that would be received by workers will also increase due to additional funds from the profit sharing development.⁵⁴ The premium scheme is: 2% paid by participants and 3.7% paid by the employer with total amount up to 5.7% of wages.⁵⁵ The premium of the JHT program is borne jointly by the employer and workers, because in addition to old age savings for workers, it would be also a reward for working in the company for years.⁵⁶ So, savings in the JHT program will remain, which in this case, in the sharia economics is known as *mudlârabah* contract.⁵⁷

The management and investment of funds in the BPJS for employment program have the same concept as *mudlârabah musytarakah* contract, namely, the premium of the BPJS for employment as *mudlârib* and those of the participants as *shâhib al-mâl* are put together.⁵⁸ Thus, the management and investment is the same as *mudlârabah musytarakah* contract.⁵⁹ However, the BPJS for employment has some differences from *mudlârabah musytarakah* contract in that the former does not make itself as a *mudlârib* and the investment share of BPJS is not the same as the provisions of *mudlârabah musytarakah* contract because BPJS Employment has its own provisions stated in the BPJS law itself.

⁵³ Yunus Assagaf, "Ketenagakerjaan dalam Konsepsi Syari`at Islam", 27.

⁵⁴ BPJS Employment funds that will be claimed by workers later when they no longer work will not expire. Participants who have died, their old-age insurance will be inherited to their family or to those on their will.

⁵⁵ Suparwi Endang Setiowati, Suharno, "Pelaksanaan BPJS Ketenagakerjaan Bagi Karyawan Di Kota Surakarta Pada Kantor Cabang BPJS Ketenagakerjaan Kota Surakarta". 163.

⁵⁶ Yunus Assagaf, "Ketenagakerjaan dalam Konsepsi Syari`at Islam", 03.

⁵⁷ Joyce Jacinta Rares Anggi Chrisye Piteradja, Masje Silija Pangkey, "Implementasi Program Jaminan Hari Tua Di Badan Penyelenggara Jaminan Sosial Ketenagakerjaan Kota Manado".,128.

⁵⁸ Fatwa of National Sharia Council of MUI No. 21/DSN-MUI/X/2001

⁵⁹ Surya Vandiantara, "Tinjauan Hukum Islam Terhadap Proses Pengelolaan Dan Konsep Investasi Dana Premi BPJS Ketenagakerjaan",128-129.

d. Pension Insurance Program (JP)

In essence, humans have limitations in all things. Just like working, at age of 57 years, the body no longer works properly and efficiently. For the old age security, the government provide pension insurance program which was later called JP⁶⁰ as savings that would be needed in the future.⁶¹

From the above assumptions, it shows that JP aims to protect participants or heirs due to death of the participants.⁶² This is because, if the participant dies during the agreement period, the heirs will receive funds that have been paid in advance by participants who will also get benefits from the investment of this JP program fund.⁶³ Pension insurance is also in the form of cash obtained as:⁶⁴ 1) Old age pension, obtained by workers after retirement during his life. 2) Disability pension, obtained by permanent disability workers due to accident or illness before reaching retirement age until death 3) Widow/widower pension, obtained by widows/widowers heirs of workers until they remarriage or death 4) Pension for children, obtained by children of heirs until they reach the age of 23 years or

⁶⁰ See Ari Hernawan, Keberadaan Uang Pesangon dalam Pemutusan Hubungan Kerja Demi Hukum di Perusahaan yang Sudah Menyelenggarakan Program Jaminan Pensiun", *Kertha Patrika: Jurnal Ilmiah Fakultas Hukum Universitas Udayana*, Vol. 38, No. 1, (January-April, 2016), 4. Government contributions to pension benefits are managed by an individual protection system related to income. It is stated in article 39 of the SJSN law that pension insurance is to maintain a decent life for workers whose income is reduced because they have reached retirement age.

⁶¹ This Pension insurance program is an additional program that can be operated on July 1, 2015 which follows one and a half years later than the other three insurance programs, namely JKK, JKM and JHT according to the National Social Security System. See Siti Kunarti, Tedi Sudrajat, Sri Wahyu Handayani, "Transformation of Social Security Administrative Body (BPJS) within Social Security Reform in Indonesia", *SHS Web of Conferences*, Vol. 54, P. 03017, (2018), 04.

⁶² Indonesia as a country that wants to strive for the welfare of its people try to provide protection for workers and their families. The JP program serves as compensation to the families of workers left behind to ease the burden of the funds needed to take care for participants who have died. In addition, JP is also a form of appreciation and motivation for workers throughout the Indonesian homeland without any exceptions, reagrless of their race, ethnicity, gender, and others.

⁶³ Abdul Manan, *Hukum Ekonomi Syariah: Dalam Perspektif Kewenangan Peradilan Agama*, 274.

⁶⁴ See the Law No. 40/2004 concerning National Social Security System and the Law No. 24/2011 concerning the Social Security Agency, 13-18.

until they get marriage 5) Pension of parents, obtained by parents of heirs of unmarried participants according to the provisions of the legislation.

It can be said that this program is a transition from inheritance theory. In Islam, the giving or transfer of ownership of a person who has died to his family or his heirs is regulated in a contract of inheritance. The provisions of fair and wise inheritance is explained in a great detail in the Qur'an as can be found in Q.S al-Nisa 4: 11-12 and 176. A French sociologist, Dr. Gustave Lebon said that what are outlined in the Qur'an are very fair and objective, because Islam also gives inheritance rights to a woman, things that had never been found in other laws.⁶⁵

From the discussion of the program above, it can be ascertained that the contract in BPJS for employment does not deviate from the sharia economic law, as stipulated in *fatwa* by the National Sharia Council of MUI (Indonesian Ulama Council) that the contract used in sharia insurance is a *tabarru'* contract. in the JKK and JKM programs, the fund is a grant from participants that is used to help other participants affected by the disaster, managed by a company. Meanwhile, the JHT program is an investment program that has the same concept as a *mudlârabah* contract as stated in the fatwa of the National Syaria Council of MUI who calls it as *tijarah* contract (funds invested in BPJS Employment in which JHT participants can claim at any time with agreed conditions). The JP program (pension insurance) can be catagorized as investment funds which can then be changed to the type of *tabarru'* contract.⁶⁶ In this JP program, a worker must at least become a BPJS employment participant for 15 years, then he can give his *mudlârabah* funds to the heirs according to the inheritance law in *mu'amalah*.

This is also confirmed in the SJSN program which is held based on the principles: 1. Mutual cooperation (helping each other amongst participants who are in need); 2. Nonprofits (trust funds, not intended to seek profits, the profits gained and budget surpluses will be

⁶⁵ FORDEBI & ADESy, *Ekonomi Dan Bisnis Islam: Seri Konsep Dan Aplikasi Ekonomi dan Bisnis Islam*,391.

⁶⁶ Fatwa of the National Sharia council No. 21/DSN-MUI/X/2001 on the general guidelines of sharia insurance.

utilized as much as possible for the benefit of participants); 3. Openness (prudence, accountability, efficiency and effectiveness); 4. Caution; 5. Accountability; 6. Portability (the active period of participations is unchanged by changing workplace); 7. Participation is compulsory (to cover all sectors of employment in Indonesia without any differences); 8. Trust funds (the funds are very well managed in order to optimize these funds for the welfare of participants); and 9. The profits gained from social security funds are intended as a whole for the development of the program funds which will then be used for the interests of the participants (from participants and will return to the participants because of the interests of the participants).⁶⁷

However, the rights for the social security for workers which are expected to be evenly distributed throughout Indonesia still face constraints. This agenda calls the government's attention to resolve it. For example, in Madura island (Pamekasan and its surroundings), there are still many workers who are not registered as permanent members of the BPJS Employment.⁶⁸ This is because either the socialization constraints in which it has not yet spreaded out through the island or the BPJS employment constraints, in which it has not scheduled the socialization to rural areas that actually have workers with fixed wages or those with not fixed wages. Unlike the Bondowoso area, in which although the average population there works in mountainous areas, the permanent membership of the BPJS Employment is almost evenly spread out through out the areas.⁶⁹

In Islamic law, social security is legal or lawful. This view is expressed by `Abd al-Wahhab Khallaf, Muhammad Yusuf Musa, `Abd al-Rahman Isa, Mustafa Ahmad Zarqa, and Muhammad Nejatullah Siddiqie. Some reasons for this view are: 1) In the Qur'an

⁶⁷ See the Law No. 40/2004 concerning National Social Security System Agency chapter II concerning Principles, Objectives, and Implementation, Article 4

⁶⁸ Interview with Fariqi Wahdy, a teacher at Madrasah Ibtidaiyah Islamiyah Ambat Tlanakan Pamekasan, Jasuli (from Ambat, Tlanakan, Pamekasan), Munaser (from Taro'an, Tlanakan, Pamekasan) and Abdul Basit (from Palengaan, Pamekasan) who is a construction worker. The interview is done from Tuesday January 15, 2019 to Monday January 21, 2019

⁶⁹ Interview with Meila Rosanti, marketing director and TI BPJS employment in Bondowoso branch, it is done on Friday November 9, 2018

and Hadith there are no provisions regarding the prohibition of social security 2) There is willingness amongst participants 3) The benefits are greater than the disadvantages 4) The social security is based on *mudlârabah* contract, namely profit sharing 5) The social security is categorized as cooperative 6) It is analogous to pension funds.

According to Muhammad Abu Zahrah, social security program is allowed on condition that it is for social purposes and not for commercial ones. Therefore, social security program does not contain elements that are prohibited by sharia law or sharia economic law and is carried out only for the benefit of society. In contrast to commercial insurance, in which can be found things that are not in accordance with sharia law.⁷⁰ Accordingly, the largest organizations in Indonesia, Nahdlatul Ulama (NU), allows social insurance on condition that social insurance is based on *ta'âwun* as stated in one of its deliberations. NU allows not only social security but also life insurance if it meets the requirements, which are: containing savings, there is a *tabarru'* agreement which only applies to virtues, investment in sectors that are permissible under Islamic law, funding claims can be done at any time when participants are in need without waiting for due date, and premium payments that are not paid off at a predetermined time will be considered a debt that can be repaid on subsequent provisions of the premium payments, and the account will remain valid without closure or forfeited funds.⁷¹

To ensure the premium from an agency that has registered its workers as a BPJS Employment participant is paid on time, it is necessary to impose sanctions as a form of assertiveness in labor protection. However, for the less fortunate, the premium of the social security program is paid by the government as stated in the law of the Republic of Indonesia number 40/2004 concerning the National Social Security System, chapter V concerning Participation and Contributions in Article 17 Number 4. With regard to the imposition of applicable sanctions for those who cannot pay the premium on time, there are parties who raise objection to the provision. They are

⁷⁰ Abdul Manan, *Hukum Ekonomi Syariah: Dalam Perspektif Kewenangan Peradilan Agama*, 253.

⁷¹ Husni Mubarrak, "Kontroversi Asuransi Di Indonesia: Telaah Fatwa Majelis Ulama Indoneisa (MUI) Tentang Badan Penyelenggaraan Jaminan Sosial (BPJS)", *Tsaqafah*, Vol. 12, No. 1, (May, 2016), 116.

mostly companies that do not have a fixed time in hiring workers (building, furniture, travel) or do not have fixed income to pay the workers (such as shopkeepers and others).

Meanwhile, according to Yusuf al-Qardlawi in his *Fatwa* on the Society and *mu'âmalah* number 13, it said that in imposing a fine for late payments according to al-Khatthab from the Mâliki school, some contemporary scholars argue that it is permissible for those who owe and are able to pay but they postpone to do so as promised, the fine is considered alms. The fine is then given to those who are in need as charity.⁷² So, for those who cannot afford or are not able to pay the premium, there will be dispensation in the form of either an extended period or downsizing premiums that must be paid off.

From the discussion above, it proves that BPJS employment which is run in the social sphere does not deviate from sharia economic law in terms of the contract because it contains virtues for the welfare of the society. There are only a few things that need to be considered such as premium paid monthly, there should have dispensation for certain members.

Conclusion

The results of the Research on the contract of the Social Security Agency (BPJS) for employmen in the context of sharia economic law show that this study produces several things that could add knowledge and answer apprehension of Indonesian people, especially Muslims. In general, the BPJS Employment programs do not deviate from the sharia economic law because the contract of the program contains virtue that benefits most of the workers, especially the BPJS Employment participants, such as the *tabarru'* contract, *ta'âwun* which applies only to virtue. There is also savings program that has the same concept as the *muḍlârabah musytarakah* contract and inheritance contract. It is in accordance with the *fatwa* of the National Sharia Council No. 21/DSN-MUI/X/2001 concerning general guidelines for sharia insurance.

⁷² Yusuf al-Qardlawi, *Fatwa-Fatwa Kontemporer Vol. 3*, ed. by Abdul Hayyie Al-Kattani et al. (Jakarta: Gema Insani Press, 2002), 534.

Bibliography

- Al Hamzah, Z. "BPJS dan Jaminan Sosial *syari'ah*", *Republika*, 17 January 2014: <https://republika.co.id/berita/koran/news-update/14/01/16/mzi35n-bpjs-dan-jaminan-sosial-syariah> (retrieved January 11 2019).
- Al-Qardhawi, Y. *Fatwa-Fatwa Kontemporer* Vol. 3. Translator: Abdul Hayyie al-Kattani et al. Edition. 1. Jakarta: Gema Insani Press, 2002.
- Assagaf, Y. "Ketenagakerjaan Dalam Konsepsi Syari'at Islam". *Jurnal Ilmiah Al-Syir'ah*, Vol. 3, No. 1 (2016).
- Fatwa Dewan Syari'ah Nasional No. 21/DSN-MUI/X/2001 tentang pedoman umum asuransi syari'ah.*
- Fawaid, A. *Pengantar Penulisan Akademik*. Yogyakarta: Pustaka Pelajar, 2016.
- FORDEBI, & ADESy. *Ekonomi dan Bisnis Islam: Seri konsep dan aplikasi Ekonomi dan Bisnis Islam*. Jakarta: Rajawali Pers, 2016.
- Ginting, A. F., Dengo, S., Kolondam, H. F. "Implementasi Program Jaminan Sosial Ketenagakerjaan Di Kota Manado". *Jurnal Administrasi Publik*, Vol. 3, No. 400 (October, 2016).
- Hakim, M. A. "Analisis Aplikasi Akad Tabarru' Dalam Asuransi *Syari'ah*: Studi Kasus Pada AJB Bumiputera 1912 *Syari'ah* Cabang Kudus". *Jurnal Muqtasid*, Vol. 3, No. 2 (December, 2012).
- Haroen, N. *Fiqh Muamalah*. Edition. 2. Jakarta: Penerbit Gaya Media Pratama, 2007.
- Hernawan, A. "Keberadaan Uang Pesangon dalam Pemutusan Hubungan Kerja Demi Hukum di Perusahaan yang Sudah Menyelenggarakan Program Jaminan Pensiun", *Kertha Patrika: Jurnal Ilmiah Fakultas Hukum Universitas Udayana*, Vol. 38, No. 1, (January-April, 2016)
- [https://www.bpjsketenagakerjaan.go.id/page/Program-Jaminan-Kematian\(JKM\).html](https://www.bpjsketenagakerjaan.go.id/page/Program-Jaminan-Kematian(JKM).html)) retrieved January 10, 2019).
- Jemikan. "Kajian Yuridis Terhadap Pelaksanaan Bpjs Ketenagakerjaan Di Lingkungan Yayasan Perguruan 17 Agustus 1945 Surabaya". *DiH Jurnal Ilmu Hukum*, Vol. 14, No. 27, (Februari, 2018). <https://doi.org/10.5281/zenodo.1188352>. Jay, 27(14), 109-120
- Karim, A. A. *Ekonomi Mikro Islami*. Ed. 8. Ed. 5. Jakarta: Rajawali Pers, 2016.

- . *Fikih Ekonomi Islam*. Translator. Abu Umar Basyir, IV. Jakarta: Darul Haq, 2013.
- Kholis, N. "Kesejahteraan Sosial Di Indonesia Perspektif Ekonomi Islam". *Akademika*, Vol. 20, No. 2, (October, 2015).
- Luthfiana, U. "Perlindungan Hukum Terhadap Pekerja/Buruh Penerima Upah Dalam Suatu Perusahaan Yang Tidak Diikutsertakan Dalam Keanggotaan Bpjs Ketenagakerjaan Ditinjau Dari Undang-Undang No. 24 Tahun 2011 Tentang BPJS". *Hukum Progresif*, Vol. X, No. 1, (June, 2016)
- Manan, A. *Hukum Ekonomi Syari'ah dalam Perspektif Kewenangan Peradilan Agama*. Jakarta: Kencana Prenada Group, 2012.
- Mubarrak, H. "Kontroversi Asuransi Di Indonesia: Telaah Fatwa Majelis Ulama Indoneisa (MUI) Tentang Badan Penyelenggaraan Jaminan Sosial (BPJS)". *Tsaqafah*, Vol. 12, No. 1, (May, 2016).
- Mukri, S. G. "Langkah Strategis Optimalisasi Sistem Ekonomi Syariah", *Salam: Jurnal Filsafat dan Budaya Hukum*, Vol. 1, No. 1, (June, 2014).
- Mustofa, I. *Fiqih Mu'amalah Kontemporer*. Jakarta: Rajawali Pers, 2016.
- Partanto, P. A., Barry, A., M. Dahlan. *Kamus Ilmiah Populer*. Surabaya: Penerbit Arkola Surabaya, 2001.
- Permana, I. P. Y. I., Suyatna, I. N., & Sarna., K. 2017. "Implementasi Undang-Undang No. 24 Tahun 2011 Tentang Badan Penyelenggara Jaminan Sosial Terkait Pendaftaran Peserta Program Jaminan Sosial Ketenagakerjaan Di Kabupaten Gianyar". *Jurnal*, Vol. 5, No. 2, (April, 2017).
- Piteradja., A. C., Pangkey., M. S., & Rares., J. J. 2017. "Implementasi Program Jaminan Hari Tua Di Badan Penyelenggara Jaminan Sosial Ketenagakerjaan Kota Manado". *Jurnal Administrasi Publik*, Vol. 4, No. 49, (February, 2017).
- Rivai, V., Buchari, A. *Islamic Economics: Ekonomi Syari'ah bukan Opsi, Tetapi Solusi*. Jakarta: PT Bumi Aksara, 2009.
- Setiowato, E., SuharNo., & Suparwi. "Pelaksanaan BPJS Ketenagakerjaan Bagi Karyawan Di Kota Surakarta Pada Kantor Cabang BPJS Ketenagakerjaan Kota Surakarta". *Seminar Nasional Perlindungan Hukum Terhadap Tenaga Kesehatan Dan Pasien Dalam Perspektif UUU No. 36 Tahun 2014*, (2017).

- Shihab, A. N. "Hadirnya Negara Di Tengah Rakyatnya Pasca Lahirnya Undang-Undang No. 24 Tahun 2011 Tentang Badan Penyelenggara Jaminan Sosial (The Presence Of The State Among People After The Declaration Of Law Number 24 Year 2011 Concerning Social Security Administeri". *Jurnal Legislasi Indonesia*, Vol. 9, No. 2, (2012)
- Shihab, M. Q. *Tafsir Al-Misbah: Pesan, Kesan dan Keserasian Al-Qur'an*. Cet. IX. Vol. 3. Jakarta: Lentera Hati, 2012.
- Siagian, M. "Tingkat Kepuasan Karyawan Perusahaan Swasta dalam Pelayanan Jaminan Sosial Tenaga Kerja (Jamsostek)", *Kesmas: Jurnal Kesehatan Masyarakat Nasional*, Vol. 7, No. 5, (December, 2012).
- Siti Kunarti, Tedi Sudrajat, Sri Wahyu Handayani, "Transformation of Social Security Administrative Body (BPJS) within Social Security Reform in Indonesia", *SHS Web of Conferences*, Vol. 54, P. 03017, (2018).
- Sula, M. S. *Asuransi Syarî'ah (Life and General): Konsep Dan Sistem Operasional*. Jakarta: Gema Insani Press, 2004.
- tn. *Himpunan Lengkap Undang-Undang Ketenagakerjaan*. Ed. 1. Jogjakarta: Buku Biru, 2013.
- Tolala, P. Y. M. C., Doda, V., & Josephus, J. "Implementasi Layanan Jaminan Kecelakaan Kerja BPJS Pada Tenaga Kerja Bongkar Muat Di Pelabuhan Laut Manado". *Jurnal Paradigma*, Vol. 4, No. 3, (2016).
- Undang-Undang Republik Indonesia No. 24 Tahun 2011 Tentang Badan Penyelenggara Jaminan Sosial*
- Undang-Undang Republik Indonesia No. 40 Tahun 2004 Tentang Sistem Jaminan Sosial Nasional*
- Vandiantara, S. "Tinjauan Hukum Islam Terhadap Proses Pengelolaan Dan Konsep Investasi Dana Premi BPJS Ketenagakerjaan". *Jurnal Balance*, Vol. XIV, No. 1, (January, 2017).
- www.bpjsketenagakerjaan.go.id, retrieved January 10, 2019.



al-Ihkam: Jurnal Hukum dan Pranata Sosial, 14 (1), 2019: 146-177
ISSN: 1907-591X, E-ISSN: 2442-3084
DOI: <http://doi.org/10.19105/al-ihkam.v14i1.1982>

الآثار المترتبة على بربو/Perppu (لوائح الحكومية البديلة) من
المنظمات المجتمعية رقم ٢ لعام ٢٠١٧ ضد وجود حزب التحرير
إندونيسيا من منظور سدّ الذريعة

Abdul Jalil

Fakultas Syariah IAIN Madura, Jl. Raya Panglegur Km. 4, Pamekasan-69317
Email: jllhasan683@gmail.com

Muhammad Taufiq

(International Islamic University Malaysia, Malaysia-53100)

Article history: Received: 13 Nopember 2018, Accepted: 27 Juni 2019, Published: 9 Juli 2019

Abstract:

The perspective of Islamic constitutional law, The Unitary State of the Republic of Indonesia is in harmony with the principles of Islamic state administration, because the system of government implemented has embraced the principles of Islamic constitution such as; *al-musâwah* (equality), *al-'adâlah* (justice), *al-syûrâ* (democraton), *al-hurriyyah* (freedom). The principle is contained in the five precepts of the Pancasila. HTI's efforts to establish a khilafah government according to its version in the Unitary Republic of Indonesia can disrupt the system, basis and philosophy of the State, can result in national disintegration, can eliminate religious tolerance which is substantially the principle in Islamic state administration. The birth of Perppu Number 2 of 2107 has implications for the closure of opportunities (*sadd al-dzarî'ah*) Community Organizations that have teachings or understandings contrary to Pancasila grow within the Unitary State of the Republic of Indonesia and HTI becomes a prohibited organization living in Indonesia. According to the

Author correspondence email: jllhasan683@gmail.com

Available online at: <http://ejournal.iainmadura.ac.id/index.php/alihkam/>

Copyright (c) 2019 by al-ihkam. All Right Reserved



consequentialist approach, the existence of HTI threatens the sovereignty of the State, so that being included in the category of levels of *sadd al-dzarî'ah* which has the effect of causing harm and danger therefore, to avoid alternative declarations dissolving HTI is the right choice that must be put forward.

Keywords:

Islamic state administration; HTI; Perppu Number 2 of 2017;
Sadd al-Dzarî'ah

ملخص البحث:

تتوافق منظور القانون الدستوري الإسلامي للدولة الموحدة بجمهورية إندونيسيا مع مبادئ الدستور الإسلامي، لأن نظام الحكم الذي يتم إدارته قد تضمن مبادئ الدستور الإسلامي مثل المساواة والعدالة والمشاورة والحرية. ويرد المبدأ في المبادئ الخمسة ل بنجاسيلا (Pancasila). يمكن جهود حزب التحرير اندونيسيا لتشكيل حكومة الخلافة وفقاً لنسختها في الدولة الموحدة لجمهورية إندونيسيا أن تعطل نظام الدولة وأساسها وفلسفتها، ويمكن أن تؤدي إلى تفكك الوطني، ويمكن أن تقضي على التسامح الديني الذي يعد أساساً في إدارة الدولة الإسلامية. إن ولادة بيرو رقم ٢ لعام ٢٠١٧ لها آثار على إغلاق الفرص (سدّ الذريعة) لمنظمات المجتمعية التي لها تعاليم أو تفاهات تتعارض مع بنجاسيلا تنمو في الدولة الموحدة لجمهورية إندونيسيا، وحزب التحرير اندونيسيا هي منظمة محظورة في إندونيسيا. وفقاً للنهج اللاحق، فإن وجود حزب التحرير اندونيسيا يهدد سيادة الدولة، بحيث يقع في فئة مستوى سدّ الذريعة الذي ينتج عنه بعض التهديدات والمخاطر. لذلك، لتجنب الضرر، فإن البديل عن حل حزب التحرير إندونيسيا هو الخيار الصحيح الذي يجب طرحه.

الكلمات الرئيسية:

إدارة الدولة الإسلامية؛ حزب التحرير إندونيسيا؛ بيبو (لوائح الحكومية البديلة)
رقم ٢ لعام ٢٠١٧؛ سدّ الذريعة.

مقدمة

"الدولة الموحّدة بجمهورية إندونيسيا القيمة الثابتة"، " الدولة الموحّدة بجمهورية إندونيسيا الثمن الأخير". في الآونة الأخيرة، تم العثور على هذين المصطلحين في العديد من الكتب والمجلات وحتى الوسائط الأخرى سواء الإلكترونية كانت أو المطبوعة كانت. بدأ أن المصطلحين هما قوة وروح الشعب الإندونيسي من أجل وحدة الأمة ذات الغالبية المسلمة. إندونيسيا دولة الموحّدة، يمكن أن يطلق عليها بعد ذلك *Bhinneka Tunggal Ika*، وهي بلد يتكون من عدة عناصر من الشعب والعرق والأمة والدين واللغة في إندونيسيا. إن استقلال الدولة الموحّدة إندونيسيا التي دافعت عنها جميع عناصر الأمة على حد سواء من المدنيين والعسكريين و الرواد الاستقلال قد ضحوا بالطاقة والأموال وحتى النفوس وقاد الأمة في النهاية نحو الاستقلال. ولكن هذا الاستقلال ما زال منزعجًا من بعض الجماعات وعناصر الأمة نفسها التي كانت مؤخرًا هذه الضربات على نطاق واسع للتساؤل عن إيديولوجية بنجاسيلا. وبينما تنعكس بنجاسيلا باعتبارها إيديولوجية الأمة الإندونيسية ذات القيمة في حياة المجتمع، إلا أنه يمكن القول إنها كانت ثمن الأخير عندما كان هذا البلد في شكل الدولة الموحّدة لجمهورية إندونيسيا.¹

¹ Libasut Taqwa, "Evolusi Gerakan HTI dan Acaman Terhadap Generasi Muda", *Jurnal Review Politik*, Vol 5 No. 1 (Juni, 2015), 2

كانت إحدى الحركة لمجموعات المتطرفة على سبيل المثال، التي طورت عقيدة الخلافة عبر الوطنية وهددت سلامة الدولة الموحدة بجمهورية إندونيسيا هي حزب التحرير إندونيسيا الذي اختصر بعد ذلك وتم الإشارة إليه في هذه الدراسة مع HTI. لقد جذبت هذه الحركة تعاطف العديد من المسلمين، وخاصة الجيل الأصغر سناً، وترى هذه المجموعة أن تراجع المجتمعات الإسلامية في الدولة يرجع إلى تخليها عن نظام الخلافة العالمي الذي يمكنه تنظيم حياة الناس نحو الرخاء والإزدهار في عصر الخلافة.

في العديد من الجامعات الكبرى، حكومية كانت أو غير حكومية كانت، لا يوجد عدد قليل من الطلاب المشاركين في إدارة هذه الحركة، بدءاً من المقاييس الصغيرة والكبيرة، كما لا يتم استبعاد الندوات وحتى الأنشطة الاجتماعية من أنشطته و برنامجه.² HTI الذي عقد أول مؤتمر دولي في إندونيسيا في ٢٨ من مايو ٢٠٠٠ وتطور بسرعة كبيرة. بعد سبع سنوات تمكنت هذه المجموعة من أخذ أتباع ومتعاطفين مع مائة ألف شخص،³ وهو رقم رائع حقاً كمجموعة من القادمين الجدد.

وراء شجار أتباع HTI وشيعته من أجل الاستمرار في الوجود بأرخبيل نوسنتارا، اتضح أنه لم ينتج بعد الدب الحلو، فالصراع الذي بدأه عبد الرحمن البغدادي يجب أن ينتهي بشكل مأساوي، هو بيرو رقم ٢ لعام ٢٠١٧ الذي أوقف حركة التنظيم الهائلة هذه بحيث، على أساس بيرو، مؤسسياً وقانونياً، يُعلن أن HTI قد تم حلها.

بعد حل HTI، جاء الرفض من أتباع داخليين لهذه المجموعة، بما في ذلك من الخارج، وحتى خبير القانون في الولاية الأستاذ يسريل إحسا ماهيندرا رفض بشدة هذا البيرو ودعا منظمات المجتمع المدني والأحزاب السياسية ضد هذا البيرو. يقيم يسريل إصدار هذه

² Arifuddin Ismail, "Pemikiran dan Gerakan Keagamaan Mahasiswa: Menelusuri Merebaknya Radikalisme Islam Di Kampus", *Harmoni Jurnal Multikultural dan Multireligius*, Vol. 3, Juli-September 2012, 49

³ Libasut Taqwa, "Evolusi Gerakan HTI, 3

اللائحة يوضح سياسة الحكومة الاستبدادية، بينما في الحياة الديمقراطية، يجب أن يمر حل المنظمات المجتمعية مثل HTI بمراحل مثل التحذيرات، إذا تجاهلها لاحقاً يمكن فرض عقوبات إدارية على الحل.⁴

لا يمكن إنكار الجدل الداعي إلى حل HTI وإلغاؤه في بلد ديمقراطي مثل إندونيسيا.⁵ تم تقييم هذا من قبل الدكتور إفضال قاسم وهو أكد أن البيرولم يكن استبدادياً حتى مع إصدار البيرو الذي يمكن أن يحافظ على سلامة الديمقراطية وليس الحد من الديمقراطية كما ذكر يوسريل، اعترف أستاذ القانون الدستوري، الذي يشغل أيضاً منصب رئيس المجلس الفخري لرابطة بكالوريوس بنهضة العلماء (ISNU)، أنه يترك من الناحية القانونية جدلاً.⁶ ويجب أن يكون هناك تحذير، من تحذير واحد أو اثنين أو ثلاثة إلى ستة، يتم إيقاف المساعدة، في حالة عدم وجود مساعدة، يجب أن تكون قرارات المحكمة قادرة على إلغاء قانونية الكيان القانوني. علاوة على ذلك، أكد محفوظ أن وجود HTI يمكن أن يشل الحكومة الإندونيسية، مما يعطل استقرار الدولة بشدة. في الواقع، قبل الإعلان عن حل HTI، أصدر الرئيس جوكو ويدودو أيضاً بياناً قوياً من شأنه أن "يهزم" المنظمات التي تحاول أن تزعم إندونيسيا.

إن الجهود التي تبذلها الحكومة للحفاظ على وحدة وتكامل جمهورية إندونيسيا من الاضطرابات الجماعية التي ترغب في تغيير إيديولوجية الدولة هي مهام ولايات تستند إلى

⁴ Miko Ardhinata, "Kewenangan Pemerintah dalam Pembubaran Organisasi Masyarakat Hizbut Tahrir Indonesia (HTI) Berdasarkan Undang-Undang Nomor 13 Tahun 2013, *Surya Keadilan*, Vol. 1, No. 1, November 2017, 124

⁵ Imam Mahdi, "Pembubaran Ormas Radikal dalam Perspektif Perundang-Undangan (Kajian Khusus Perppu No. 2 Tahun 2017)", *Nuansa*, Vol. X, Nomor 2, Desember 2017, 140

⁶ Miko Ardhinata, "Kewenangan Pemerintah dalam Pembubaran Organisasi Masyarakat Hizbut Tahrir Indonesia (HTI) Berdasarkan Undang-Undang Nomor 13 Tahun 2013, *Surya Keadilan*, Vol. 1, No. 1, November 2017, 119

القانون الأساسي عام ١٩٥٤، وفقاً للباحثين، ما الذي تفعله الحكومة بإصدار بيربو رقم ٢ لعام ٢٠١٧ والتي لا تزال حتى الآن جدلية هي جزء من الاجتهاد السياسي للزعيم (تصرف الإمام) الذي يحتاج إلى التقدير لخلق فائدة في حياة الدولة.

ومن إحدى طرق استنباط الحكم التي وفقاً للباحث تتوافق مع إصدار هذا البربو هي سدّ الذريعة. يمكن استخدام هذه الطريقة لمنع ووقف جميع أشكال الأنشطة أو الإجراءات المسموح بها أساساً حتى المحمية بموجب قوانين مثل المجموعات أو الجمعيات، ولكن إذا كانت الأنشطة أو الإجراءات التي تم تنفيذها وتطويرها يمكن أن تسبب فوضى أو تهديدات يمكن أن تؤدي إلى التفكك الوطني بحيث تكون الفائدة في الأمة ليست سوى المنظار والأمل.

بسبب هذا الأساس يصوغ المؤلف التركيز في هذه الدراسة. أولاً، ما هو منظور القانون الدستوري الإسلامي حول إنشاء حكومة الخلافة داخل الدولة الموحدة لجمهورية إندونيسيا كما طلب HHI. ثانياً، ما هي الأثار المترتبة على Perppu رقم ٢ لعام ٢٠١٧ على وجود HHI من وجهة نظر سدّ الذريعة.

محور هذا النقاش مهم بالنظر إلى أن الدولة الوحيدة لجمهورية إندونيسيا إلى حد كبير مع أساسيات دولة الخلافة ونظام الحكم الإسلامي الذي قاتل بقوة من أجل HHI لديه ملاءمة ولكن HHI يعتبر غير إسلامي ، كما سيناقش الباحثون في هذه المقالة. ثم ، ينتهي إصدار بيربو رقم ٢ لعام ٢٠١٧ لوجود HHI وسيختتم اجتماع إطلاق المنظمات الجماهيرية التي تنحرف عن أساس الدولة وهو بنجاسيلا. سيتم فحص حل HHI من خلال إصدار بيربو من قبل الباحثين مع نظرية سدّ الذريعة التي يشيع استخدامها من قبل المجاهدين في استنباط الحكم.

منهج البحث

معالجة البحث في هذه الدراسة باستخدام مدخل الوصفي مع تحليل النوعي النقدي. بينما يتم إعادة البحث عن نوع بحث المكتبة، فإن مصادر البيانات هي وثائق الدولة في شكل نسخ من بيريو رقم ٢ لعام ٢٠١٧ ، ومخطوطات جمهورية إندونيسيا رقم ١٧ لعام ٢٠١٣ ، والكتب والمجلات التي تغطي الفقه السياسي، HPI ومفهوم سدّ الذريعة، كان التحليل في هذه الدراسة عن طريق تقليل البيانات (تلخيص واختيار الأشياء الرئيسية في شكل بيانات مناسبة، مع التركيز ثم تقديم وصف موجز وعلاقة مع النظريات المقدمة بالفعل، ثم استخلاص النتائج والتحقق.

أ. مبادئ الحكم الإسلامي / الخلافة

الحكم الإسلامي كما قد تجلّى في زمن النبي محمد صلى الله عليه وسلم. ويدير خلفاؤه الخلفاء حكومة إسلامية لها مبادئ تشمل المساواة. المساواة بين البشرية هي مبدأ إسلامي مبني على الوعي بأن جميع الرجال والنساء هم أبناء آدم وهوى، وهذا ما أوضحه الله سبحانه وتعالى. في كلمته سورة النساء ٤: ١.

العدالة. العدالة مبدأ أساسي يؤكده الإسلام بقوة. يتم ذكر أعمال العدالة مرارًا وتكرارًا في القرآن، وخاصةً في سياق تطبيق القانون، على سبيل المثال في كلمة الله سورة النساء: ٥٨، حتى لو كانت هناك كراهية لأي شخص لا يزال محكومًا بالعدل، مثل كلمة الله في سورة المائدة: ٨ وما زالت هناك آيات أخرى.

السيرة (التداول). واحدة من آيات القرآن الذي هو أساس مبدأ التداول في الإسلام هو كلمة الله سورة الشّورا: ٣٨ بينما الأمر لفعل مصبورة يمكن فحصه في كلمة الله في سورة آل عمران: ١٥٩.

الحرية (الحرية). الحرية حق متأصل ولم يتم فصله عن البشر ككائنات لها موهبة المجد من الله سبحانه وتعالى من خلال شريعة الله تعالى. إعطاء مساحة لخدمته الحرية ، بما في ذلك الحرية الدينية والتفكير وتكوين الجمعيات والتعبير عن الرأي. مساحة الحرية واسعة للغاية لذا يجب أن تكون محدودة ، هذه الحدود هي ؛ أولاً، هذه الحرية لا تشوه الكرامة والكرامة الإنسانية ككائن شريف. ثانياً، لا يتعارض مع حقوق الآخرين. ثالثاً ، ليس ضد القواعد ، لا قواعد الشريعة، أو نتائج الاتفاقيات الجماعية، طالما أنها ذات قيمة جيدة ولا تتعارض مع الشريعة. رقابة الأمة (إشراف الناس). في الشريعة الإسلامية، لكل مواطن الحق أو الالتزام بالإشراف على الزعيم المختار والسيطرة عليه وتقديم المشورة إليه وانتقاده. النقد المشار إليه هو نقد بناء موجه نحو الصالح العام، أي القادة وأولئك الذين يتم قيادتهم.^٧

ب. بناء حكومة الخلافة داخل الدولة الموحدة لجمهورية إندونيسيا

من الشائع أن يقوم حزب التحرير إندونيسيا بتفويض كبير منذ إنشائه في الأراضي الفلسطينية بقلم تقي الدين النبهاني، كحزب سياسي مع حركة مستقيمة ويهدف إلى إعادة تأسيس مجد الإسلام من خلال إعادة تأسيس الخليفة الإسلامي. كحزب سياسي له أيديولوجية إسلامية، يهتف دائماً بـ "إنقاذ إندونيسيا بالشريعة الإسلامية" و "توحيد المسلمين في نظام الخلافة" و "رفض التدخل الأمريكي" سلسلة من الشعارات التي يتم التعبير عنها دائماً بشكل مألوف.

اعتبر أتباع ومتعاطفون حزب التحرير أن حزب التحرير كان أيديولوجية وحركة أرادوا إقامة دولة خلافة، والسبب الكامن وراء تفكيرهم لأن المسلمين في العالم يتعرضون للاضطهاد،

^٧ عفيف الدين مهاجر، فقه السياسة الدولية (جوكجاكرتا : IRCiSoD، ٢٠١٧)، ٥٧.

ولا يتحدون بناءً على وحدة جيوسياسية معينة، والمسلمين الذين يعيشون في مجموعات غير متكاملة. لذلك يحتاج المسلمون إلى لم شملهم في منتدى سياسي واحد يدعى "الخلافة"، وهو ما تمارسه منذ "خلافة الراشدين".

يجب على المسلمين العودة إلى الشريعة الإسلامية، كما يسميها. لأنه يوجد في الشريعة الإسلام حل لجميع الأزمات التي تعاني منها الأمة. هناك حاجة إلى الشريعة الإسلامية لتحسين معنويات الناس حتى يتم تقديمها مباشرة في خضم حياة الأمة والدولة، مع وضع الشريعة الإسلامية جانباً عن طريق إسناد حياة الأمة والدولة إلى جانب ترك تعاليم الله سبحانه وتعالى.

بناءً على ذلك، تعتبر الدولة الموحدة لجمهورية إندونيسيا مع إيديولوجية بنجاسيلا متناقضة مع تعاليم الشريعة الإسلامية، وحتى HHI ترفض صراحة إيديولوجية بنجاسيلا، والأسوأ من ذلك أنها تعتبر بالطاغوت (اله غير الله). لذلك، فإن إنشاء نظام حكم نحو الرخاء والصالح المشتركين، هو أن تصبح دولة كبلدة طيبة ورب غفور هي الوحيدة التي تدير عجالات الحكومة كما تجسدها خلفاء الراشدين، أي نظام الخلافة.⁸

في الدستور الإسلامي، نظام الخلافة ونظام الحكم الإسلامي عبارة عن تعبيرين لهما فهم مختلف ولكن المضمون هو نفسه. أي أن نظام الخلافة ونظام الحكم الإسلامي في اللغة لهما فهم مختلف ولكنهما يؤديان إلى نفس الغرض والغرض. يقال إن نظام الحكم الإسلامي هو لأنه يهدف ويهدف نحو تحقيق الشريعة الإسلامية وهو مبني على المبادئ الإسلامية. الهدف هو خلق السعادة والازدهار للناس في الدنيا والآخرة.⁹

⁸ Siti Jamilah, "Gerakan Hizbut Tahrir di Kota Pare-Pare (Membaca Pengaruh Pemikiran Taqyuddin a-Nabhani)", *Jurnal Diskursus Islam*, Vol. 3, No. 1, 2015, 6

⁹ عفيف الدين مهاجر، فقه السياسة الدولية، ٤٢.

نظام حكومة الخلافة في قيادتها متمسك بإمام يسمى الخليفة الذي يعني الخلف أو الخلف، لأن الخليفة يصبح بشكل مباشر أو غير مباشر بديلاً للنبي. في أداء واجبات النبوة والولاية العظيمة، وحراسة الدين وتنظيم العالم.^{١٠}

إن حكومة الخلافة كما حاولت HHI في الدولة الوحيدة لجمهورية إندونيسيا والتي لديها إيديولوجية بنجاسيلا وعلى أساس القانون الأساسي عام ١٩٤٥ ليس من السهل أن تصبح حقيقة واقعة^{١١}، يمكن أن تصبح فكرة طوباوية، من المستبعد جداً لأنها ليست قائمة على الواقع، لأن مؤسس الأمة الإندونيسية وافق على نظام حكم دولة إندونيسيا.

من وجهة النظر، أن بنجاسيلا كفلسفة دولة في ونام وتمشيا مع الشريعة الإسلامية، فمن الواضح أن البانشاسيلة ذات قيمة إسلامية، وهذا أمر معقول لأنه أولاً، من الناحية التاريخية، وُلد الإسلام في الأرخييل وتطور من خلال خطباء من شبه الجزيرة العربية، وخاصة في منطقة جوى المعروفة مع والى سونغو وغيره من الدعاة. ثانياً، تلتزم الدولة الإندونيسية أيديولوجياً بنظرية الغزالي، أي مفهوم تعايش الدوافع التي يحتاجها الدين والدولة. يشبه الغزال الدين كأساس والدولة كحارس حتى لا يساء استعمال الدين لأنه يقول الدين هو الأساس أو المبدئ، بينما الحكومة أو الدولة هي الوصي. شيء لا أساس له سينهار بلا شك وسيختفي شيء ليس له حراسة^{١٢}. تتطلب قواعد الدين من الدولة أن تصدر تعاليمها بحيث يكون لها صلاحيات ملزمة.

^{١٠} بحسب الموردي، من المتوقع أن يقوم كاهن أو خليفه بمهمة النبوة، وتشمل المهمة النبوية جِزَاةَ الَّذِينَ وَسَيَاةَ الدُّنْيَا، بمعنى آخر، الحفاظ على الدين وتحقيق نظام عالمي عادل ومنصف. ثم، يسمى نموذج الحكم عادة الخلافة (أبو الحسن علي محمد بن محمد بن حبيب الموردي، الأحكام السلطانية (قاهرة: دار الحديث، دون السنة)، ١٥.

^{١١} Ilyya Muhsin, "Gerakan Penegakan Syariah: Studi Gerakan Sosial Hizbut Tahrir Indonesia", *Ijtihad Jurnal Wacana Hukum Islam dan Kemanusiaan*, Vol. 12, No. 1, Juni 2012, 44

^{١٢} أبو حميد محمد بن محمد الغزالي، *احياء علوم الدين*، جزء ١ (بيروت: دار المعرفه، دون السنة)، ١٧.

ثالثًا، استنادًا إلى جانب المحتوى ، تشتمل المبادئ الخمسة الواردة في البانثاسيلا على الأقل على عنصرين، هما العقيدة والشريعة الإسلامية. في جانب العقيدة، يحتوي البانثاسيلا على تعاليم التوحيد من خلال تأييد إله الكون، المبدأ الأول. بالإضافة إلى ذلك، كانت هناك أيضًا شهادة للنبي محمد باعتباره آخر نبي ورد في ميثاق جاكرتا بلغة الشريعة الإسلامية وهي روح البانثاسيلا الحالية.

في مستوى الشريعة الإسلامية، يحتوي بنجاسيلا على مبدأ العدالة في تنفيذ حياة الأمة والدولة والوحدة الوطنية، بالإضافة إلى أن مبدأ المداولة هو بمثابة دعامة للديمقراطية موجهة بالكامل نحو تحقيق الرخاء والعدالة المشتركين. في هذه الحالة، يمكن فهم أن الدولة الوحيدة لجمهورية إندونيسيا والتي تستند إلى بنجاسيلا و القانون الأساسي عام ١٩٤٥ في التعاليم تحتوي على قيم الشريعة الإسلامية التي تحتوي على عناصر من التوحيد أو المعتقدات والشريعة التي تشمل الأفعال.

تناسب القيم الإسلامية الموجودة في البانثاسيلا مع الجوانب الأساسية التي تشكل الأساس لتحقيق حكومة الخلافة. في حكومة الخلافة، هناك حاجة لمبدأ المساواة (المصوغ) بين إخواننا من البشر. في الواقع أن البشر لديهم نفس الدرجة من الالتزامات والواجبات والحقوق ولون البشرة واللغة والعرق والموقع والنسب والثروة وما إلى ذلك، لا يمكن استخدامها كذريعة لمصلحة بعض البشر على الآخرين. يتعارض توزيع الامتيازات بسبب عامل اللون أو الأصل العرقي أو النسب أو الطبقة أو الممتلكات أو الموقف مع مبادئ وعقائد الإسلام التي تنص على أن البشر من نفس الأصل. لا يمكن الحصول على التميز مع بعضنا البعض إلا من خلال التفاني والإنجاز. انظر مثال في كلمة الله :

يَا أَيُّهَا النَّاسُ اتَّقُوا رَبَّكُمُ الَّذِي خَلَقَكُمْ مِنْ نَفْسٍ وَاحِدَةٍ وَخَلَقَ مِنْهَا زَوْجَهَا وَبَثَّ

مِنْهُمَا رِجَالًا كَثِيرًا وَنِسَاءً.^{١٣}

ثم قال رسول الله صلى الله عليه وسلم في الحديث النبوي : والناس بنو آدم وخلق الله آدم من تراب.^{١٤}

في بنجاسيلا، ينعكس مبدأ المساواة بين البشر في المبدأ الثاني، ألا وهو الإنسانية العادلة والحضارية. تُظهر القيم الإنسانية العادلة والحضارية أن البشر يتم التعرف عليهم ومعاملتهم وفقاً لحركاتهم وكرامتهم كخلق الله تعالى. بناءً على هذه القيمة، فإن المحبة والرحمة لبعضنا البعض أمر لا بد منه كمواطن إندونيسي وموقف من التسامح وموقف غير تعسفي تجاه الآخرين.

استناداً إلى القيم الإنسانية أيضاً، تعارض إندونيسيا جميع أشكال الاستغلال والقمع من قبل دولة ضد أخرى، ومن جانب جماعة ضد الأخرى، وترفض إندونيسيا قهر طائفة من الديانات والمعتقدات في جماعة أخرى، ومن جانب البشر ضد البشر الآخرين، من قبل حاكم شعبه. تعارض اندونيسيا التشهير من مجموعة مع أخرى. كما قد شرح في سورة الحجرات آية ١١ و ١٣ :

"يَا أَيُّهَا الَّذِينَ آمَنُوا لَا يَسْخَرْ قَوْمٌ مِّن قَوْمٍ عَسَىٰ أَن يَكُونُوا خَيْرًا مِّنْهُمْ"^{١٥}

"يا أيها الناس إنا خلقناكم من ذكر وأنثى وجعلناكم شعوباً وقبائل لتعارفوا إن أكرمكم عند الله أتقاكم"^{١٦}

الإنسانية العادلة والحضارية تعني احترام القيم الإنسانية والتعليم لاحترام كرامة الإنسان وضمان حقوق الإنسان. تستند هذه القيمة إلى إدراك أن البشر متساوون، ثم يشعر الشعب الإندونيسي بأنه جزء من البشرية جمعاء، وذلك بسبب احترام واحترام الأمم الأخرى. تعني

^{١٣} القرآن سورة النساء آية ١

^{١٤} محمد بن عيسى الترميذي، سنن الترميذي (مصر : شركة مكتبة و مطبعة مصطفى الباب الحلبي، ١٩٧٥)، جزء ٠.٧، ٣٨٩

^{١٥} القرآن سورة الحجرات آية ١١

^{١٦} القرآن سورة الحجرات آية ١٣

معاملة البشر في بنجاسيلا وضع كل كائن بشري ومعالجته بطريقة عادلة ومتحضرة. فيما يتعلق بالإنسانية، تلتزم تلك الإنسانية بمبدأ الحرية، والبشر كمخلوقات تُمنح هبة الكرامة وتصبح جزءاً من مبدأ الحكم الإسلامي. الله اليوم وغداً. من خلال الشريعة الإسلامية، فإنه يعطي مساحة لخدمته، بما في ذلك في الحرية الدينية والتفكير وتكوين الجمعيات والتعبير عن الآراء. ومع ذلك، هذه المساحة كبيرة بما يكفي لتكون محدودة؛ أولاً، لا تشوه الحرية الكرامة والكرامة الإنسانية ككائن شريف؛ ثانياً، لا يتعارض مع حقوق الآخرين، وثالثاً، لا يعارض القواعد، إما قواعد الشريعة أو نتائج الاتفاقيات الجماعية، طالما أنها ذات قيمة جيدة ولا تتعارض مع الشريعة الإسلامية.^{١٧}

نظراً لأنه يجب الحفاظ على القيم الإنسانية، فإن عواقب الوثام بالطبع لكل شعب إندونيسيا الذين لديهم اختلافات في الدين والإثنية واللغة والثقافة أصبحت ضرورية. نظراً لأن تنوع الشخص مبني على قناعة، فمن المنطقي ألا يكون هناك إكراه في الدين، فلا يجب أن يكون هناك إكراه على الاعتقاد أو عدم الإيمان بدين مشمول في التدفق. لأن هذا مبدأ في الإسلام. كما قال الله في سورة يونس آية ٩٩: "وَلَوْ شَاءَ رَبُّكَ لَأَمَنَّ مَنْ فِي الْأَرْضِ كُلَّهُمْ جَمِيعًا ۖ أَفَأَنْتَ تُكْرِهُ النَّاسَ حَتَّىٰ يَكُونُوا مُؤْمِنِينَ"^{١٨}

شيء آخر لا بد من جعل مبدأ المتدينين هو مبدأ التسامح. هذا ينطلق من إدراك أن جميع الاختلافات، بما في ذلك الاختلافات في الدين هي طبيعة إنسانية. إنكار الاختلاف يعني إنكار الطبيعة. وهذه القضية تعتمد مع كلام الله في سورة الكهف آية ٢٩: "فَمَنْ شَاءَ فَلْيُؤْمِنْ وَمَنْ شَاءَ فَلْيُكْفُرْ".^{١٩}

من خلال مبدأ التسامح، ليست هناك حاجة لتوحيد الدين، كما تم تصوره ومتابعته

^{١٧}عفيف الدين مهاجر، فقه السياسة الدولية، ٥٧.

^{١٨}القرآن سورة يونس آية ٩٩

^{١٩}القرآن سورة الكهف آية ٢٩

من قبل HHI. وبالمثل، ليست هناك حاجة لبذل جهد لإنشاء الاعتقاد بأن جميع الأديان صحيحة. لأنه إذا كان هناك اعتقاد بأن جميع الأديان صحيحة، فلا داعي للتسامح في الدين.

حقيقة واحدة غالباً ما تحدث هي أن أتباع الدين فخورون بدينهم ويعتقدون أن دينهم فقط هو الصحيح. ثم حاولوا تقوية دينهم من خلال تعزيز جماعة الأخوة بين الديانات بين أتباع الدين. بالطبع هذا شرعي، حتى منطقي وعقلاني. ومع ذلك، يصبح من غير المنطقي وغير المنطقي أن يكون هناك شخص أو جماعة تؤمن بدين أو طائفة معينة ولكن تكره وتعادي الأديان أو المدارس الأخرى، لا سيما لتبرير دماء وممتلكات الآخرين.

على الرغم من أن هذا أمر خطير وغير معقول، يمكن للمرء العثور على أشخاص يقومون بأعمال دم ضد أشخاص آخرين، بما في ذلك بين المسلمين. ومن المفارقات أن البعض منهم يرون أن الفعل يتضمن شكل تقارب الله (الاقتراب من الله). ربما كانوا يعنون جيداً ولكن العكس هو الصحيح. ربما كان ينوي تزيين وجهه الديني لجعله أكثر جاذبية وسحرًا، لكن ما حدث قد شوهوه. إنهم مسلحون بحماس شديد في الدين فقط، لكنهم غير متوازنين بالمعرفة الدينية الكافية.^{٢٠}

لقد فهم الشعب الإندونيسي أنه في الدولة الموحدة لجمهورية إندونيسيا يتألف من عدة أديان وقبائل ولغات وثقافات. أصبح هذا التنوع مطلقة. لذلك، في الأمة الإندونيسية، لا تريد أن يحدث تفكك الأمة، يجب أن يتحد الشعب الإندونيسي كما هو موضح في المبدأ الثالث، ألا وهو الوحدة الإندونيسية، الوحدة في التنوع، بناء التسامح الشديد تجاه رفاة الشعب الإندونيسي.

إن مبدأ الشورى (أساس المشاورة) الذي هو أساس الحكومة الإسلامية أو حكومة

^{٢٠} عفيف الدين مهاجر، فقه السياسة الدولية، ١٣٦.

الخلافة موجود أيضًا في المبدأ الرابع لبنكاسيلا، أي الشعبية التي تقودها حكمة الحكمة في الاستشارات التمثيلية. يعكس هذا المبدأ الأساس السياسي لجمهورية إندونيسيا. إن سيادة الشعب هي الأساس المطلق لطبيعة الديمقراطية في دولة إندونيسيا. لأنه يحتوي على قاعدتين مطلقتين، فإن طبيعة الديمقراطية في دولة إندونيسيا هي أيضًا مطلقة، أي أنه لا يمكن تغييرها أو إلغاؤها.

العلاقة معنى وزيدة المبدأ الرابع هو النظام الديمقراطي نفسه. مفهوم الديمقراطية يعني أن كل خطوة تتخذها الحكومة يجب أن يكون لها علاقة بعناصر الشعب ومن أجله ومن أجله. هنا، يصبح الناس العنصر الرئيسي في الديمقراطية. هذا ما يجب أن يكون الواقع الذي يبنى الأمة. لأن الشعب هو العنصر الرئيسي في تنفيذ نظام ديمقراطي، فإن إشراف الشعب على القادة الذين يديرون الحكومة ويتخذون السياسات هو العنصر الرئيسي أيضًا.

تتمشى مشاركة الناس في الإشراف على القادة مع مبادئ الخلافة / الحكومة الإسلامية نفسها، أي رغبة الأمة، وللشعب الحق أو الالتزام بالإشراف على الزعماء المنتخبين والسيطرة عليهم وتقديم المشورة لهم وتبلورهم. النقد المذكور هو نقد بناء موجه نحو الصالح العام، وتحقيق الأمل المتبادل والمنفعة المتبادلة، أي القائد والمأقودة.^{٢١}

يظهر مبدأ العدالة الاجتماعية لجميع الشعب الإندونيسي باعتباره المبدأ الخامس أن الشعب الإندونيسي يدرك نفس الحقوق والالتزامات لإقامة العدل الاجتماعي في المجتمع الإندونيسي. العدالة الاجتماعية لجميع الشعب الإندونيسي تعني أن جميع الشعب الإندونيسي يحصل على معاملة عادلة سواء في مجالات القانون والسياسة والاقتصاد والثقافة والاحتياجات الروحية والروحية من أجل خلق مجتمع عادل ومزدهر في تنفيذ حياة الدولة. في جوهرها، أن هناك مساواة إنسانية في الحياة الاجتماعية، لا يوجد فرق في المستوى أو

^{٢١} نفس المرجع، ٦٤.

الطبقات فيه، كل الناس يحصلون على حقوق يجب الحصول عليها بشكل عادل. لذلك، كل شخص لديه الإنجاز له الحق في الحصول على مكافأة (جائزة أو مدح)، تمامًا كما يكون للشخص المذنب الحق أو الإلتزام في الحصول على العقوبة (التأييد أو العقوبة). لكل شخص يتمتع بالنزاهة والقدرة الحق في الحصول على منصب معين؛ يجب الدفاع عن كل من يعتقد أنه على صواب. وبالتالي ، فإن تكليف مهمة أو تفويض لشخص ليس له طاقة فهو ظالم.

يمكن رؤية مثال على تطبيق العدالة في الإسلام في قصة نزاع في زمن النبي محمد. في إحدى المرات ارتكبت عملية سطو على يد مسلم وهو طئمة بن عبيرق. سرق الدرع التابع لجاره المجاور اسمه قتادة. تركت طئمة عمدًا بضائعها المسروقة إلى يهودي يدعى زيد بن سامين. لقد صدم هذا اليهودي بالتأكيد عندما وجده صاحب الدروع في منزل زيد بن سامين. يمكنه فقط شرح أنه في الواقع كان العنصر الذي تلقاه من طئمة كوديعة وتفسير قد تم الاتفاق عليه من قبل شعبه.

ومع ذلك، طئمة باعتباره اللص الذي دافع فعلا بشراسة من قبل شعبه، حتى جاءوا إلى رسول الله. وشهد زورًا أمام رسول الله أن اللص كان يهوديًا وليس ثيمة. لقد صدق النبي وأراد التصرف. لكن في النهاية أصبح الأمر واضحًا أن اليهودي كان بريئًا بسبب تهامة اللص الحقيقي والعقاب المستحق لأفعاله. ثم نزل سورة النساء آيات ١٠٥-١٠٧ :

توضح الفقرة أعلاه بوضوح كيف يجب الحفاظ على العدالة دون التمييز بين الدين والعرق والشعب والطبقة. لأنه من خلال تطبيق سلام القانون، سوف يصبح النظام ورفاهية الشعب حقيقيين في حياة الدولة. في هذا الصدد ، يجعل نظام الحكم الإسلامي مبدأ العدالة هذا أساسًا لتنفيذ حكومة الدولة الإسلامية.

ملاحظة أفكار ومفاهيم HTI لجعل الدولة الموحدة لجمهورية إندونيسيا دولة إسلامية

أو الخلافة، بينما من جانب واحد من بنجاسيلا كأساس لدولة إندونيسيا، كان في وئام مع مبادئ الخلافة / الحكومة الإسلامية التي تشمل مبدأ المساواة والمشاركة والحرية، بالإضافة إلى المبدئ متشابكة في جذور بنجاسيلا، هناك أيضا هذه المبادئ، حلم HTI وحتى المجموعات الأخرى أبعد ما يكون عن ممكن.

يمكن القول، أن بنجاسيلا هو الحكم الأخير الذي لا يمكن الطعن فيه، وعلاوة على ذلك، سيتم استبداله بنظام الخلافة الذي ليس في إطاره إطار واضح ومثبت في إطار الدولة وسط التعددية الدينية، والأعراق والثقافات المختلفة مثل جمهورية إندونيسيا الموحدة، إن الجمع بين الدولة في نظام الدولة الإسلامية على النحو الذي تسعى إليه HTI لا يمكن أن يؤدي إلا إلى تفكك وطني، حيث ستفصل المناطق التي يقطنها سكان من غير المسلمين أنفسهم عن وحدة جمهورية إندونيسيا ، مما سيضر بالدولة نفسها.

بالإضافة إلى ذلك، فإن تاريخ حكومة الخلافة التي أشاد بها HTI والتي استمرت حوالي ثلاثة قرون فقط من وقت النبي ^{٢٢} حتى زمن الخليفة المنشور، الخليفة هارون الرشيد، الخليفة المكمون، الخليفة المعتمد، الخليفة المتوكل حتى غادر الخليفة الوثيق قصة حزينه وخفض القيم الإنسانية بين المسلمين، وتعرض كثير من العلماء للتعذيب، والجلد، والسجن حتى الموت، وقتل، وقطع رأسه. على سبيل المثال، أمر الخليفة المنشور بجلد الإمام أبو حنيفة عندما رفض تعيين قاضٍ وسجنه حتى الموت في السجن. الإمام مالك، لإصداره فتوى قد تخرج تمرّدًا على المنشور بسبب القسوة التي ارتكبتها. تم القبض عليه، وجلده بسبب الفتوى. ^{٢٣}

من الواضح أن استبدال الدولة الوجودية لجمهورية إندونيسيا بدولة الخلافة يتجاهل بوضوح مبدأ التسامح بين المتدينين في إندونيسيا ، في حين أن التسامح نفسه مبدأ يجب

^{٢٢} ابن خلدون، مقدمة ابن خلدون (بيروت : دار الإحياء التراث العربي، دون السنة)، ٢٩٢.

^{٢٣} أبي جعفر محمد بن جرير الطبري، تاريخ الطبري : تاريخ الرسول و الملوك (قاهرة : دار المعارف، دون السنة)، ٣٥٠.

امتلاكه ودعمه في نظام دولة الخلافة. تتطلب الخلافة التي بادر بها HTI إدارة حكومة مع النظام الإسلامي، بينما تزدهر التعددية الدينية والسلام جنبًا إلى جنب، والأعراق المختلفة والقبائل والبوادية هي أصول قيمة للغاية لمملوكة لجمهورية إندونيسيا، وسوف تشكل هشة كبيرة وحتى تفكك الأمة تهديدًا كبيرًا سلامة الدولة.

بالإضافة إلى ذلك، ستكون هناك فوضى داخل المجتمع الإسلامي نفسه، ومن المؤكد أنه سيكون هناك صراع من أجل مدارس عدة مدارس في الإسلام سيتم تقنينها وتنفيذها من قبل الدولة، خاصة من المنظمات الكبيرة في إندونيسيا مثل جماعة محمدية و نهضة العلماء. إذا تم إضفاء الشرعية على إحدى المنظمات الجماهيرية والمدارس من قبل الدولة، فمن المحتمل أن تشتعل الأعمال العدائية والصراعات وحتى تقتل بعضها البعض وسفك الدماء، وتعتبر الجماعات التي تحجم عن متابعة مدارسها غير مخلصه وخيانة للدولة لعدم مشاركتها في مدارسها. أيضا، لن يكون من الممكن للمنظمات الأخرى التي لديها مدارس خاصة بها تجنب تصديق الدولة عليها. يجب أولاً تجنب ظهور الفوضى والمصاعب بين المتدينين من الاستفادة من تطبيق دولة الخلافة أو الحكومة الإسلامية. هذا وفقاً لقواعد الفقه :

"درء المفاسد مقدم على جلب المصالح"^{٢٤}

جعل حكومة الخلافة تحل تلقائياً وتحل كل قواعد الدولة الإندونيسية مثل بنجاسيلا ودستور جمهورية إندونيسيا لعام ١٩٤٥ والديمقراطية مع نظام الدولة الإسلامية، على الرغم من أن هذه القواعد الثلاثة لا تتعارض بشكل كبير مع الإسلام وحتى وفقاً للتعاليم والمفاهيم الإسلامية. بنجاسيلا، جميع التعاليم الواردة فيه تتفق مع مبادئ الحكومة الإسلامية. على سبيل المثال، مبدأ الشورى هو ذو مغزى وله قيمة الديمقراطية، الحرية، تعني الحرية التي لا تزال مقيدة بحرية الآخرين، وليس الحرية المطلقة.

^{٢٤} عبد الرحمن بن أبو بكر السيوطي، الأشبح والنظائر (بيروت : دار الكتب العلمية : ١٤٠٣ هـ)، ٨٧.

تم تأسيس بنجاسيلا والقانون الأساسي ١٩٤٥ كأساس للدولة باعتباره قرارًا مشتركًا من قبل زعماء ومؤسسي الأمة واللجنة التحضيرية للاستقلال الإندونيسي (PPKI) في عام ١٩٤٥، مما أدى إلى رفض الأحكام ورفضها وكذلك عصيان أحكام أولى الأمر. بينما في التعاليم الإسلامية، فإن إطاعة أولى الأمر طالما أنها ذات قيمة جيدة ولا تتعارض مع الشريعة تصبح ضرورة مثل إطاعة أحكام الشريعة من الله سبحانه وتعالى. هو أيضا ضرورة، معارضة ورفضه هو شكل من أشكال التمرد. قال الله تعالى في سورة النساء آية ٥٩: "يَا أَيُّهَا الَّذِينَ آمَنُوا أَطِيعُوا اللَّهَ وَأَطِيعُوا الرَّسُولَ وَأُولِي الْأَمْرِ مِنْكُمْ"^{٢٥}

ج. الآثار المترتبة على بيربو/Perppu (لوائح الحكومية البديلة) من المنظمات المجتمعية رقم ٢ لعام ٢٠١٧ ضد وجود حزب التحرير إندونيسيا من منظور سدّ الذريعة

سدّ الذريعة صياغتان تتألفان من السد و الذريعة. معنى السد هو الإغلاق، في حين أن الذريعة هي مصدر من لفظ ذرع. "الذريعة" تعني "الوسيلة" أو "الوسيط"^{٢٦} واصطلاحا هي "الطريق المؤدي إلى شيء محظور لأنه يمكن أن يؤدي إلى ضرر"^{٢٧}. إذا أصبحت الكلمتان تركيبا واحدا وهو سدّ الذريعة، فهذا يعني إغلاق شيء معيب وتخزين حفرة.^{٢٨} وفقًا لمصطلح الشاطبي سدّ الذريعة هو رفض شيء مسموح به حتى لا يسلم إلى شيء محظور.^{٢٩}

^{٢٥} القرآن سورة النساء آية : ٥٩ .

^{٢٦} احمد ورسون منور، قاموس المنور (جوكجاكرتا : مكتبة بركريسييف، ١٩٨٤)، ٤٤ .

^{٢٧} يتم التعبير عن هذا التعريف من قبل الإمام الشاطبي. انظر : ابراهيم بن موسى أبو اسحاق الشاطبي، الموافقات في الأصول الشرعية جزء ١ (بيروت : دار الكتب العلمية، ٢٠١١)، ١٧٦ .

^{٢٨} محمد بن مكرم بن منظور، لسان العرب جزء ٣ (بيروت : دار الصدر، دون السنة)، ٢٠٧ .

^{٢٩} الشاطبي، الموافقات، ٢٥٧ .

أما بالنسبة تعريف إصطلاحي كما ذكره الإمام الشيوكاني في مقبسة من شفيع الدين صديق، فإن سدّ الذريعة شيء قانوني ظاهرياً، لكنه سيؤدي إلى أمور محظورة.^{٢٠} إذاً المقصود من سدّ الذريعة ما هو ظاهر ظاهرياً ولكنه سيجلب إلى المحرومين.

وفقاً لما قاله ابن القيم الجوزية، وفقاً لما أوردته وهبة الزحيلي، الذريعة فهو أمر يؤدي إلى الآخرين. هذا الشيء ليس معناه العام، لكن يمكن فهمه من قرنه، أي الحديث عن وسيط يؤدي إلى الطاعة والفساق في الشريعة. لذلك يمكن أن نرى أن الذريعة لها معان، وهي المحظورة (سدّ الذريعة) والمطلوب فعلها (فتح الذريعة)^{٢١}. من هذا التعريف، هناك اختلاف مع الفهم الذي عبر عنه الشاطبي، لأن الذريعة وفقاً له تقتصر فقط على الوسطاء المحظورة.

على مستوى الجوانب الناتجة وفقاً لابن القيم كما نقل عن شفيع الدين صادق، يمكن تصنيف الذريعة إلى أربعة أنواع بما في ذلك؛ أولاً، الإجراء الذي من المؤكد أنه سيسبب ضرراً (مافسادا) مثل تناول الخمر التي يمكن أن تؤدي إلى السكر وأفعال الزنا التي تسبب غموض الأنف. ثانياً، الفعل المسموح به أو الموصى به بشكل أساسي (المستحب)، مع ذلك، يستخدم عن قصد كوسيط لشيء شرير (المفسدة) أن يحدث، مثل الزواج من امرأة طلقت ثلاثة حتى يمكن للمرأة أن تتزوج (التحل). أمثلة أخرى مثل البيع والشراء بطريقة معينة تؤدي إلى عنصر الربا.

ثالثاً، الفعل المسموح به أساساً ولكن ليس عن قصد يخلق شرّاً وبشكل عام لا يزال هذا الشر يحدث حتى لو لم يكن مقصوداً. القبح الذي من المرجح أن يحدث أكبر نتيجة للخير الذي تحقق. مثل الأوثان المتعبدة التي يعبدها المشركون.

^{٢٠} شفيع الدين صديق، أصول الفقه (جاكرتا : Kencana Prenada Media، ٢٠١١)، ١٠٤.

^{٢١} وهبة الزهيلي، أصول الفقه الإسلامي، جزء ٢ (شريا : دار الفكر، ٢٠٠١)، ٨٧٣.

ورابعاً، وهو عمل مسموح به بشكل أساسي ولكن، في بعض الأحيان يمكن أن يسبب الشر أو المفسدة. أن نفعها أكبر من سيئتها. مثل رؤية امرأة يتم تفضيلها وانتقاد زعيم ظالم.^{٣٢}

جعل الإمام مالك وأحمد بن حنبل الذريعة من الشرع. في حين أن أبو حنيفة والشافعي في بعض الأحيان جعلوا من الذريعة دليلاً، لكن في بعض الأحيان رفضوها كدليل. على سبيل المثال، يسمح الشافعي لشخص مسن (مثل المرضى والمسافر) بمغادرة صلاة الجمعة واستبدالها بصلاة الظهر، لكن عليه الصلاة سرّاً حتى لا يُترك صلاة الجمعة عمداً.^{٣٣}

تقبل علماء المالكية والحنابلة حجتها كدليل الشريعة، وتشمل أسبابها ما يلي:

كما قال الله تعالى في سورة الأنعام آية ١٠٨: "وَلَا تَسُبُّوا الَّذِينَ يَدْعُونَ مِنْ دُونِ اللَّهِ فَيَسُبُّوا اللَّهَ عَدْوًا بِغَيْرِ عِلْمٍ".^{٣٤}

ذكر في الحديث رواه البخاري، أن لا يجوز توبيخ والديه: حَدَّثَنَا أَحْمَدُ بْنُ يُونُسَ قَالَ: حَدَّثَنَا إِبْرَاهِيمُ بْنُ سَعْدٍ عَنْ أَبِيهِ، عَنْ حُمَيْدِ بْنِ عَبْدِ الرَّحْمَنِ، عَنْ عَبْدِ اللَّهِ بْنِ عَمْرٍ وَرَضِيَ اللَّهُ عَنْهُمَا قَالَ: قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ (إِنَّ مِنْ أَكْبَرِ الْكَبَا ئِرِ أَنْ يَلْعَنَ الرَّجُلُ وَالِدَيْهِ) قِيلَ: يَا رَسُولَ اللَّهِ، وَكَيْفَ يَلْعَنُ الرَّجُلُ وَالِدَيْهِ قَالَ: (يَسُبُّ الرَّجُلُ أَبَا الرَّجُلِ، فَيَسُبُّ أَبَاهُ وَيَسُبُّ أُمَّهُ).^{٣٥}

^{٣٢} شفيع الدين صديق، أصول الفقه، ١٦٧.

^{٣٣} عبد الرحمن دهلان، أصول الفقه (جاكرتا: عمرة، ٢٠١٠)، ٢٣٩.

^{٣٤} القرآن سورة الأنعام آية ١٠٨

^{٣٥} محمد بن إسماعيل البخاري، صحيح بخاري، جزء ٤ (لبنون: دار الفكر، دون السنة)، ٦٩.

إن عقوبة توبيخ آباء الآخرين، كما لو أن لعن والديه ليصبح خطيئة كبيرة. تجنب هذه الأفعال هو جزء من سد الذريعة.

هناك أربعة احتمالات يمكن أن تحدث في سد الذريعة. أولاً، بالتأكيد والثاني أكثر احتمالاً، والثالث ممكن، ونادراً ما يكون الرابع³⁶. تعتبر حجج العلماء التالية أمثلة على أن يكون سد الذريعة مثل حفر آبار على الطرق العامة كإجراءات قانونية تؤدي حتماً إلى عواقب قانونية غير قانونية، إلا أن العلماء وافقوا على حظرها، لكنهم شككوا في ملاءمة المسؤولية والعقوبات إذا حدثت. تقع على أشخاص آخرين.

أعطى الإمام الشاطبي مثلاً على بيع العنب، حيث كان عدد قليل من الناس يستخدمونه لصنع الخمر. لا ينطبق إغلاق المنشأة على حالة مماثلة، لأن فوائد الإجراءات القانونية تتجاوز عيوبها، في حين أن الخطر نادر الحدوث. بيع الأسلحة للعدو أثناء الحرب أو بيع العنب لصانعي المشروبات الكحولية، من المرجح أن يؤدي إلى كارثة. من المحتمل أن تتسبب المرأة التي تذهب بمفردها في حدوث طين طيني لها.

لا يزال موقف السد الذريعة كأحد أساليب استثناء الحكم مثار خلاف، خاصة على محور الإمام مذهب، فهناك ثلاث مجموعات كبيرة على الأقل لا توافق على السد الذريعة، بعضها يقبلها تماماً، والبعض الآخر يقبلها تماماً مرة واحدة لا تعترف بذلك.

على سبيل المثال، مالكية والحنابلة، قبلت هاتان المجموعتان تماماً السد الذريعة، وطوّرت مجموعة المالكية هذه الطريقة في نقاشات مختلفة حول الفقه وأصول الفقه حتى يمكن تطبيقها على نطاق أوسع. ذكر وهبة الزحيلي، نقلاً عن رأي الإمام ابن القيم، أن ربع المشكلات في الإسلام يمكن حلها باستخدام سد الذريعة³⁷.

³⁶ Jasser Audah, *al-Maqâshid Untuk Pemula*, terj.: Ali Abd Moen'im (Yogyakarta: SUKA-Press UIN Sunan Kalijaga, 2013), 96

³⁷ وهبة الزهيلي، أصول الفقه الإسلامي، ٨٨٨.

في هذه الأثناء، لم توافق هاتان المجموعتان، الحنافية والشافعية، تمامًا على سد الذريعة كوسيلة لإقرار القانون. في بعض الحالات، تقبل هذه المجموعة كطريقة في وضع قانون ولكن ليس في حالات أخرى.^{٣٨} استخدم الشافعي سد الذريعة في حالة تدفق المياه إلى المزارع أو الحقول، ومنع الشافعي تدفق المياه. لقد كان مسببًا لأنه سيكون وسيلة لمنع فعل الحصول على شيء سمح به الله وأيضًا كوسيلة لحظر شيء خففه الله مؤقتًا، فالمياه كانت رحمة الله التي يمكن لأي شخص الوصول إليها.^{٣٩} استخدمت الحنافية سد الذريعة في حالة المرأة التي تزين نفسها عندما توفي زوجها، ومنعته الحنافية لأنه استطاع أن يجذب التعاطف ورغبة الرجال في الزواج مؤقتًا، ولا يزال ممنوعًا من الزواج لأنه كان لا يزال في فترة العدة.^{٤٠} جماعة الظاهرية، ابن حزم، هذه المجموعة لم تقبل ولم تعترف بسد الذريعة كوسيلة لتحديد القانون. والسبب في ذلك هو أن سد الذريعة مجرد تخمين مؤقت، فالقانون يتطلب اليقين.^{٤١}

في افتتاح الفقرة الرابعة من القنون الأساسي عام ١٩٤٥ لجمهورية إندونيسيا ذكر أن "بعد ذلك، لتشكيل حكومة دولة إندونيسية تحمي الأمة الإندونيسية بأكملها وسفك الدماء الإندونيسي بأكمله وتعزيز الرفاهية العامة، وتنقيف حياة الأمة، والمشاركة في تنفيذ النظام العالمي على أساس الاستقلال والسلام الأبدي والعدالة الاجتماعية، تم صياغة الاستقلال الوطني الإندونيسي في دستور دولة لجمهورية إندونيسيا، والذي تم تشكيله في هيكل دولة جمهورية إندونيسيا التي كانت السيادة على أساس إله واحد، الإنسانية العادلة والحضارة والوحدة الإندونيسية والشعبية بقيادة حكمة الحكمة في التشاور/ التوكيل، وتحقيق العدالة الاجتماعية لجميع الشعب الإندونيسي".^{٤٢}

^{٣٨} وهبة الزهيلي، أصول الفقه الإسلامي، ٨٨٩.

^{٣٩} محمد بن إدريس الشافعي، الأم، جزء ٧ (بيروت: دار المعرفة، ١٩٩٠)، ٢٤٩.

^{٤٠} عبد الغاني الغانمي الدمشقي، اللب في شرح الكتاب، جزء ١ (بيروت: دار المعرفة، ١٩٩٧)، ٤٦٧.

^{٤١} وهبة الزهيلي، أصول الفقه الإسلامي، ٨٨٩.

^{٤٢} صفحة القانون الأساسي لجمهورية إندونيسيا عام ١٩٤٥، ١.

إن تجسيد صوت الفقرة الرابعة من افتتاح القنون الأساسي لجمهورية إندونيسيا لعام ١٩٤٥، بما في ذلك حرية تكوين الجمعيات والتجمع وإصدار الرأي هو جزء من حقوق الإنسان في حياة الأمة في الدولة الموحدة لجمهورية إندونيسيا. لذلك ، وجود HPI كشكل من أشكال ضمانات القنون الأساسي ١٩٤٥ للمواطنين للانضمام والتجمع في منظمة مجتمع للمشاركة في التنمية من أجل تحقيق الأهداف الوطنية في حاوية الدولة الموحدة لجمهورية إندونيسيا على أساس بنجاسيلا

المنظمات المجتمعية بجميع أشكالها موجودة وتنمو وتتطور بما يتوافق مع تاريخ تطور الحياة في المجتمع والأمة والدولة. في تاريخ النضال من أجل استقلال جمهورية إندونيسيا ، كانت منظمات المجتمع المدني الممتدى الرئيسي في حركة الاستقلال بما في ذلك بودي أوتومو (Budi Utomo) ، ومحمدية، ونهضة العلماء وغيرها من المنظمات الجماهيرية التي تم تأسيسها قبل استقلال جمهورية إندونيسيا. يحتوي دور منظمات المجتمع المدني التي حاربت بإخلاص وطواعية وسجلها التاريخي على قيمة تاريخية وممتلكات وطنية مهمة جداً لرحلة الأمة والدولة. وبالتالي ، من المتوقع وجود HPI بالتأكيد كذلك. لكن اتضح العكس.

تنفيذاً لأحكام المادة ٢٨ من القانون الأساسي لجمهورية إندونيسيا لعام ١٩٤٥ ، سنت الحكومة القانون رقم ١٧ لعام ٢٠١٣ بشأن المنظمات المجتمعية والقانون رقم ٩ لعام ١٩٩٨ بشأن حرية التعبير في الأماكن العامة. في القانونين، تم إدراج حقوق كل مواطن كشكل من أشكال الحماية الحكومية لحقوق الإنسان. ومع ذلك، في إطار حماية حقوق الإنسان، واجب على كل مواطن بحماية حقوق الإنسان للآخرين.

تم إدراج تأكيد حماية حقوق الإنسان والالتزامات الإنسانية في المادة ٢٨ ج من القنون الأساسي عام ١٩٤٥ لجمهورية إندونيسيا، واستناداً إلى هذه الأحكام، يمكن أن نستنتج أن مفهوم حقوق الإنسان على أساس المادة ٢٨ جيا من القنون الأساسي عام

١٩٤٥ لجمهورية إندونيسيا ليست مطلق (نسبي). وهذا يتماشى مع وجهة نظر الرابطة في النقطتين الأولى والثانية من إعلان بانكوك بشأن حقوق الإنسان لعام ١٩٩٣ (Bangkok Declaration on Human Rights 1993). ويؤكد ختام النقطتين الأولى والثانية من إعلان بانكوك أن الإعلان العالمي لحقوق الإنسان في سياق الرابطة يجب أن يأخذ في الاعتبار الخصائص الإقليمية والوطنية ومختلف الخصائص التاريخية والثقافية والتاريخية والدين ، بحيث لا ينبغي تفسير الإعلان العالمي لحقوق الإنسان وتحقيقه في تناقض مع الخلفيات الثلاثة المقصودة.^{٤٣}

إن تطوير حماية حقوق الإنسان كما هو موصوف ، من الجوانب الوطنية والإقليمية والدولية على حد سواء ، قد ميز حماية حقوق الإنسان في ظل الظروف العادية (السلام) وفي حالات الطوارئ (Emergency). في القانون الوطني، سنت الحكومة القانون رقم ٣٩ لعام ١٩٩٩ بشأن حقوق الإنسان، والقانون رقم ٢٦ لعام ٢٠٠٠ بشأن محاكم حقوق الإنسان ، والعديد من القوانين الأخرى المتعلقة بحماية حقوق الإنسان والقانون رقم ٢٣ في عام ١٩٥٩ بشأن حالة الخطر، والتي كانت حالة تستبعد حماية حقوق الإنسان. يستند الاستثناء دستورياً إلى الفقرة (١) من المادة ٢٢ من القانون الأساسي ١٩٤٥.

تقرير Perppu رقم ٢ لسنة ٢٠١٧ فيما يتعلق بالتغييرات في القانون رقم ١٧ لعام ٢٠١٣ بشأن المنظمات المجتمعية على اعتبار أن الدولة ملزمة بحماية سيادة NKRI على أساس بنجاسيلا وقانون الأساسي ١٩٤٥، حيث تستند انتهاكات مبادئ وأهداف المنظمات الاجتماعية إلى بنجاسيلا والقانون الأساسي ١٩٤٥ وهو حقير للغاية في ضوء أخلاق الشعب الإندونيسيا، بغض النظر عن الخلفية الإثنية والدينية والوطنية لمرتكبيها.

^{٤٣} شرح بيرو رقم ٢ لعام ٢٠١٧ بخصوص المنظمات المجتمعية. ٢

بالإضافة إلى ذلك، فإن القانون رقم ١٧ لعام ٢٠١٣ الذي ينظم المنظمات المجتمعية لم ينظم بشكل شامل المعايير التي تتعارض مع بنجاسيلا وقانون أساسي ١٩٤٥ ، مما أدى إلى فراغ قانوني في حالة العقوبات الفعالة المطبقة كأمر مسلم به.^{٤٤}

يمكن تصنيف شرط بيروا على منظمات المجتمعية المدني التي وقّع عليها الرئيس جوكو ويدودو في ١٠ يوليو ٢٠١٧ في نظر الفقه كشكل من أشكال تصرف الإمام (سياسة الرعييم). أن سياسة القائد يجب أن تكون متوافقة مع المنفعة. ذكر في قواعد الفقه : "تصرف الإمام على الرعية منوط بالمصلحة."^{٤٥}

الفائدة المتوقعة هي إنشاء دولة موالية لخلق السلام والسلام والازدهار في حياة الأمة والدولة. لا شك أن وجود عدد من المنظمات الجماهيرية مثل HTI التي رفضت بوضوح أيديولوجية دولة إندونيسيا وحاولت استبدالها بنظام حكومة الخلافة ليست مشكلة في إطار الدولة الوحيدة لجمهورية إندونيسيا المليئة بخيانة الأمانة، المليئة بالاختلافات في الدين والعرق والإثنية والأمة. وبالتالي، بما في ذلك المنظمات الجماهيرية التي تتعارض مع بنجاسيلا وقانون أساسي ١٩٤٥ ، كما هو منصوص عليه في فصل ٥٩ (٣) (أ) و (٤) (ب) و (ج) بيروا رقم ٢ لعام ٢٠١٧. هذه التفاهات والإجراءات لا تؤدي بالتأكيد إلى مصلحة عامة "الشاملة" في الدولة.

بناءً على أحكام فصل ٥٩ (٣) (أ) (٤) (ب) و (ج) بيروا رقم ٢ لعام ٢٠١٧ ذكر

:

"القيام بأعمال عدائية تجاه العرق أو الدين أو الشعب أو الطبقة"

⁴⁴ Dian Kus Pratiwi, "Impilkasi Yuridis Peraturan Pemerintah Pengganti Undang-Undang Nomor 2 Tahun 2017 tentang Perubahan Atas Undang-Undang Nomor 17 Tahun 2013 tentang Organisasi Kemasyarakatan di Indonesia", *PJIH*, Vol. 4 No. 2 Tahun 2017., 291

^{٤٥} السيوطي، الأشبح والنظائر، ١٢١

"يحظر على منظمات المجتمعية المدني القيام بأنشطة انفصالية تهدد سيادة الدولة الموحدة لجمهورية إندونيسيا؛ و/أو الالتزام بالتعليمات أو التفاهات التي تتعارض مع بنجاسيلا وتطويرها ونشرها ما مدى أهمية وحالة الطوارئ في هذا البلد من التعليم والتفاهات التي تتعارض مع بنجاسيلا"

ما مدى خطورة هذا البلد وحالته الطارئة من التعليم والتفاهات التي تتنافى مع البانشاسيلا ، لذلك يجب أن يولد بيبو رقم ٢ لعام ٢٠١٧ فيما يتعلق بالمنظمات الاجتماعية؟ استنادًا إلى سجلات الوكالة الوطنية لمكافحة الإرهاب (BNPT) لعام ٢٠١٧ ، هناك ١٧ منطقة/مدينة في جاوى الشرقية مصابة بفكر التطرف وأيديولوجية الخلافة. أصبحت الجامعات الكبرى المعروفة في المدن الكبرى في إندونيسيا في يوجياكرتا وباندونغ وغيرها من المدن أماكن مزدهرة للتفاهم. ويمكن تصنيف ذلك من حيث الأزمات القهرية، التي يحق فيها للرئيس وضع اللوائح الحكومية كبديل للقانون.

العبارات المتعلقة بإلحاح القوة في سياق الفقه تسمى الضرورة أو الطوارئ. في تطبيق الأحكام القانونية في حالات الضرورية، فإنه يختلف عن الأحكام القانونية العادية. حتى لسبب إعلان مبرر في انتهاك الأحكام القانونية العادية كما يطبقها العلماء عادة، مثل قواعد الفقه : "الضرورة تبيح المحظورات".^{٤٦}

في هذه الحالة، فإن إصدار بيبو منظمات المجتمعية، لأنه كان مدفوعًا بوجود منظمات جماهيرية في القيام بأدوارها وأهدافها يهدد سيادة جمهورية إندونيسيا، وبناءً على بيبو، تم حل المنظمات الجماهيرية من قبل الحكومة دون المرور بعملية قضائية على النحو المنصوص عليه في القانون منظمات المجتمعية رقم ١٧ لعام ٢٠١٣. إذا تم حل الأوامر التي تنتهك أحكام القانون دون الدخول في إجراءات المحكمة محظورة لأنها تنتهك أحكام

^{٤٦} السيوطي، الأشبح والنظائر، ١٤

القانون. ومع ذلك، لأنه في ظروف وحالات الطوارئ الخطيرة، يمكن حل أفكار HTI وجهودها بشأن الخلافة التي تهدد دولة إندونيسيا بدون إجراء قضائي.

إن الجهد المبذول لإقامة دولة الخلافة على الأرض في إندونيسيا هو عمل من شأنه أن يسبب أعمال شغب داخل الدولة، وكذلك حل HTI يمكن أن يتسبب أيضًا في مفسدة في شكل رفض قوي، مظاهرات من قبل المتعاطفين مع HTI السابق نفسه. العيان وسوء الفهم يواجهان بعضهما البعض، لذلك ما يجب اختياره هو أخف ضرر، وهو تفريق HTI بسهولة أكبر، وهذا مدرج أيضًا في تطبيق طريقة سدر الدزارية. لذلك، سياسة الحكومة عن طريق إصدار بيروا منظمات المجتمعية وحل HTI وفقا لقواعد الفقه: "إذا تعارض المفسدتان روعي أعظمهما ضررا بارتكاب أخفهما".^{٤٧}

حتى لو كانت الجماعة الإسلامية/الخلافة الإسلامية، وفقًا لجماعة HTI، هي النموذج المثالي للحكومة كما وعد الله،^{٤٨} لأنها تقوم على الإسلام، وقد جسد الصحابة ذات يوم كخليفة للنبي، وهذا بالطبع هو المصلح. بينما قامت إندونيسيا ببناء ركيزة قوية ومبدأ يرتكز أساس الدولة على البانشاسيلا ودستور عام ١٩٤٥، فإن تحويلها إلى دولة الخلافة سيصبح بدلاً من ذلك مفسدة في شكل صراعات قبلية وعنصرية ودينية ويمكن أن تؤدي إلى تفكك وطني لأن إندونيسيا تتكون من قبائل وأعراق وأديان مختلفة. وبالتالي، هناك مصلحة مرغوب فيها ولكن هناك مفسدات والتي ستحدث، في هذا السياق، أول شيء فعله هو رفض المحن. وهذه القضية توافق مع قواعد الفقهية: "درء المفاسد مقدم على جلب المصالح".^{٤٩} الغرض من القاعدة المذكورة أعلاه، إذا تم تطبيق نظام الخلافة في إندونيسيا، فمن المؤكد أن له آثار الصراعات بين الجماعات والأعراق والأشعاب والأديان والفريق التي تعيش

^{٤٧} نفس المرجع، ٧٨.

^{٤٨} Abdul Qahar, "Eksistensi Gerakan Ideologi Transnasional HTI Sebelum dan Sesudah Pembubaran", *Kalam*, Vol. 11 nomor 2 Desember 2017, 392

^{٤٩} السيوطي، الأشبه والنظائر، ٨٧.

في وئام وسلام معهم. لذا فإن رفض النزاع هو ما يجب طرحه بدلاً من الحلم بالصلح من خلال نظام الخلافة المطلوب.

مع ولادة بربوا رقم ٢ لعام ٢٠١٧ فيما يتعلق بالمنظمات المجتمعية يمكن إغلاق الطريق (سد الذريعة) من جديد ظهور تعاليم أو تفاهات تتناقض مع بنجاسيلا. كطريقة لتأسيس الشريعة الإسلامية، يعني سد الذريعة بحظر اتخاذ إجراءات قانونية، لأنه يخشى أن يؤدي ذلك إلى أعمال غير قانونية.⁵⁰

تعتبر الجمعيات والمجموعات مثل إنشاء منظمات المجتمع المحلي إجراءات/أفعالية قانونية مضمونة ومحمية بموجب القانون. ومع ذلك، كان يخشى أن يؤدي ذلك إلى أعمال غير قانونية مثل إنشاء حكومة الخلافة واستخدامها كمتنديات لنشر التعاليم أو التفاهات التي تتعارض مع بنجاسيلا، والتي تم حظرها. وبالتالي، فإن بربوا رقم ٢ لعام ٢٠١٧ فيما يتعلق بالمنظمات الاجتماعية يعني صراحة إغلاق المنظمات المجتمعية التي لديها تعاليم أو تفاهات تتناقض مع بنجاسيلا التي تولد من جديد داخل الدولة الموحدة لجمهورية إندونيسيا، ومنعت HHI من العيش في جمهورية إندونيسيا.

يمكن إلغاء تصنيف الحكومة من خلال إلغاء ترخيص إنشاء كيان قانوني HHI وما يترتب عليه من حل على مستوى ساد الدزارية الذي إذا تم تركه بدون رقابة سيؤدي بالتأكيد إلى ضرر وخطر على استقرار حياة الدولة، لأنه من الواضح أن ذلك سيؤسس دولة خلافة ولن يقبل بانكاسيلا وأساس الدولة. على مستوى التنفيذ، باستخدام مصطلحات الفلسفة الأخلاقية، تشمل طريقة الدزارية الحزينة على مقارنة تبعية تعني أن الاستخدام والتطبيق يعتمد على نوع العواقب التي تسببها. إذا كانت العواقب مؤكدة، يصبح سد الذريعة وسيلة بديلة يجب اتباعها.

⁵⁰ Jasser Audah, *al-Maqâshid Untuk Pemula*, 95

الخاتمة

من منظور القانون الدستوري الإسلامي، تتواءم الدولة الموحدة لجمهورية إندونيسيا مع مبادئ إدارة الدولة الإسلامية، لأن نظام الحكم المطبق قد تبني مبادئ الدستور الإسلامي مثل؛ المساواة، والعدالة، والمشاورة، والحرية. ويرد المبدأ في المبادئ الخمسة لبنجاسيلا. يمكن لجهود HTI لتشكيل حكومة خلافة وفقاً لنسختها في دولة الموحدة لجمهورية إندونيسيا أن تعطل نظام الدولة وأساسها وفلسفتها، ويمكن أن تؤدي إلى تفكك وطني، ويمكن أن تقضي على التسامح الديني الذي يعد أساساً في إدارة الدولة الإسلامية. إن الديمقراطية التي هي تجسيد لمبدأ الشريعة يمكن أن تمزق من رحم الأرض، على الرغم من أن مبدأ الشريعة هو مبدأ في وحدة الإسلام.

تم رفض بنجاسيلا وقانون أساسي عام ١٩٤٥ كأساس للدولة الناجم عن الاتفاق المتبادل بين مؤسسي وقادة الدولة من قبل HTI، على الرغم من أن أساس الدولة وفلسفتها لا يتماشيان مع التعاليم الإسلامية. رفض وجود بنجاسيلا والقانون الأساسي ١٩٤٥ يعني عدم قبول قيم وتعاليم الإسلام الواردة فيها، بالإضافة إلى أولئك الذين لا يطيعون أحكام أولي الأمر. بطبيعة الحال، فإن إصدار بيرو للتنظيم الاجتماعي رقم ٢ لعام ٢٠١٧ بشأن وجود HTI من وجهة نظر سد الذريعة الذي له معنى حظر الإجراءات القانونية، لأنه يخشى أن يؤدي إلى أعمال غير قانونية. وهكذا، فإن إصدار بيرو رقم ٢ لعام ٢٠١٧ بشكل صريح يعني ضمناً إغلاق وسائل (سد الذريعة) منظمات المجتمع التي لها تعاليم أو تفاهات مخالفة لبنجاسيلا ولدت وانتشرت داخل جمهورية إندونيسيا الموحدة وأصبح HTI محظوراً على العيش في جمهورية اندونيسيا.

وفقاً للنهج اللاحق، فإن وجود HTI في خطوات وأهداف تنظيمها يهدد سيادة الدولة الموحدة لجمهورية إندونيسيا، بحيث يشمل ذلك فئة السد الدرزية التي ستؤدي بالتأكيد إلى

إلحاق ضرر وخطر على استقرار الدولة بسبب رفضها الصريح للأساس والفلسفة ولاية بنجاسيلا. لذلك، لتجنب المزيد من الاستقلالية، فإن البديل عن حل HTI هو خيار الحكومة الذي يجب طرحه لأنه مدرج في أخاف الضارين، والله أعلم باصواب.

قائمة المراجع

- Afifah, Wiwik. "Sistem Pembubaran Organisasi Kemasyarakatan di Indonesia", *Jurnal Supremasi*, Vol. 8, No. 1, Maret 2018.
- Afifuddin Muhajir, *Fiqh al-Siyasah al-Daulah*, Yogyakarta, IRCiSoD, 2017.
- Al-Bukhori, Muhammad Isma'il, *Shahih Bukhori*, V 4, Beirut, Dar el-Fikr, tt.)
- Al-Ghanimi, Abdul Ghani al-Dimasyqi, *Al-Lubab fi Syarhi al-Kitab*, V 1, Beirut, Dar el-Makrifat, 1997 M.
- Al-Ghazali, Abu Hamid Muhammad ibn Muhammad, *Ihya' Ulum Al-Din*, V 1, Beirut, Dar el-Makrifat, tt.
- Al-Mawardi, Abu al-Hasan Ali ibn Muhammad ibn Muhammad ibn Habib, *Al-Ahkam al-Sulthaniyah*, Beirut, Dar el-Makrifat, tt.
- Al-Shatibi, Ibrahim ibn Musa Abu Ishaq, *Al-Muwafaqat fi Ushuli al-Syariah*, V 1, Beirut, Dar el-Kotob el-Ilmiyah, 2011.
- Al-Suyuthi, Abdurrahman ibn Abu Bakar, *Al-Asybah wa al-Nadzair*, Beirut: Dar el-Kutub el-Ilmiyah, 1403 H.
- Al-Syafi'I, Muhammad ibn Idris, *Al-Um*, V 7, Beirut, Dar el-Makrifat, 1990 M.
- Al-Thabary, Abu Jakfar Muhammad ibn Jarir, *Tarikh Al-Rasul wa el-Muluk*, Cairo, Dar el-Ma'arif, tt.
- Al-Tirmidzi, Muhammad ibn Isa. *Sunan Al-Tirmidzi*, Mesir, Syirkah Maktabah wa Mathba'ah Mushtafa al-Bab al-Halabi, 1975 M.
- Al-Zuhaily, Wahbah, *Ushul el-Fiqh Al-Islami*, V 2, Syiria, Dar el-Fikr, 2001 M.
- Ardhinata, Miko. "Kewenangan Pemerintah dalam Pembubaran Organisasi Masyarakat Hizbut Tahrir Indonesia (HTI) Berdasarkan Undang-Undang Nomor 13 Tahun 2013, *Surya Keadilan*, Vol. 1, No. 1, November 2017.

- Audah, Jasser, *al-Maqâshid Untuk Pemula*, terj.: Ali Abd Moen'im, Yogyakarta, SUKA-Press UIN Sunan Kalijaga, 2013.
- Departemen Agama RI, *Al-Qur'ân dan Terjemahnya*, Jakarta, PT. Hati Emas, 2014.
- Ibn Mandzur, Muhammad ibn Mukarram, *Lisanu Al-Arab*, V 3, Beirut, Dar el-Shodiq, vol. 3, tt.).
- Ibnu Khaldun, *Muqaddimah Ibnu Khaldun*, Beirut, Dar el-Ihya' el-Araby, tt.
- Ismail, Arifuddin. "Pemikiran dan Gerakan Keagamaan Mahasiswa: Menelusuri Merebaknya Radikalisme Islam Di Kampus", *Harmoni Jurnal Multikultural dan Multireligius*, Vol. 3, Juli-September 2012.
- Jamilah, Siti. "Gerakan Hizbut Tahrir di Kota Pare-Pare (Membaca Pengaruh Pemikiran Raqyuddin a-Nabhani)", *Jurnal Diskursus Islam*, Vol. 3, No. 1, 2015.
- Kitab Undang-Undang Dasar Negara Republik Indonesia Tahun 1945,. 1 <https://luk.staff.ugm.ac.id/atur/UUD1945.pdf>, diakses pada tanggal 23 Mei 2018.
- Mahdi, Imam. "Pembubaran Ormas Radikal dalam Perspektif Perundang-Undangan (Kajian Khusus Perppu No. 2 Tahun 2017)", *Nuansa*, Vol. X, Nomor 2, Desember 2017.
- Muhsin, Ilyya. "Gerakan Penegakan Syariah: Studi Gerakan Sosial Hizbut Tahrir Indonesia", *Ijtihad Jurnal Wacana Hukum Islam dan Kemanusiaan*, Vol. 12, No. 1, Juni 2012.
- Pratiwi, Dian Kus. "Impilkasi Yuridis Peraturan Pemerintah Pengganti Undang-Undang Nomor 2 Tahun 2017 tentang Perubahan Atas Undang-Undang Nomor 17 Tahun 2013 tentang Oragnisasi Kemasyarakatan di Indonesia", *PJIH*, Vol. 4 No. 2 Tahun 2017.
- Qahar, Abdul "Eksistensi Gerakan Ideologi Transnasional HTI Sebelum dan Sesudah Pembubaran", *Kalam*, Vol. 11 nomor 2 Desember 2017.
- Rijal, Syamsul. "Radikalisme Klasik dan Kontemporer: Membanding Khawarij dan Hizbut Tahrir" *Al-Fikr*, Vol. 14, No. 2 tahun 2010.
- Rokhmad, Abu. "Radikalime Islam dan Upaya Deradikalisasi Paham Radikal", *Walisongo*, Vol. 20, No. 1 Mei, 2012.

Abdul Jalil, Muhammad Taufiq

Syafi'uddin Shodiq, *Ushul Al-Fiqh*, Jakarta, Kencana Prenada Media, 2011.

Taqwa, Libasut. "Evolusi Gerakan HTI dan Acaman Terhadap Generasi Muda", *Jurnal Review Politik*, Vol 5 No. 1 Juni, 2015.



al-Ihkam: Jurnal Hukum dan Pranata Sosial, 14 (1), 2019: 178-200
ISSN: 1907-591X, E-ISSN: 2442-3084
DOI: <http://doi.org/10.19105/al-Ihkam.v14i1.1844>

The Urgency to Incorporate the Islamic Concept of Rights into the International Human Rights Law Course in Indonesian Law Schools

Sigit Riyanto

*Department of International Law and Dean of the Faculty of Law,
Universitas Gadjah Mada, Jl. Sosio-Yustisia No. 1, Bulaksumur, Yogyakarta
Email: riyanto@gadjahmada.edu*

Fajri Matahati Muhammadin

*Department of International Law, Faculty of Law,
Universitas Gadjah Mada, Jl. Sosio-Yustisia No. 1, Bulaksumur, Yogyakarta*

Article history: Received: 25 February 2019, Accepted: 6 October 2019,
Published: 11 July, 2019

Abstract:

The discourse between International Human Rights Law (IHRL) and Islam has been a longstanding one. However, not all IHRL courses in Indonesia include Islamic human rights as one of the taught chapters. This normative research explores the urgency to include Islamic human rights in the IHRL curriculum and finds that it is indeed urgent to do so. There are two reasons found to include Islamic human rights in IHRL. First, it is a counter to the Eurocentric discourse of IHRL. Second, there are paradigmatic differences between IHRL and Islam which, if not understood, will make it difficult to fairly consider the discourse and analyze the derivative issues. There are two paradigmatic differences between IHRL and Islamic human rights, which are the epistemology and rights-obligation construction.

Keywords:

Islam; Human Rights Law; International Law; Indonesian.

Author correspondence email: riyanto@gadjahmada.edu
Available online at: <http://ejournal.iainmadura.ac.id/index.php/alihkam/>
Copyright (c) 2019 by al-ihkam. All Right Reserved



Abstrak:

Diskursus antara Hukum Hak Asasi Manusia Internasional (HHAMI) dan Islam telah ada sejak lama dan hingga kini tidak habis-habis. Akan tetapi, ternyata tidak semua mata kuliah HHAMI yang diajarkan di fakultas-fakultas hukum Indonesia memasukkan HAM Islam sebagai salah satu pokok bahasan. Penelitian yang bersifat normatif ini akan mengkaji urgensi memasukkan konsep HAM Islam ke dalam kurikulum HHAMI di mana hal tersebut diketahui memiliki urgensi. Ditemukan dua alasan utama untuk melakukan hal tersebut. Pertama, sebagai salah satu *counter* terhadap narasi Eurosentrisme dalam diskursus HHAMI. Kedua, ternyata ada beberapa perbedaan yang bersifat paradigmatis antara HHAMI dan Islam, yang apabila tidak dikenal maka akan sulit mendudukkan diskursus HHAMI dan Islam dengan akurat apalagi mengkaji isu-isu turunan dengan tepat. Perbedaan paradigmatis ini ada dua, yaitu pada tatanan epistemologi serta konstruksi antara hak dan kewajiban.

Kata Kunci:

Islam; Hak Asasi Manusia; Hukum Internasional; Indonesia.

Introduction

There are so many discourses between international human rights law (hereinafter, IHRL) and Islam. So many fierce debates occur on this issue, and perhaps it can be agreed by all that there are matters of agreement and disagreements between IHRL and Islam.¹ The differences are not only in the detailed rights and application, but also at a paradigmatic level as this research will show.² Therefore, it

¹ See *inter alia*: Abdullahi Ahmed An-Na'im, "Why Should Muslims Abandon Jihad? Human Rights and the Future of International Law," *Third World Quarterly* 27, No. 5 (2006): 785-97; Mashood A. Baderin, *Hukum Internasional Hak Asasi Manusia dan Hukum Islam* (Jakarta: Komisi Nasional Hak Asasi Manusia, 2010); Ann Elizabeth Mayer, "Universal versus Islamic Human Rights: A Clash of Cultures or Clash with a Construct," *Mich. J. Int'l L.* 15 (1993): 307.

² The differences can go as deep as epistemology, as Islam and the Western-secular rooted human rights concept are worlds apart in this regard. Surely the derivative products (knowledge and rules) of the two would have differences that cannot be comprehended without first understanding the paradigmatic differences. This research goes deeper into this. Further reading on this difference of epistemology:

should be common sense to teach the Islamic concept of rights as one of the subjects in the teaching of IHRL in the world, and it should be more so in Islamic nations.³

However, a short survey conducted by the Research Team reveals that the teaching of IHRL courses in several universities in Indonesia has little to do with Islamic rights content. How can a law graduate understand, interpret, and apply Islamic laws or laws influenced by Islamic teachings without understanding or even knowing Islamic law theories? This is despite Islam being the second-largest religion in the world,⁴ and Indonesia has the largest Muslim population in the world.⁵ Besides, the Indonesian legal system has some Islamic influence albeit not formally being an Islamic state. The making of the Pancasila as the state ideology and 'source of all sources of law' was very heavily influenced by Islamic teachings and the Muslims.⁶

Some researches have addressed concern towards the issue mentioned above and also suggested prospects towards Islamization of knowledge.⁷ Those researches focus only on the Introduction to Jurisprudence course and only on particular chapters. As for the relation between IHRL and Islam, academic works mostly discuss the prospect of reconciliation the two different.⁸ It is difficult to find researches addressing the urgency to apply Islamization of

Adian Husaini and Dinar Dewi Kania, eds., *Filsafat Ilmu: Perspektif Barat dan Islam* (Jakarta: Gema Insani Press, 2013).

³ See for example, at the Ahmad Ibrahim Kuliyyah of Laws, International Islamic University of Malaysia, there is a course named "Fundamental Rights in Islam".

⁴Drew Desilver and David Masci, "World's Muslim Population More Widespread than You Might Think," Pew Research Center, 2017, <http://www.pewresearch.org/fact-tank/2017/01/31/worlds-muslim-population-more-widespread-than-you-might-think/>.

⁵Desilver and Masci.

⁶M. Saifullah Rohman, "Kandungan Nilai-Nilai Syariat Islam alam Pancasila," *Jurnal Studi Agama Millah* 13, No. 1 (2013): 209-11.

⁷ See *inter alia*: Fajri Matahati Muhammadin and Hanindito Danusatya, "De-Secularizing Legal Education in Indonesian Non-Islamic Law Schools: Examining The 'Introduction to Jurisprudence' Textbooks On The 'Norm Classification' Chapter," *Ulul Albab: Jurnal Studi dan Penelitian Hukum Islam* 1, No. 2 (2018): 135-58.

⁸ See *inter alia*: Mashood A Baderin, *International Human Rights and Islamic Law* (Oxford: Oxford University Press, 2003). Baderin's work juxtaposes the rights in IHRL and Islam and suggests possible ways to reconcile the differences.

knowledge specifically in the context of the teaching of IHRL. Therefore, this research brings forth something new by observing the need for Islamization of knowledge in the context of teaching IHRL.

This research observes the urgency to incorporate the Islamic concept of rights into the IHRL courses in law schools. There are two major problems found, and it is these two problems which are discussed in this research: First, Islam's relation with international law throughout the ages has been met with problems of 'Eurocentrism'. Second, there are two paradigmatic differences between IHRL and the Islamic concept of rights, which are: Epistemology (secular and non-secular), and the construct of rights and responsibilities. These two problems are the focus of the discussion in this research, and it is found that they are essential to understand to objectively comprehend the discourse of IHRL and Islam. Likewise, it will be very difficult to understand the discourse of IHRL and Islam without introducing the Islamic concept of rights, especially at the paradigmatic level, in the IHRL courses.

Method

This research is mainly doctrinal legal research that analyses legal principles, doctrines, and theories and their relevance towards the teaching of IHRL. Two approaches will be combined, i.e. post-colonial theories in critical international law especially as argued by Antony Anghie, and the Islamic worldview as developed by Syed Muhammad Naquib Al-Attas. A literature review is conducted primarily using information and data obtained from books, articles, researches, and the primary, secondary, and tertiary sources of law of both international and Islamic law.

Discussion and Result

Unlike the secular understanding of what 'religion' means and encompasses, Islam is an *Al-dîn* whose meaning includes 'judicious power'.⁹ The Islamic legal system itself has the Al-Qur'ân and Sunnah

⁹ Edward William Lane, *An Arabic-English Lexicon: In Eight Parts*, Vol. 3 (Bayrût: Librairie du Liban, 1968), 942-47. For a detailed comparison between the Islamic notion of 'religion' and the secular one, see Syed Muhammad Naquib Al-Attas, *Islam and Secularism* (Kuala Lumpur: ISTAC, 1993); Zara Khan, "Refractions Through the

as primary sources, and matters not specifically and explicitly regulated in those primary sources will be derived from those primary sources through *ijtihad*.¹⁰

Islam and International Law

One of the branches of Islamic law (*fiqh*) regulates the conduct of the Islamic nation with other nations, namely *fiqh al-siyar* (known also as the 'Islamic international law').¹¹ This branch of *fiqh* recognizes agreements and customary laws as source of law as long as they do not contradict the primary sources.¹² *Fiqh al-siyar* has historically contributed positively to the development of the norms of international law.¹³ There are claims that the first charter of rights in the world is the Madinah Charter.¹⁴ In this age, there is still a little role for Islamic law in modern international law, such as the use of Islamic law rules or maxims by the judges of the International Court of Justice.¹⁵

Additionally, there are numerous human rights treaties ratified by Muslim nations that also submitted reservations based on Islamic law.¹⁶ The practice of these Islamic nations which diverges from the

Secular: Islam, Human Rights, and Universality" (The City University of New York, 2016).

¹⁰Imran Ahsan Khan Nyazee, *Islamic Jurisprudence* (Selangor: The Other Press, 2003), 20; Wahbah al-Zuhayli, *Uşûl Al-Fiḡh Al-Islāmī*, vol. 1 (Tehran: Dar Ihsan, 1997), 19; 'Abd al-Karim Zaydan, *Synopsis on the Elucidation of Legal Maxims in Islamic Law*, trans. Md. Habibur Rahman and Azman Ismail (Kuala Lumpur: IBFIM, 2015), 29.

¹¹Imam Al-Shaybānī, *The Islamic Law of Nations: Shaybani's Siyar*, trans. Majid Khadduri (Maryland: John Hopkins Press, 1966), 5-6.

¹² Al-Shaybānī, 8.

¹³Jean Pictet, *Development and Principles of International Humanitarian Law* (Geneva: Henry Dunant Institute, 1985), 15-17; Nahed Samour, "Is There a Role for Islamic International Law in the History of International Law?," *European Journal of International Law* 25, no. 1 (2014): 313-19.

¹⁴Badria Al-Awadhi, "Address by the Dean of the Faculty of Law and Shari`a in the University of Kuwait," in *Human Rights in Islam* (Geneva: International Commission of Jurists, 1982), 28.

¹⁵Awn S. Al-Khasawneh, "Islam and International Law," in *Islam and International Law: Engaging Self-Centrism from a Plurality of Perspectives*, ed. Marie-Luisa Frick and Andreas Th Müller (Martinus Nijhoff Publishers, 2013), 34-41.

¹⁶Such as the International Covenant on Civil and Political Rights 1966 (ICCPR) and Convention on the Elimination of all Forms of Discrimination Against Women 1979 (CEDAW), where many Islamic states made reservation.

other nations may be recognized as a persistent objection that creates an exception from the development of the customary international law¹⁷ of human rights. This is in addition to the Cairo Declaration on Human Rights in Islam (1990). However, there are various challenges and problems which diminish the role of Islam in international law. Some scholars suggest that it is partly due to the failure of the Organization of Islamic Cooperation to take lead,¹⁸ while others point their fingers towards the crisis of knowledge within the Islamic community itself.¹⁹

'Eurocentrism' as an External Problem

Scholars do not seem to deny that modern international law is of European origin. Some of these scholars accept this without questioning further,²⁰ but other scholars and thinkers, especially those using the post-colonial theory, are more critical and point out that there has been an injustice throughout history which needs to be corrected.

These thinkers have traced back this problem to medieval Europe during the rise of the natural law school of Francisco De Vitoria who justified colonialism as the center of international law at the time: The 'civilized nations' (i.e. the European nations) must 'civilize the uncivilized nations' (i.e. other than the European nations).²¹

¹⁷Malcolm N Shaw, *International Law*, 6th ed. (New York: Cambridge University Press, 2008), 91-93. There is a debate on the 'other states' approval' requirement in this.

¹⁸ See *inter alia*: Salim Farrar, "The Organisation of Islamic Cooperation: Forever on the Periphery of Public International Law?," *Chinese Journal of International Law* 13, no. 4 (2014): 787-817.

¹⁹ See *inter alia*: Syed Muhammad Naquib Al-Attas, *Risalah untuk Kaum Muslimin* (Kuala Lumpur: ISTAC, 2001).

²⁰ Sugeng Istanto, *Hukum Internasional* (Yogyakarta: Penerbit Universitas Atmajaya Yogyakarta, 1994), 9-10.

²¹Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (New York: Cambridge University Press, 2004), 251. This train of thought was adopted by other scholars in that era including those dubbed as 'fathers of international law' such as Emer de Vattel. De Vattel justified the conquest over the natives of North America because these natives were nomadic, while the 'natural law' (according to the Europeans, that is) demands the permanent cultivation of the lands. See Emer De Vattel and Joseph Chitty, *The Law of Nations: Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* (PH Nicklin & T. Johnson, 1835), 35.

In that global colonial era, the colonial powers have made various efforts to eradicate the practice of Islamic law in their colonies. For example, in the part of Nusantara (which is now Indonesia), well-established and pre-existing *adat* and Islamic courts were abolished and replaced by the Dutch law courts.²² It was only after independence that Islam could become an important element in the system of governance in Indonesia,²³ and this is even only to a few matters. This was how a 'Eurocentric' international law was formed, and then preserved through the era of legal positivism.²⁴ It was even further preserved throughout the post-World War II decolonization period,²⁵ and continues to this day where the European (more referred to as 'Western') worldview becomes the measure of truth and correctness by the mere virtue of being Western.²⁶

Examples of this include the imposition of the Western human rights standards of good governance at the World Bank,²⁷ strange and ill-justified UN reports issued by the Committee Against Torture and UN Rapporteurs regarding lashing as a penalty,²⁸ the European Union policy on investments which requires the investee state to apply EU-

²²Ramlah, "Implikasi Pengaruh Politik Hukum Kolonial Belanda Terhadap Badan Peradilan Agama di Indonesia," *Jurnal Kajian Hukum Islam* 12, No. 1 (2012): 386-90.

²³ As explained earlier, even the Pancasila as state ideology was heavily influenced by Islam and the Muslims. See: Rohman, "Kandungan Nilai-Nilai Syariat Islam dalam Pancasila"; Marybeth T. Acac, "Pancasila: A Contemporary Application of Maqasid Al-Shari' Ah?," *Journal of Indonesian Islam* 9, no. 1 (2015): 59-78.

²⁴ Fajri Matahati Muhammadin, "Universalitas Hak Asasi Manusia dalam Hukum Internasional: Sebuah Pendekatan Post-Kolonial," in *Hak Asasi Manusia: Dialektika Universalisme vs Relativisme Di Indonesia*, ed. Al-Khanif, Herlambang P. Wiratraman, and Manunggal Kusuma Wardaya (Yogyakarta: LKiS, 2017), 7; John Austin, *The Province of Jurisprudence Determined* (London: John Murray, 1832), 1-2.

²⁵Anghie, *Imperialism, Sovereignty, and the Making of International Law*, 254; Antony Anghie, "Towards a Postcolonial International Law," in *Critical International Law: Post-Realism, Post Colonialism, and Transnationalism*, ed. Prabakhar Singh and Benoit Mayer (Oxford-New Dheli, 2014), 136-37.

²⁶ Wan Mohd Nor Wan Daud, *Islamization of Contemporary Knowledge and the Role of the University in the Context of De-Westernization and Decolonialization* (Johor Baru: UTM Press, 2013), 6-7.

²⁷ The primary victims were the Latin American States. See Anghie, *Imperialism, Sovereignty, and the Making of International Law*, 261-62.

²⁸ Fajri Matahati Muhammadin et al., "Lashing in Qanun Aceh and the Convention Against Torture," *Malaysian Journal of Syariah and Law* 7, no. 1 (2019): 18-20.

style human rights as prerequisite to investments,²⁹ the imposition of the Western-secular gender equality standards in CEDAW,³⁰ and many others. This is the unjust imposition of Western worldview and its products as a universal standard,³¹ also referred to as 'Eurocentrism'.

Traces of Eurocentrism in Law School Education

It has been explained earlier how Islamic law in Indonesia has been heavily reduced due to colonialism. This heavily impacts education. For many years and decades, Islamic law is made alien to law students (including the Muslim students) except for the few parts of it already codified to the Indonesian national legislation. A survey has been conducted towards the law students (Muslims only) of one of the best law schools in Indonesia, and one hundred percent of the respondents did not know any basic of *al-qawā'id al-fiqhiyyah*, but they all recognized the Latin legal maxims which have the same meaning with the basic *al-qawā'id al-fiqhiyyah* asked to them.³²

From the most fundamental aspects, the concept of religion as a norm is taught to display as if it is disconnected from other aspects of life. In the Introduction to Jurisprudence course, for example, most textbooks explain that 'religious norms' is a separate norm from the others such as legal norms, ethical/moral norms, and social norms (although they may complement each other).³³ Religious norms are said to be: (i) only regulating human-God relations, and (ii) has

²⁹Lorand Bartels, "The European Parliament's Role concerning Human Rights in Trade and Investment Agreements," 2014, <http://www.europarl.europa.eu/cmsdata/86031/Study.pdf>.

³⁰ Muhammadin, "Universalitas Hak Asasi Manusia dalam Hukum Internasional: Sebuah Pendekatan Post-Kolonial," 12, 13, dan 16.

³¹ Padahal ia sejatinya tidaklah universal. Lihat: Muhammadin, "Universalitas Hak Asasi Manusia Dalam Hukum Internasional: Sebuah Pendekatan Post-Kolonial."

³² Vina Berliana Kimberly, Novita Dwi Lestari, and Fajri Matahati Muhammadin, "Incorporating Qawaidh Fiqhiyyah to the 'Principles of Law' Chapter in the Introduction to Jurisprudence Course in Indonesia's Legal Education," in *International Conference on Research in Islamic Education 2018 Conference Proceeding, Fakultas Tamadun Islam, Universiti Teknologi Malaysia* (Kuala Lumpur: Springer, 2019), (upcoming).

³³Sudikno Mertokusumo, *Mengenal Hukum (Suatu Pengantar)*, 3rd ed. (Yogyakarta: Liberty, 1991), 5-12; Peter Mahmud Marzuki, *Pengantar Ilmu Hukum* (Jakarta: Prenadamedia Group, 2008), 79-83; Satjipto Rahardjo, *Ilmu Hukum* (Bandung: Citra Aditya Bhakti, 1991), 26.

weaknesses because it only prescribes obligations and does not have worldly sanctions.³⁴ On the other hand, Islam, as explained earlier, is not at all like that.³⁵

Because of that, all courses with traces of Eurocentrism, including IHRL, must be critically reviewed and renewed. Otherwise, these courses will do nothing but preserve and continue the intellectual legacies of colonialism. It must be noted that the Preamble of the Indonesian constitution, in its first line, reads “...*penjajahan di atas dunia harus dihapuskan.*”³⁶ Law students must be aware of a broader extent of the IHRL discourses. Particularly in the discussion of this research, the Islamic concept of rights must be introduced as it is not only a very contemporary discourse but also because it is very close to the identity of the Indonesian people which was once eroded by colonialism.

Islam, Islamic Epistemology, and Its Implications

An undeniable reality of the human rights concept in international law (i.e. IHRL) is its origin from a secular concept.³⁷ This is despite some non-secular states that ratify the IHRL instruments and therefore implement them in a non-secular manner (insofar as they can do so).³⁸ The problem is that the distinction between a secular and non-secular worldview is often understood only at the surface. This is while the differences between the two are very fundamental, and the failure to understand it would render students unable to properly and objectively understand derivative issues.

The first thing to understand is that the term ‘secular’ is fundamentally a worldview of reality as explained by C. A. van Peursen: “...*deliverance first from religious, and then from metaphysical,*

³⁴Mertokusumo, *Mengenal Hukum (Suatu Pengantar)*, 9-10.

³⁵ See further: Muhammadin and Danusatya, “De-Secularizing Legal Education in Indonesian Non-Islamic Law Schools: Examining The ‘Introduction to Jurisprudence’ Textbooks on The ‘Norm Classification’ Chapter”; Khan, “Refractions Through the Secular: Islam, Human Rights, and Universality.”

³⁶ Loosely translated: “... colonialism must be eradicated from the face of the earth.”

³⁷Michael Freeman, “The Problem of Secularism in Human Rights Theory,” *Human Rights Quarterly* 26, no. 2 (2004): 399.

³⁸For example Indonesia, Saudi Arabia, and others.

control over human reason and language.”³⁹ Secularism is then derived into the disenchantment of nature, the desacralization of politics, and deconsecration of values.⁴⁰

Secularism then affects epistemology, especially on the sources of knowledge. The human mind's ratio becomes the only criteria of truth and source of knowledge,⁴¹ while metaphysical realities have neither relevance nor epistemological value.⁴² One of the effects is the promulgation of secular-derived theories such as August Comte's *Law of Three Stages* which assumes that a man taking knowledge from religion is the most primordial stage of man, while a man taking knowledge from the scientific inquiry is the modern (and most advanced) man.⁴³

On the other hand, Islam is very different. The first time the Al-Qur'ān mentions *taqwā*, it is in the form of *muttaqīn* ('people of *taqwā*').⁴⁴ That mention is followed by a list of characteristics of the *muttaqīn*, and the very first characteristic is 'to believe in the *ghayb* or unseen'.⁴⁵ How can someone believe in metaphysical realities without making them a source of knowledge? This is why the Islamic epistemology puts *khobar sādīq* or true news (which includes divine revelation) as one of the causes of knowledge other than ratio, senses, and intuition.⁴⁶ This is where the secular and Islamic epistemology clash.

³⁹Cited in: Harvey Cox, *The Secular City: Secularization and Urbanization in Theological Perspective* (New Jersey: Princeton University Press, 2013), 2.

⁴⁰Al-Attas, *Islam and Secularism*, 18.

⁴¹Adnin Armas and Dinar Dewi Kania, "Sekulerisasi Ilmu," in *Filsafat Ilmu: Perspektif Barat dan Islam*, ed. Adian Husaini and Dinar Dewi Kania (Jakarta: Gema Insani Press, 2013), 7.

⁴²Justus Harnack, *Kant's Theory of Knowledge* (London: Macmillan Publisher, 1968), 142-45.

⁴³Auguste Comte, "Plan of the Scientific Work Necessary for the Reorganisation of Society," in *Comte: Early Political Writings*, ed. H.S. Jones (Cambridge: Cambridge University Press, 1998), 81.

⁴⁴ *Taqwā* means the consciousness of Allah.

⁴⁵ *Ghayb* means 'the unseen', referring to things that exist in a metaphysical but not a physical materialistic plane. See Q.S al-Baqarah 2 :2-3, especially verse 3 where the characteristics of the 'people of *taqwā*' are mentioned.

⁴⁶ Sa'd al-Din Al-Taftazani, *A Commentary on the Creed of Islam (Sa'd Al-Din Al-Taftazani on the Creed of Najm Al-Din Al-Nasafi)* (New York: Columbia University Press, 1950), 15-17.

Some scholars such as Helen Quane merely demand that secular international law must take precedence over religious teachings when they contradict each other.⁴⁷ Meanwhile, one cannot simply put man-made laws over God-made laws unless they have by default applied a secular framework that sees anything 'religious' as primordial as per Comte's theory. Quane simply dismisses the Islamic epistemology without any mention of it and bases her entire case on a secular view.

On the other hand, putting Islamic laws below other laws is one of the nullifiers of Islam.⁴⁸ Even the Pancasila, considering what the First *sila* says, cannot accept Quane's argument. However, it may seem that Quane's position represents mainstream scholarship. Therefore, secular thinkers would not recognize the epistemological problem behind this train of thought and therefore unable to address the issue objectively and correctly.

Case Study: Religious Blasphemy

One of the most concrete case studies to best illustrate the significant difference between both epistemologies is the criminalization of religious blasphemy. On one hand, the position of IHRL is clear. Various bodies under the UN have stated that the criminalization of religious blasphemy is a violation of the freedom of expression.⁴⁹ On the other hand, Islam supports the criminalization of religious blasphemy. There is a consensus among the classical Muslim jurists that religious blasphemy is punishable by death.⁵⁰ Behind both of these different positions are significant epistemological differences.

⁴⁷ Helen Quane, "Legal Pluralism and International Human Rights Law: Inherently Incompatible, Mutually Reinforcing or Something in Between?," *Oxford Journal of Legal Studies* 33, No. 4 (2013): 675.

⁴⁸Committing a nullifier of Islam would render a Muslim no longer within the fold of Islam. Shalih bin Fauzan Al-Fauzan, *Syarah Nawaaqidhul Islam* (Jakarta: Akbar Media, 2017), 122-40.

⁴⁹ OHCHR, "Blasphemy Law Has No Place in a Tolerant Nation like Indonesia - UN Rights Experts," *Office of the High Commissioner of Human Rights*, May 22, 2017, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21646&LangID=E>; HRC, "General Comments No. 34 (CCPR/C/GC/34)" (Geneva, 2011), <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>.

⁵⁰Imam ibn Al-Mundzir Al-Naysaburi, *Al-Ijma* (Saudi Arabia: Maktabah Al-Furqan, 1999), 174.

The secular IHRL position sees no virtue in criminalizing religious blasphemy. This is because *inter alia* most major textbooks explain 'benefit' as a purpose of law with Jeremy Bentham's utilitarianism.⁵¹ John Stuart Mill, Bentham's student, stated that punishments should only be applied only to prevent material danger or loss towards other members of the society (as opposed to the moral infringement).⁵² Bentham is secular, and Mill accepts Comte's Law of Three Stages.⁵³ Surely they do not consider metaphysical danger or loss such as in the context of *aqidah*.⁵⁴

On the other hand, Islam sees it differently. The purpose of the *Syari'ah* (*maqāṣid al-syari'ah*) is to achieve *maṣlaḥat* (advantage) both in this world and the hereafter.⁵⁵ *Maṣlaḥat* is therefore divided into the hereafter's *maṣlaḥat* and the world *maṣlaḥat*.⁵⁶ The hereafter's *maṣlaḥat* truly takes precedence over the world *maṣlaḥat*,⁵⁷ because Islam sees this world as a mere means to achieve the hereafter⁵⁸ and heaven is the best destination in that hereafter.⁵⁹

One of the subjects under *maṣlaḥat* is the *hifdz al-dīn* (preservation of belief, meaning towards Islam) is the glorification of

⁵¹ Sudikno Mertokusumo, *Mengenal Hukum: Suatu Pengantar* (Yogyakarta: Liberty Press, 2006), 80; Marzuki, *Pengantar Ilmu Hukum*, 119; Achmad Ali, *Menguak Tabir Hukum*, 2nd Edition (Jakarta: Penerbit Kencana, 2015), 92-95.

⁵² John Gray, *Mill on Liberty: A Defence*, Second Edition (London and New York: Routledge, 1996), 3.

⁵³ James E. Crimmins, "Bentham on Religion: Atheism and the Secular Society," *Journal of the History of Ideas* 47, no. 1 (1986): 95-110; Sujith Shashi Kumar, "Reassessing JS Mill's Liberalism: The Influence of Auguste Comte, Jeremy Bentham, and Wilhelm von Humboldt." (London School of Economics and Political Science (United Kingdom), 2006), 62.

⁵⁴ Further discussions regarding utilitarianism and *maqāṣid al-syari'ah*: Nurizal Ismail, Fajri Matahati Muhammadin, and Hanindito Danusatya, "The Urgency to Incorporate Maqasid Shari'ah as an Elucidation of 'Benefit' as a Purpose of Law in Indonesia's Legal Education," in *1st International Conference on Law, Technology, and Society (ICOLESS) 2018* (Malang: Universitas Islam Negeri Maulana Malik Ibrahim, 2019).

⁵⁵ Imam Ibn Ashur, *Treatise on Maqasid Al-Shariah* (London: IIIT, 2006), 71.

⁵⁶ Imam Al-Ghazali, *Shifa'al-Ghalil Fi Bayan Al-Syabah Wa Al-Mukhil Wa Masalik Al-Ta'lil* (Baghdad: Mathba'ah al-Irsyad, 1971), 159-61.

⁵⁷ Al-Ghazali, 159; Nyazee, *Islamic Jurisprudence*, 204-6.

⁵⁸ Imam Ibn Al-Qayyim Al-Jawziyah, *'Uddatush Shabirin* (Jakarta: Qisthi Press, 2010), 264.

⁵⁹ See *inter alia*: Q.S Ali Imron 3:185.

Allah, His *dīn* (religion), and his messengers (i.e. prophets).⁶⁰ Blasphemy violates that very fundamental and basic aspect of Islam,⁶¹ and Muslims committing it are considered no longer in the fold of Islam and therefore the laws related to apostasy (*riddah*) would apply towards them.⁶²

It is therefore clear that IHRL which is based on secular-based jurisprudence and thought cannot accept the criminalization of religious blasphemy, while Islam can. Which epistemology should one choose? This is not a difficult choice for Muslim studying law in a state-based upon the Pancasila as a state ideology. Surely this can be debated further. However, if this difference is not even introduced in the classrooms, students will not be able to objectively and accurately comprehend problems rising from these epistemological differences between IHRL and Islam. Consequently, they will be unable to make proper and coherent conclusions when analyzing those problems.

It is understood that this discussion seems more of a philosophical discussion rather than that of law. However, multidisciplinary approaches in legal education (or the education any field, really) is an inevitability.⁶³

The Concept of 'Human Obligations' in Islam

In the realm of IHRL, the term 'rights' (meaning 'entitlement'), is often mentioned as a recurring theme. On the other hand, the term 'obligation', is rarely mentioned other than 'obligation to respect/guarantee rights'. Islam is different in this respect, and this difference has paradigmatic implications.

IHRL is constructed to heavily lean towards rights, one of the factors is that it historically was a regime born out of the extremely massive violation of human rights during World Wars I and II.⁶⁴

⁶⁰ Abd al-Raḥmān Al-Sa'di, *Taysiru Al-Karīma Al-Raḥmān Fī Tafṣīri Kalāmi Al-Mannān* (Cairo: Dar al-Hadith, 2002), 357.

⁶¹ Al-Sa'di, 357. See also: Imam Ibn Al-Qayyim Al-Jawziyah, *Al-Jawāb Al-Kāfi* (Al-Maghrib: Dar al-Ma'rifah, 1997), 46.

⁶² See: Q.S al-Tawbah, 9:65-66. See also: Imam Muhammad bin 'Abd al-Wahhab, *Nawaqidhul Islam - Pembatal Islam (Matan dan Terjemah)* (Surabaya: Pustaka Syabab, 2015), 164-83.

⁶³ See: Mochtar Kusumaatmadja, "Pendidikan Hukum di Indonesia: Penjelasan Tentang Kurikulum 1993," *Jurnal Hukum & Pembangunan* 6, no. 1994 (1994): 498-99.

⁶⁴ Shaw, *International Law*, 271.

However, this absence of ‘human obligations’ to balance the ‘human rights’ was one of the main critics of the Indonesian Council of Ulema towards international human rights.⁶⁵ This problem is also a deviation from the pattern of balance between rights and obligations in legal education. For example, law students are taught in their first semester about the relation between ‘law, rights, and obligations’.⁶⁶ Even, Law No. 39 of 1999 concerning Human Rights prescribes *Kewajiban Dasar Manusia* (i.e. human fundamental obligations).⁶⁷

If two different regimes have different constructions of balancing rights and obligations, surely there would be very different understandings of what ‘rights’ mean and how they are perceived. As a consequence, the detailed enumeration of rights would surely have different meanings between the two different regimes altogether. This is the case with IHRL and Islam.

Islam, in contrast to IHRL, provides both rights and obligations while somewhat inclining towards obligations. From the most fundamental nature of a human being, humans are created with the obligation –not rights—to worship Allah as explained in Q.S al-Dzāriyāt 51:56: “*And I did not create the genie and mankind except to worship Me.*”

Only then that Allah decrees that humans have rights as He is *Al-Raḥmān* which means The Most Compassionate and Merciful towards all creation without exception⁶⁸ and has prohibited *dzulm* (the violation of rights) upon Himself and all creation.⁶⁹ This is why, as argued by Shamrahayu bt. Abdul Aziz, Islam is essentially duty-

⁶⁵“Fatwa Majelis Ulama Indonesia No. 6/MUNAS VI/MUI/2000 Tentang Hak Asasi Manusia” (Jakarta, 2000), 381, <https://mui.or.id/wp-content/uploads/2017/02/26.-Hak-hak-Asasi-Manusia-HAM.pdf>.

⁶⁶Mertokusumo, *Mengenal Hukum (Suatu Pengantar)*, 38–46.

⁶⁷Articles 67-70 of Law No. 39. Of 1999 concerning Human Rights: Obeying the law, defending the state, and respecting the human rights of other people.

⁶⁸Imam Ismail ibn Katsir, *Tafsir Al-Qur’an Al-Adzim*, vol. 1 (Beirut: Dar al-Kutub ‘Ilmiya, 1998), 39.

⁶⁹Imam Muslim, *Sahih Muslim* (Riyadh: Bait Al-Afkar Ad-Dauliyyah, 1998), ḥadīth no.2577. Imam An-Nawawi and Muhammad bin Shalih Al-Utsaimin, *Syarah Hadits Arba’in Imam Nawawi* (Yogyakarta: Media Hidayah, 2006), 195.

based.⁷⁰ This difference with IHRL would create paradigmatic differences towards derivative issues which, if not understood, would result in misunderstanding.

A Case Study on Derivative Issues

Among the differences between IHRL and Islam due to the difference in the construction of rights and obligations is related to knowledge and education. IHRL, through Article 13 (1) of the International Covenant on Economic, Social, and Cultural Rights 1966 (ICESCR), prescribes a right to education.

On the other hand, to receive an education is not a right but rather an obligation.⁷¹ Islamic jurists divide knowledge in two types: first, knowledge which is obligatory to be learned by everyone (*farḍ al-'ayn*) such as the knowledge of *tawhīd* and basic *fiqh*;⁷² and second, knowledge which is obligatory to some people (*farḍ al-kifāyah*) due to a collective necessity of it within the community, such as medical science.⁷³

The Islamic State has obligations to *inter alia* implement and enforces the *Syari'ah* (which contains rights and obligations),⁷⁴ which includes providing education to facilitate the society's need to fulfil their obligation to receive an education. This would also mean that the society would then also have rights to be guaranteed to receive education by the Islamic State so that they can fulfil their obligation as explained earlier. From here, more derivative issues may follow, such as whether someone may choose to be uneducated (IHRL: yes, Islam: no), and many more.

A second derivative issue that resulted from the different construction in rights and obligations, which is very central, is the issue of religion and worship. On one hand, the ICCPR in articles

⁷⁰Shamrahayu Binti Abdul Aziz, "Islamic Concept of Human Rights," in *Human Rights Law: International, Malaysian and Islamic Perspectives*, ed. Abdul Ghafur Hamid @ Khin Maung Sein (Selangor: Thomson Reuters Malaysia Sdn Bhd, 2012), 329.

⁷¹ See *inter alia*: QS. Taha 20: 114, QS. Al-Nahl 16: 78, QS. Muhammad 47: 19, and see also: Imām Al-Ghazālī, *Ihyā' 'Ulūm Al-Dīn*, vol. 1 (Beirut: Dar al-Kutub 'Ilmiya, 1971), 14.

⁷²Al-Ghazālī, 1:14.

⁷³Al-Ghazālī, 1:15-16.

⁷⁴Musthafa Al-Khin and Musthafa Al-Bugha, *Konsep Kepemimpinan dan Jihad dalam Islam: Menurut Madzhab Syafi'i* (Jakarta: Darul Haq, 2014), 110-11.

18(1)-(2) rules that every human being has the freedom to choose their religion and manifest them in acts of worship, and that they may not be forced in a manner that would disrupt that freedom. Here, the role of the government is to guarantee that such freedom is enjoyed by their people.

Islam sees the issue very differently. As explained earlier, to worship Allah is essentially an obligation (instead of a right) towards all *jinn* and human beings as Q.S al-Dzāriyāt 51:56 mentions. Besides, Islam only recognizes one religion (i.e. Islam) as the true religion as Q.S Ali Imrān 3:19 stated: “Indeed, the religion in the sight of Allah is Islam.”

As a side note, it is important to note that the consequence of the obligation to worship Allah in Islamic terms does not mean that Muslims may coerce non-Muslims to accept Islam.⁷⁵ Rather, it is understood to mean that Muslims must conduct *da'wah* (propagation) with good arguments and in the best of manners.⁷⁶ If a non-Muslim refuses to accept Islam until the end of her/his life, it would be their business with Allah.⁷⁷

The differences of construction between IHRL and Islam regarding religion and worship, which is a right according to IHRL and an obligation according to Islam, causes a complex relationship between the two. At times, IHRL and Islam can agree on certain issues. For example, the Human Rights Committee declared that the *hijāb* (or *khimār*, referring to the headscarf worn by Muslim women) prohibition in Uzbekistan was a violation of human rights.⁷⁸ The Muslims would surely support the condemnation towards that Uzbekistan policy. However, there are times when disagreements and misunderstandings occur between IHRL and Islam. An example of

⁷⁵See: QS. Al-Baqarah 2: 256, and: Haji Abdulmalik Abdulkarim Amrullah, *Tafsir Al-Azhar*, vol. 1 (Singapore: Pustaka Nasional PTE Ltd, n.d.), 623–24.

⁷⁶ Haji Abdulmalik Abdulkarim Amrullah, *Tafsir Al-Azhar*, vol. 5 (Singapore: Pustaka Nasional PTE Ltd, n.d.), 3989–90.

⁷⁷ I.e. to receive punishment in the hereafter. See: QS. Al-Kahf 18:29, also see: Haji Abdulmalik Abdulkarim Amrullah, *Tafsir Al-Azhar*, vol. 6 (Singapore: Pustaka Nasional PTE Ltd, n.d.), 4191.

⁷⁸ UN Human Rights Committee, *Hudoyberganova v. Uzbekistan*, CCPR/C/82/D/931/2000, para. 6.2.

this is Ann Elizabeth Mayer's critic of the imposition of *hijāb* in Saudi Arabia.⁷⁹

According to Mayer, Saudi's policy is not Islamic teaching but rather a mere political maneuver. In her explanation, it is clear that Mayer sees that for Muslim women to wear the *hijāb* is a right (which may or may not be exercised, at the discretion of the individuals), while the government should have only taken the role as guarantor of rights.⁸⁰ However, in Islam, wearing a *hijāb* is obligatory for grown-up women.⁸¹ As explained earlier, an Islamic state has to implement and enforce the *Syari'ah* which is duty-based. This is different from an IHRL construct, where Mayer seems to misunderstand and therefore ends up with an inaccurate conclusion.

Conclusion

It has also been shown that there are some paradigmatic differences between IHRL and the Islamic concept of rights which, if not understood, will cause much misunderstanding. It is difficult to truly understand religion-related issues such as deviant sects or religious blasphemy if one analyzes the relevant Islamic laws but using a secular epistemology. For instance, failing to understand the difference in the construction of rights and obligations (i.e. IHRL focusing on rights, and Islam focusing on both but leaning towards obligations) would also lead to misunderstanding and confusion in derivative issues. Therefore, it is essential to incorporate the Islamic concept of rights in the curriculum of the IHRL course in Indonesian law schools. More importantly, the syllabus must emphasize the identification and understanding of the paradigmatic differences between IHRL and the Islamic concept of rights. This is hoped to help facilitate the students to be able to study and analyze issues related to IHRL and Islam more objectively and accurately.

Bibliography

'Abd al-Wahhab, Imam Muhammad bin. *Nawāqidhul Islam - Pembatal*

⁷⁹Mayer, "Universal versus Islamic Human Rights: A Clash of Cultures or Clash with a Construct," 393-97.

⁸⁰Mayer, 402-3.

⁸¹ Except in front of their immediate family. Imam ibn Ḥazm, *Marātib Al-Ijmā'* (Beirut: Dar al-Kutub al-'Ilmiyyah, n.d.).

- Islam (Matan Dan Terjemah)*. Surabaya: Pustaka Syabab, 2015.
- Acac, Marybeth T. "Pancasila: A Contemporary Application of Maqasid Al-Shari'Ah?" *Journal of Indonesian Islam* 9, no. 1 (2015): 59-78.
- Al-Attas, Syed Muhammad Naquib. *Islam and Secularism*. Kuala Lumpur: ISTAC, 1993.
- — —. *Risalah Untuk Kaum Muslimin*. Kuala Lumpur: ISTAC, 2001.
- Al-Awadhi, Badria. "Address by the Dean of the Faculty of Law and Shari'ah in the University of Kuwait." In *Human Rights in Islam*. Geneva: International Commission of Jurists, 1982.
- Al-Fauzan, Shalih bin Fauzan. *Syarah Nawaaqidhul Islam*. Jakarta: Akbar Media, 2017.
- Al-Ghazali, Imam. *Shifa'al-Ghalil Fi Bayan Al-Syabah Wa Al-Mukhil Wa Masalik Al-Ta'lil*. Baghdad: Mathba'ah al-Irsyad, 1971.
- Al-Ghazali, Imām. *Ihyā' 'Ulūm Al-Dīn*. Vol. 1. Beirut: Dar al-Kutub 'Ilmiya, 1971.
- Al-Jawziyah, Imam Ibn Al-Qayyim. *'Uddatush Shabirin*. Jakarta: Qisthi Press, 2010.
- — —. *Al-Jawāb Al-Kāfi*. Al-Maghrib: Dar al-Ma'rifah, 1997.
- Al-Khasawneh, Awn S. "Islam and International Law." In *Islam and International Law: Engaging Self-Centrism from a Plurality of Perspectives*, edited by Marie-Luisa Frick and Andreas Th Müller, 29-44. Martinus Nijhoff Publishers, 2013.
- Al-Khin, Musthafa, and Musthafa Al-Bugha. *Konsep Kepemimpinan Dan Jihad Dalam Islam: Menurut Madzhab Syafi'i*. Jakarta: Darul Haq, 2014.
- Al-Naysaburi, Imam ibn Al-Mundzir. *Al-Ijma*. Saudi Arabia: Maktabah Al-Furqan, 1999.
- Al-Sa'di, 'Abd al-Rahmān. *Taysiru Al-Karīma Al-Rahmān Fi Tafsīri Kalāmi Al-Mannān*. Cairo: Dar al-Hadith, 2002.
- Al-Shaybānī, Imam. *The Islamic Law of Nations: Shaybani's Siyar*. Translated by Majid Khadduri. Maryland: John Hopkins Press, 1966.
- Al-Taftazani, Sa'd al-Din. *A Commentary on the Creed of Islam (Sa'd Al-Din Al-Taftazani on the Creed of Najm Al-Din Al-Nasafi)*. New York: Columbia University Press, 1950.
- al-Zuhayli, Wahbah. *Uṣūl Al-Fiqh Al-Islāmī*. Vol. 1. Tehran: Dar Ihsan, 1997.

- Ali, Achmad. *Menguak Tabir Hukum*. 2nd Editio. Jakarta: Penerbit Kencana, 2015.
- Amrullah, Haji Abdulmalik Abdulkarim. *Tafsir Al-Azhar*. Vol. 1. Singapore: Pustaka Nasional PTE Ltd, n.d.
- — —. *Tafsir Al-Azhar*. Vol. 5. Singapore: Pustaka Nasional PTE Ltd, n.d.
- — —. *Tafsir Al-Azhar*. Vol. 6. Singapore: Pustaka Nasional PTE Ltd, n.d.
- An-Na'im, Abdullahi Ahmed. "Why Should Muslims Abandon Jihad? Human Rights and the Future of International Law." *Third World Quarterly* 27, no. 5 (2006): 785-97.
- An-Nawawi, Imam, and Muhammad bin Shalih Al-Utsaimin. *Syarah Hadits Arba'in Imam Nawawi*. Yogyakarta: Media Hidayah, 2006.
- Anghie, Antony. *Imperialism, Sovereignty, and the Making of International Law*. New York: Cambridge University Press, 2004.
- — —. "Towards a Postcolonial International Law." In *Critical International Law: Post-Realism, Post Colonialism, and Transnationalism*, edited by Prabakhar Singh and Benoit Mayer, 121-42. Oxford-New Dheli, 2014.
- Armas, Adnin, and Dinar Dewi Kania. "Sekulerisasi Ilmu." In *Filsafat Ilmu: Perspektif Barat Dan Islam*, edited by Adian Husaini and Dinar Dewi Kania. Jakarta: Gema Insani Press, 2013.
- Ashur, Imam Ibn. *Treatise on Maqasid Al-Shariah*. London: IIIT, 2006.
- Austin, John. *The Province of Jurisprudence Determined*. London: John Murray, 1832.
- Aziz, Shamrahayu binti Abdul. "Islamic Concept of Human Rights." In *Human Rights Law: International, Malaysian and Islamic Perspectives*, edited by Abdul Ghafur Hamid @ Khin Maung Sein. Selangor: Thomson Reuters Malaysia Sdn Bhd, 2012.
- Baderin, Mashood A. *Hukum Internasional Hak Asasi Manusia Dan Hukum Islam*. Jakarta: Komisi Nasional Hak Asasi Manusia, 2010.
- Baderin, Mashood A. *International Human Rights and Islamic Law*. Oxford: Oxford University Press, 2003.
- Bartels, Lorand. "The European Parliament's Role in Relation to Human Rights in Trade and Investment Agreements," 2014. <http://www.europarl.europa.eu/cmsdata/86031/Study.pdf>.
- Comte, Auguste. "Plan of the Scientific Work Necessary for the Reorganisation of Society." In *Comte: Early Political Writings*,

- edited by H.S. Jones. Cambridge: Cambridge University Press, 1998.
- Cox, Harvey. *The Secular City: Secularization and Urbanization in Theological Perspective*. New Jersey: Princeton University Press, 2013.
- Crimmins, James E. "Bentham on Religion: Atheism and the Secular Society." *Journal of the History of Ideas* 47, no. 1 (1986): 95–110.
- Daud, Wan Mohd Nor Wan. *Islamization of Contemporary Knowledge and the Role of the University in the Context of De-Westernization and Decolonialization*. Johor Baru: UTM Press, 2013.
- Desilver, Drew, and David Masci. "World's Muslim Population More Widespread than You Might Think." Pew Research Center, 2017. <http://www.pewresearch.org/fact-tank/2017/01/31/worlds-muslim-population-more-widespread-than-you-might-think/>.
- Farrar, Salim. "The Organisation of Islamic Cooperation: Forever on the Periphery of Public International Law?" *Chinese Journal of International Law* 13, no. 4 (2014): 787–817.
- "Fatwa Majelis Ulama Indonesia No. 6/MUNAS VI/MUI/2000 Tentang Hak Asasi Manusia." Jakarta, 2000. <https://mui.or.id/wp-content/uploads/2017/02/26.-Hak-hak-Asasi-Manusia-HAM.pdf>.
- Freeman, Michael. "The Problem of Secularism in Human Rights Theory." *Human Rights Quarterly* 26, no. 2 (2004): 375–400.
- Gray, John. *Mill on Liberty: A Defence*. Second Edi. London and New York: Routledge, 1996.
- Harnack, Justus. *Kant's Theory of Knowledge*. London: Macmillan Publisher, 1968.
- HRC. "General Comments No. 34 (CCPR/C/GC/34)." Geneva, 2011. <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>.
- Husaini, Adian, and Dinar Dewi Kania, eds. *Filsafat Ilmu: Perspektif Barat Dan Islam*. Jakarta: Gema Insani Press, 2013.
- ibn Ḥazm, Imam. *Marātib Al-Ijmā'*. Beirut: Dar al-Kutub al-'Ilmiyyah, n.d.
- ibn Katsir, Imam Ismail. *Tafsir Al-Qur'an Al-Adzim*. Vol. 1. Beirut: Dar al-Kutub 'Ilmiya, 1998.
- Ismail, Nurizal, Fajri Matahati Muhammadin, and Hanindito Danusatya. "The Urgency to Incorporate Maqasid Shari'ah as an Eludication of 'Benefit' as a Purpose of Law in Indonesia's Legal

- Education." In *1st International Conference on Law, Technology, and Society (ICOLESS) 2018*. Malang: Universitas Islam Negeri Maulana Malik Ibrahim, 2019.
- Istanto, Sugeng. *Hukum Internasional*. Yogyakarta: Penerbit Universitas Atmajaya Yogyakarta, 1994.
- Khan, Zara. "Refractions Through the Secular: Islam, Human Rights, and Universality." The City University of New York, 2016.
- Kimberly, Vina Berliana, Novita Dwi Lestari, and Fajri Matahati Muhammadin. "Incorporating Qawaidh Fiqhiyyah to the 'Principles of Law' Chapter in the Introduction to Jurisprudence Course in Indonesia's Legal Education." In *International Conference on Research in Islamic Education 2018 Conference Proceeding, Fakultas Tamadun Islam, Universiti Teknologi Malaysia*, (upcoming). Kuala Lumpur: Springer, 2019.
- Kumar, Sujith Shashi. "Reassessing JS Mill's Liberalism: The Influence of Auguste Comte, Jeremy Bentham, and Wilhelm von Humboldt." London School of Economics and Political Science (United Kingdom), 2006.
- Kusumaatmadja, Mochtar. "Pendidikan Hukum Di Indonesia: Penjelasan Tentang Kurikulum 1993." *Jurnal Hukum & Pembangunan* 6, no. 1994 (1994): 491-501.
- Lane, Edward William. *An Arabic-English Lexicon: In Eight Parts*. Vol. 3. Beirut: Librairie du Liban, 1968.
- Marzuki, Peter Mahmud. *Pengantar Ilmu Hukum*. Jakarta: Prenadamedia Group, 2008.
- Mayer, Ann Elizabeth. "Universal versus Islamic Human Rights: A Clash of Cultures or Clash with a Construct." *Mich. J. Int'l L.* 15 (1993): 307.
- Mertokusumo, Sudikno. *Mengenal Hukum: Suatu Pengantar*. Yogyakarta: Liberty Press, 2006.
- — —. *Mengenal Hukum (Suatu Pengantar)*. 3rd ed. Yogyakarta: Liberty, 1991.
- Muhammadin, Fajri Matahati. "Universalitas Hak Asasi Manusia Dalam Hukum Internasional: Sebuah Pendekatan Post-Kolonial." In *Hak Asasi Manusia: Dialektika Universalisme vs Relativisme Di Indonesia*, edited by Al-Khanif, Herlambang P. Wiratraman, and Manunggal Kusuma Wardaya, 1-20. Yogyakarta: LKiS, 2017.

- Muhammadin, Fajri Matahati, and Hanindito Danusatya. "De-Secularizing Legal Education in Indonesian Non-Islamic Law Schools: Examining The 'Introduction to Jurisprudence' Textbooks On The 'Norm Classification' Chapter." *Ulul Albab: Jurnal Studi Dan Penelitian Hukum Islam* 1, no. 2 (2018): 135-58.
- Muhammadin, Fajri Matahati, Dian Agung Wicaksono, Almonika Cindy Fatika Sari, and Ola Anisa Ayutama. "Lashing in Qanun Aceh and the Convention Against Torture." *Malaysian Journal of Syariah and Law* 7, no. 1 (2019): 11-24.
- Muslim, Imam. *Sahih Muslim*. Riyadh: Bait Al-Afkar Ad-Dauliyyah, 1998.
- Nyazee, Imran Ahsan Khan. *Islamic Jurisprudence*. Selangor: The Other Press, 2003.
- OHCHR. "Blasphemy Law Has No Place in a Tolerant Nation like Indonesia - UN Rights Experts." *Office of the High Commissioner of Human Rights*. May 22, 2017. <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21646&LangID=E>.
- Pictet, Jean. *Development and Principles of International Humanitarian Law*. Geneva: Henry Dunant Institute, 1985.
- Quane, Helen. "Legal Pluralism and International Human Rights Law: Inherently Incompatible, Mutually Reinforcing or Something in Between?" *Oxford Journal of Legal Studies* 33, no. 4 (2013): 675-702.
- Rahardjo, Satjipto. *Ilmu Hukum*. Bandung: Citra Aditya Bhakti, 1991.
- Ramlah. "Implikasi Pengaruh Politik Hukum Kolonial Belanda Terhadap Badan Peradilan Agama Di Indonesia." *Jurnal Kajian Hukum Islam* 12, no. 1 (2012): 387-406.
- Rohman, M. Saifullah. "Kandungan Nilai-Nilai Syariat Islam Dalam Pancasila." *Jurnal Studi Agama Millah* 13, no. 1 (2013): 205-15.
- Samour, Nahed. "Is There a Role for Islamic International Law in the History of International Law?" *European Journal of International Law* 25, no. 1 (2014): 313-19.
- Shaw, Malcolm N. *International Law*. 6th ed. New York: Cambridge University Press, 2008.
- Vattel, Emer De, and Joseph Chitty. *The Law of Nations: Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*. PH Nicklin & T. Johnson, 1835.

Sigit Riyanto, Fajri Matahati Muhammadin

Zaydan, 'Abd al-Karim. *Synopsis on the Elucidation of Legal Maxims in Islamic Law*. Translated by Md. Habibur Rahman and Azman Ismail. Kuala Lumpur: IBFIM, 2015.

al-Ihkâm

Jurnal Hukum dan Pranata Sosial

The Author Guidelines of “*Al-Ihkam: Jurnal Hukum dan Pranata Sosial*” since the publication year of 2015 (online).

1. Introduction

Al-Ihkam: Jurnal Hukum dan Pranata Sosial is a high-quality open-access peer-reviewed research journal published by the Faculty of Sharia, Institut Agama Islam Negeri Madura, Pamekasan, East Java, Indonesia. This journal focuses on providing readers with a better understanding of Islamic jurisprudence and law concerning plurality and living values in Indonesian and Southeast Asian society by publishing articles and research reports.

Al-Ihkam: Jurnal Hukum dan Pranata Sosial specializes in Islamic jurisprudence and Indonesian as well as Southeast Asian Islamic law, and aims to communicate original research and relevant current issues. This journal warmly welcomes contributions from scholars of related disciplines. *Al-Ihkam: Jurnal Hukum dan Pranata Sosial* has been available online since June 1st, 2015. This journal is indexed in DOAJ, DIMENSION, Indonesia Publication Index (IPI), Google Scholar, Indonesian Scientific Journal Database (ISJD), and SINTA 2 (Accredited by the Directorate General of Research And Development of the Ministry of Research, Technology, and Higher Education of the Republic of Indonesia Number 30 / E / KPT / 2019).

It aims primarily to facilitate scholarly and professional discussion over current developments on Islamic jurisprudence

and law concerning Indonesian and Southeast Asian plurality and living values. Publishing articles exclusively in English and Arabic since 2019, the journal seeks to expand boundaries of Indonesian and Southeast Asian Islamic law discourses to access broader English or Arabic speaking contributors and readers worldwide. Hence, it welcomes contributions from international legal scholars, professionals, representatives of the courts, executive authorities, researchers, and students.

Al-Ihkam: Jurnal Hukum dan Pranata Sosial contains topics concerning Jurisprudence as well as Indonesian and Southeast Asian Islamic law society. Novelty and recency of issues, however, are the priority in publishing. The range of contents covers established jurisprudence, Indonesian and Southeast Asian Islamic law society, local culture, and various approaches on legal studies such as comparative Islamic law, political Islamic law, sociology of Islamic law and the likes.

2. How to Write the Title, the Name, and the Author's Address

The title of the manuscript should be on the top of the first page with the center text alignment. Meanwhile, the author's name (without academic degree) and the affiliation address of the author should also be at the center text alignment under the title of the article. The author should give two line spaces between the title and his/her name. Then, the space between the author's affiliation address and the abstract title is one space. The keywords must be written below the overall abstract for all words in alphabetical order and be separated by semicolons numbering three to five words. Additionally, the Indonesian title of the article, if any, should be stated in English.

The responsible or corresponding author's name must be written first and then followed by the second, the third, and so on. Communication regarding the article revision and the final statement will be informed via email to the corresponding author only. If there is more than one author, the author's names should be written down separated by comma (.). If the

author's name consists of at least two words, the first name should not be shorted. If the author's names are only one word, it should be written as it is. However, in the online version, it will be written in two words with the same name repeatedly for the metadata indexing (Camdali and Tunc, 2006; Friedman, 2008). For each data retrieval or quoted from other references, the author must write the reference source. References or citations are written in the description/text by the author's name and the year (Irwan & Salim, 1998). If there are more than two authors, just write the name of the first author followed by "et al." (Bezuidenhout et al., 2009; Roeva, 2012). All references in the text must be listed in the References section and vice versa, all written in the References should be cited in the text (Wang et al., 2011).

3. The Manuscript General Guidelines

The manuscript text general guidelines are as follows:

1. The manuscript is the authentic research result that has not been published yet in other publication media or publishing houses.
2. The manuscript does not contain any plagiarism element. To check the possibility of plagiarism, use the application Turnitin. The article must below 20% of plagiarism. The editorial board will directly reject the text that indicates plagiarism.
3. The submission and the publication have no APCs, submission charges, or another fees.
4. The manuscript article writing guidelines and template can be downloaded at the home page of *Al-Ihkam: Jurnal Hukum dan Pranata Sosial* website and are available in MS Word (*.doc/*.docx) format.
5. The manuscript online submission procedure is available at online submission guidelines in the next part.

6. Any inappropriate manuscript with *Al-Ihkam: Jurnal Hukum dan Pranata Sosial* writing guidelines will get returned to the author before the reviewing process.
7. The manuscript should contain several aspects of a scientific article as follows: (a) the title of the article, (b) the author's name (no academic title), (c) the affiliated author's address, (d) the author's email (e) the abstract and the keywords, (f) the introduction, (g) the method (h), the research findings and discussion (i), the conclusion (j), the references.
8. The subtitles included in the discussion part (*Introduction, Methods, Finding and Discussion, and Conclusion*) should be numbered in the Arabic order starting from one. The subtitles are written in the bold and title case format. It uses the left text alignment without underline. The next expanded subtitles should be in bold and sentence case format using the left text alignment and the numbering format level two.
9. The manuscript can be in either English or Arabic with the standard language. The body of the paper must be elaborated between 6500 - 7.000 words (maximum) including abstract, references, and footnotes, written in Book Antiqua Style, size: 11, line spacing: single. The article is on B5-sized papers (176x250 mm) with custom margins as follows: left 40 mm, right 30 mm, bottom 30 mm, and top 40 mm.
10. The words from uncommon or foreign languages are in Italic format. Each paragraph starts 11 mm from the left side border and there is no space among paragraphs. All numbers are written in Arabic numbering format except for the new sentence.
11. The tables and figures are placed in the text group. Each figure and table must be given a title and be numbered in Arabic format. The figure attachment should be guaranteed well printable (font size, resolution, and line space are clearly seen). The figure, the table, and the chart

should be placed in the center between text groups. If it has a bigger size, it can be placed in the center of the page. The table should not contain vertical lines, while horizontal lines are allowed only for the important point.

4. The Guidelines for the Manuscript Body Text

The title of the manuscript: The title should be informative and be written both briefly and clearly. It cannot diverse multi interpretations. It has to be pinpoint with the issues that will be discussed. The beginning word is written in the capital case and symmetrically. The article title does not contain any uncommon abbreviation. The main ideas should be written first and followed then by their explanations. The article title should be written within twelve words, 13pt-sized font, with the bold selection and in the center text format. Meanwhile, the abstract has to be within 250 words maximum and followed by four to five keywords.

Introduction: The introduction must contain (shortly and consecutively) a general background and a literature review (state of the art) as the basis of the brand new research question, statements of the brand new scientific article, main research problems, and the hypothesis (if any). In the final part of the introduction, the purpose of the article writing should be stated. In the scientific article format, it does not allow to write down the references as in the research report. They should be represented in the literature review to show the brand news of the scientific article.

Method: The method aims to solve problems, including analytical methods. The methods used in the problem solving of the research are explained in this part.

Discussion and Result: Discussion and Result must be written in the same part. They should be presented continuously starting from the main result until supporting results and

equipped with a discussion. Figures and tables (if any) should be put in the same part of this section and should be actively edited by the editors.

Conclusion: This is the final part containing conclusions and pieces of advice. The conclusions will be the answers to the hypothesis, the research purposes, and the research discoveries. The conclusion should not contain only the repetition of the results and discussions. It should be the summary of the research results as the author expects in the research purposes or the hypothesis. The advice contains suggestions associated with further ideas from the research.

Bibliography: All the references that are used in the article must be listed in this part. In this part, all the used references must be taken from primary sources (75% from all the references) that were published in the last ten years. Each article should have at least ten references.

5. The Guidelines for Literature Reviews, Citations, and References

Author may cite several articles from *Al-Ihkam: Jurnal Hukum dan Pranata Sosial*. All the presented data or quotes in the article taken from other author articles should attach the reference sources. The references and literature review should use a reference application management Mendeley. The writing format in *Al-Ihkam: Jurnal Hukum dan Pranata Sosial* follows the format applied by *Chicago Manual Citation Style:17th Ed.*

6. The Online Submission Manuscript Guidelines

The manuscript text submission must be through these following steps:

1. Firstly, the author should register as either an author or reviewer (checking role as author or reviewer) in the "Register" bottom.
2. After the registration step is completed, log in as author then click on the "New Submission" column. The article submission stage consists of five stages, namely: (1). *Start*, (2). *Upload Submission*, (3). *Enter Metadata*, (4). *Upload Supplementary Files*, (5). *Confirmation*.
3. In the "*Start*" column, choose Journal Section (Full Article) and check all the checklists.
4. In the "*Upload Submission*" column, upload the manuscript files in MS. Word format.
5. In the "*Enter Metadata*" column, fill in with all of the author data and affiliation, including the journal title, abstract, and indexing keywords.
6. In the "*Upload Supplementary Files*" column, the author is allowed to upload supplementary files, the statement letter, or any other else.
7. In the "*Confirmation*" column, click "*Finish Submission*" if the data entered are all correct.

If the author has difficulties in the submission process through the online system, please contact *Al-Ihkam: Jurnal Hukum dan Pranata Sosial* editorial team at email: alihkam@iainmadura.ac.id.



FACULTY OF SHARIA
INSTITUT AGAMA ISLAM NEGERI (IAIN) MADURA

