Vol. 15 No. 2 December 2020

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

al-Ihkâm

Jurnal Hukum dan Pranata Sosial

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

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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.

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OFFICE:
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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

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Jurnal Hukum dan Pranata Sosial

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PEDOMAN TRANSLITERASI

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

Untuk madd dan diftong

â	= a panjang	اَوْ	= aw
î	= i panjang	أَيْ	= ay
û	= u panjang	اِيْ	= iy

al-Ihkam: Jurnal Hukum dan Pranata Sosial, 15 (2), 2020: 173-200
ISSN: 1907-591X, E-ISSN: 2442-3084
DOI: http://doi.org/10.19105/al-Ihkam.v15i2.3656

Green Fatwas in *Bahtsul Masā'il*: Nahdlatul Ulama's Response to the Discourse of Environmental Crisis in Indonesia

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Article history: Received: 05 October 2020, Accepted: 30 October 2020, Published: 27 December 2020

Abstract:

This article aims to discuss *Nahdlatul Ulama'* (NU)'s responses to the environmental crisis in Indonesia. It portrays social context beyond the birth of NU' fatwas concerning with ecological issues and the follow-up steps to build eco-literacy among *nahdliyyin*. The results of the study indicate that the emergence of ecological or green fatwas was based on the concern of NU's Executive Boards who are aware of the increasing scale of the Indonesian environmental crisis. The idea to respond to this environmental crisis has appeared since the 29th NU Congress in Cipasung, Tasikmalaya, West Java. NU contributed by issuing ecological fatwas through *Bahtsul Masa'il* forum from *the fiqh* perspective as a guide for *nahdliyyin* to manage the environment in a friendly and sustainable manner. As for the examples of follow-up steps on those fatwa were through a program called *Bank Sampah Nusantara* (Archipelago Garbage Bank) with its campaign for *Nusantara Bebas Sampah* (*Zero Waste Archipelago*) under the management of NU's *Lembaga Penanggulangan Bencana dan Perubahan Iklim* (Agency for Disaster Management and Climate Change).

Keywords:
Green-Fatwas; Bahtsūl Masāil; Environmental Crisis

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Abstrak:

Artikel ini bertujuan mendiskusikan respon Nahdlatul Ulama (NU) terhadap krisis lingkungan yang terjadi di Indonesia. Ia menggambarkan konteks sosial di balik lahirnya fatwa-fatwa bernuansa ekologis *ala* NU dan tindak lanjutnya dalam upaya membangun masyarakat *nahdliyyin* yang memiliki semangat sadar lingkungan (*eco-literacy*). Hasil kajian menunjukkan bahwa lahirnya fatwa-fatwa ekologis atau *green fatwa* tersebut bermula dari keprihatinan Pengurus Besar NU perihal fenomena krisis lingkungan di Indonesia yang semakin memprihatinkan. Gagasan untuk merespon fenomena krisis lingkungan ini telah muncul sejak Muktamar NU ke-29 di Cipasung, Tasikmalaya, Jawa Barat. Adapun kontribusi NU dalam konteks ini adalah mengeluarkan fatwa-fatwa bernuansa ekologis dalam perspektif fiqh melalui lembaga *Bahtsul Masail*-nya sebagai panduan agar para *nahdliyin* berinteraksi dengan lingkungan secara ramah dan berkelanjutan. Adapun contoh langkah tindak lanjut dari berbagai fatwa tersebut adalah program bertajuk "Bank Sampah Nusantara" dengan kampanye "Nusantara Bebas Sampah" di bawah komando Lembaga Penanggulangan Bencana dan Perubahan Iklim (LPBI) milik NU.

Kata Kunci:

Fatwa-Hijau; *Bahtsul Masail*; Krisis Lingkungan

Introduction

The current environmental crisis has become a global issue. Global warming, for instance, is of concern to the world community and its threats to the environment are getting public attention more and more. This makes very much sense as both climate change and global warming have in many ways negatively impacted the environment and humanity.[1] Awareness and action in responding to this phenomenon are inevitably needed for Muslim communities that have environmentally friendly doctrines. Islam itself offers a holistic view of

[1] Nik Nazli Nik Ahmad and Dewan Mahboob Hossain, "Climate Change and Global Warming Discourses and Disclosures in the Corporate Annual Reports: A Study on the Malaysian Companies," 2015, 246–53.

creation while the Qur'an clearly sets out the obligation to preserve the environment.[2]

This research discusses green fatwas in Nahdlatul Ulama *Bahtsul Masail* forum. It focuses on fatwas with ecological and pro-environmental spirits that had been decided in the *Bahtsul Masail* forums at the 32nd Nahdlatul Ulama Congress in Makassar and the 33rd Nahdlatul Ulama Congress in Jombang. Additionally, it also examines ecological fatwas after the congress in Jombang such as a fatwa regarding the lobster seed export policy which had been a controversial issue then catches the attention of the public quite recently.[3]

Nahdlatul Ulama is the largest Islamic organization in Indonesia. It has a strategic position in discussing religious discourse, including those related to environmental issues. Moreover, this phenomenon has become a very popular public discussion theme both on a national and global scale.[4] *Nahdliyin* as a big part of Indonesian society certainly has an important role in environmental preservation efforts as their moral responsibility in carrying out socio-religious and socio-ecological life. Awareness of the importance to care for the environment and to protect it through religious values, therefore, finds its relevance.[5]

Nahdlatul Ulama as the subject of this study has been becoming the focus of many critical and in-depth studies. In a broad classification,

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[2] Norah bin Hamad, "Foundations for Sustainable Development: Harmonizing Islam, Nature and Law" (Pace University, n.d.), http://digitalcommons.pace.edu/lawdissertations/20/. Accessed 20 Oktober 2020.

[3] Https://www.kompas.com/Tren/Read/2020/07/25/110500065/pro-Kontra-Kebijakan-Ekspor-Benih-Lobster-Di-Era-Edhy-Prabowo-?Page=all," n.d. Accessed on 25 September 2020.

[4] Irfan Ilyas Vania Zulfa, Milson Max, Iskar Hukum, "Isu-Isu Kritis Lingkungan dan Perspektif Global," *Journal Green Growth dan Manajmen Lingkungan* 5, no. 1 July (2016): 30.

[5] Thiyas Tono Taufiq, "Lingkungan dan Kearifan Lokal Masyarakat Muslim-Kristen Pesisir Banyutowo," *Living Islam* I, no. 2 Nopember (2018): 4.

there are several typologies of scientific studies of Nahdlatul Ulama: *First* is research about Nahdlatul Ulama from the aspect of its central figures, such as KH. Hasyim Asy'ari, Gus Dur, Gus Mus, KH. Sahal Mahfudz and other figures.[6] *Second* is research related to the political attitudes of Nahdlatul Ulama[7]. *Third* is research related to Nahdlatul Ulama ideology.[8] *Fourth* is research on the legal *ijtihad* of Nahdlatul Ulama.

Specifically, research on Nahdlatul Ulama *ijtihad* products as formulated in *Bahtsul Masail* forum has been conducted by several researchers. To mention some, there found research by Ahmad Zahro[9], Lakpesdam Jakarta,[10] Rifyal Ka'bah[11], Pujiono,[12] Ahmad[13], and others. In further examination, it is found that studies on *Bahtsul Masail* fatwa

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[6] Beberapa penelitian tentang tokoh-tokoh NU di antaranya adalah : Sutrisno, *Nalar Fiqh Gus Mus* (Yogyakarta: Pustaka Pelajar, 2010) Jamal Ma'mus Asmuni, *Mengembangkan Fikih Sosial KH. MA. Sahal Mahfudh (*Jakarta: Quanta, 2015), Greg Barton, *Biografi Abdurrahaman Wahid* Edisi Baru (Yogyakarta: IRCiSOD, 2019) dan karya lainnya.

[7] Ridwan, *Paradigma Politik NU* (Yogyakarta: Pustaka Pelajar, 2004) Greg Fealy, *Ijtihad Politik Ulama: Sejarah NU 1952-1967* (Yogyakarta: LKiS, 2003), Asep Saiful Muhtadi, *Komunikasi Politik Nahdlatul Ulama: Pergulatan Politik Radikal dan Akomodatif* (Jakarta: LP3ES, 2008).

[8] Khamami Zada and A. Fawaid Sjadzali, ed., *Nahdlatul Ulama: Dinamika Ideologi Dan Politik Kebangsaan* (Jakarta: Kompas Media Nusantara, 2010).

[9] Ahmad Zahro, "Lajnah Bahtsul Masail NU 1926-1999: Telaah Kritis terhadap Keputusan Hukum Fiqh" (UIN Sunan Kalijaga, 2001).

[10] Lakpesdam Jakarta, *Kritik Nalar Fiqih NU: Tranformasi Paradigma Bahtsul Masail* (Jakarta: Lakpesdam, 2002).

[11] Rifyal Ka'bah, "Keputusan Lajnah Tarjih Muhammadiyah dan Lajnah Bahtsul Masail NU Sebagai Keputusan Ijtihad Damai di Indonesia" (Jakarta: Universitas Indonesia, 1998).

[12] Pujiono, "Perilaku Ekonomi Warga NU Kabupaten Pasuruan dalam Perspektif Hukum Islam; Studi Penerapan Putusan Bahtsul Masail" (IAIN Sunan Ampel, 2010).

[13] Ahmad, "Implementasi Ijtihad Tahqiq Al-Manat dalam Fatwa Lajnah Bahtsul Masail Nahdhatul Ulama dan Majelis Tarjih dan Tajdid Muhammadiyah (Studi Analisis Komparatif Fatwa Ekonomi)" (UIN Alauddin Makasar, 2017).

products were carried out by researchers with their own respective characteristics from methodological studies to thematic legal products.

Among those studies, I choose to specifically portray LBM-NU (Lembaga *Bahtsul Masa'il*-Nahdlatul Ulama' or Nahdlatul Ulama' *Bahtsul Masa'il* Forum) fatwa products on ecological concerns. I focus on examining the fatwa through socio-historical background analysis and its implications for *nahdliyin*'s attitude toward the environment. The fatwa itself is a response to global and national phenomena regarding the increasingly worrisome environmental crisis which requires people to be much more aware of the importance of being environmentally friendly. Moreover, it also aims to avoid natural disasters due to human ignorance of the environment which also becomes a current major problem in Indonesia.[14]

The significance of this study is obvious from two aspects. *First*, LBM-NU has the authority to discuss legal issues on public matters including *mahdhah* worship issues as well as socio-ecological issues, particularly the one that threatens the sustainability of the earth's environmental ecosystem. *Second*, LBM-NU fatwa products serve as a life guide for the Muslim community, especially *nahdliyin,* in interacting with the surrounding environment. Therefore, the fatwa plays an important role in building awareness and concern among the Muslim community towards the environment. Based on it, this study is expected to actualize legal thinking through a study of Nahdlatul Ulama *Bahtsul Masa'il* fatwa products on a socio-ecological issue that has been becoming global and national discourse.

Method

[14] Walhi, "Tinjauan Lingkungan Hidup 2020: Menabur Investasi Menuai Krisis Multidimensi" (Jakarta, 2010), 12, https://www.walhi.or.id/wp-content/uploads/Laporan Tahunan/Outlook 2020.pdf.

This is a library research using historical and philosophical approaches. The historical approach aims to describe socio-historical context beyond the birth of ecological fatwas, while the philosophical approach intends to analyze the fatwas on the basis of *maqāsid syarī'ah*.[15]

The data of this study consists of fatwa resulted from 32nd Nahdlatul Ulama Congress in Makassar, 33rd Nahdlatul Ulama Congress in Jombang, the documents of *Bahtsul Masa'il* decision Number: 06 of 2020 concerning the export policy of Lobster seeds, as well as two books from studies of LBM-NU entitling "*Fiqh of Waste Management*" and "*Fiqh of Renewable Energy*". The research data were then analyzed using a historical-philosophical approach.

Environmental Issues in *Bahtsul Masa'il*: Products of Ecological Fatwas

Historically, the idea to respond to the environmental crisis phenomenon had occurred since the 29th NU Congress in Cipasung, Tasikmalaya, West Java. Therefore, the congress held in 1994 can be claimed as the embryo of the "*Fiqh al-biah*" idea in Nahdlatul Ulama cultural tradition. At the congress, environmental pollution law had even been stipulated as *haram* (forbidden action) and was categorized

[15] The use of *maqasid syariah* approach in a variey of research is carried out by many contemporary researchers. Among others, there found Ahmad Imam Mawardi, *Fiqh Minoritas: Fiqh Al-Aqalliyat Dan Evolusi Maqasid Al-Syariah Dari Konsep Ke Pendekatan* (Yogyakarta: LKiS, 2010). Harun al-Rasyid, *Fikih Korupsi: Analisis Politik Uang di Indonesia dalam Perspektif Maqasid Al-Syariah* (Jakarta: Kencana, 2016). Moh. Thariquddin, *Pengelolaan Zakat Produktif Perspektif Maqasid al-Syariah Ibn Asyur* (Malang: UIN-Maliki Press, 2015). Zainab al-Alwanī, *al-Usarah fi Maqasid al-Syariah: Qirāah fi Qadāyā al-Zawājwa al-Talāq fi Amrika* (USA: The International Institute of islamic Thought, 2013) and other studies.

as a criminal act (*jarīmah*).[16] Furthermore, through *Bahtsul Masail,* NU has accused environmental pollution acts as a type of crime.

Three years later, on *Halaqah National Forestry and Environment Movement* (GNKL; Gerakan Nasional Kehutanan dan Lingkungan Hidup) held on 20-23th July 2007, PBNU had taken one step forward for accentuating its concern in responding to ecological issues. It obliged *Nahdliyin* to fight for environmental preservation (*jihad bi'iyah*) and claimed it as a movement to care for the environment. They were told to plant and care for trees, conserve forests, soil, water, and biodiversity, improve mining areas, help with disaster management, build national food and energy security, increase competitiveness of domestic products, neutralize global market penetration, and maintain national economic stability.

The decision of the Cipasung congress (1994) and PBNU *Halaqah* (2007) were the starting points for NU's awareness in guarding environmental political policies in Indonesia. The literacy of *nahdliyyin* regarding the importance of protecting the environment is a real contribution in order to realize sustainable development, particularly at the ecological aspect. As a mass organization that has succeeded in building a civil society, it makes sense if NU also aims to succeed in developing ecological awareness through building eco-society for the benefit of environmental preservation.

Furthermore, at the 32nd NU congress in Makassar, *Bahtsul Masa'il* had again discussed several issues in the field of environmental issues, such as the law of illegal fishing.[17] Subsequently a year later, at the 33rd

[16] See, Decision of Nahdlatul Ulama 29th Congress in CipasungTasikmalaya on1 Rajab 1415 H. / 4 Desember 1994 M. "Keputusan-Muktamar-Nahdlatul-Ulama-Ke-29-Cipasung-Tasikmalaya-4-Desember-1994," accessed September 20, 2020, https://www.laduni.id/post/read/63122/keputusan-muktamar-nahdlatul-ulama-ke-29-cipasung-tasikmalaya-4-desember-1994-m.html.

[17] The Decision of Commission of Bahtsul Masail Diniyah Waqi'iyah Muktamar Nahdlatul Ulama XXXII 2010. See, "Hasil_Keputusan_Muktamar_Ke_32_NAHDLATUL_ULAMA_di_Makassar

Congress in Jombang, East Java, the environmental issue came up again and became a discussion theme at the forum. The forums examined several contemporary issues related to environmental problems, including the law of burning and sinking foreign ships carrying out illegal fishing; the law of excessive exploitation of nature; and the land conversion law.

More specifically, the ecological fatwas from the discussion of *Bahtsul Masa'il* include the following:

1. Fatwa of Illegal Fishing

The illegal fishing practice is one of the problems for Indonesian fishery resource management. The Indonesian fishery resource is often exploited by fishermen from neighboring countries. On the other hand, sometimes, Indonesian fishermen also make the same in the borders of neighboring countries.

Therefore, the *Bahtsul Masa'il* forum found it urgent to discuss the legal status of the practice. There are at least three issues in the discussion. *First* is whether the practice is categorized as an act of theft (*sarīqah* in the study of *fiqh*). *Second* is whether the law of national borders automatically becomes the law of property rights and the *third* is on the legal status of the stolen fish.

Answering this problem, the *Bahtsul Masa'il* concluded that the theft of fishes is out of *sarīqah* concept in the term of *fiqh.* However, it is considered forbidden because it violates international agreements. This closely relates to the result of a discussion on the second problem that the state boundaries cannot become legal provisions of ownership although it might become legal provisions in the rights of state power.

_22_28_Maret_2010.," 2010, https://www.academia.edu/42099304/Hasil_Keputusan_Muktamar_Ke_32_NAHDLATUL_ULAMA_di_Makassar_22_28_Maret_2010.

In this context, the stolen fish might be seized by the state as its original owner as *ta'zīr māl* (in the context of state power).[18]

2. Fatwa on Burning and Sinking Illegal Fishing Vessels

Continuing the discussion of the *Bahtsul Masa'il* forum at the 32nd NU Congress in Makassar about illegal fishing, the next congress at Jombang discussed the related issue, namely the practice of burning and sinking illegal fishing vessels. The forum provided a legal answer for supporting environmental protection.

It concluded that the practice of burning and sinking any foreign illegal fishing vessels is allowed as they have violated the territory law of Indonesia. The consideration is on the benefit that the fatwa brings for protecting the sovereignty of Indonesia as a country. In the concept of Islamic law, this punishment is categorized as a form of *ta'zīr*. However, if it is deemed necessary to change the form of *ta'zīr* to another one, Islamic law might justify the new form as long as it gives benefits for public (*maslahah 'āmmah*).[19]

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[18]The references in determining the law of illegal fishing are as follow: *Hāsyiyah al-Jamal* (p. 470-471), *Faid al-Qadīr* vol. VI (p. 276), *Rawdhah al-Thālibīn wa Umdah al-Muftīn* vol. III (p. 430), *al-Tasyrī' al-Jinā'ī al-Islāmī* vol. I (p. 295-296), *Qurrah al-Ain* (p. 96-97), *Bughiyyah al-Mustarsyidīn* (p. 91), *Hāsyiyah Qalyubī wa Āmirah* vol. IX (p. 461), *al-Thuruq al-Hukmiyah fi al-Siyāsah al-Syar'iyah* (p. 266-279).

[19]The references of formulating the fatwa are as follow: *al-Tasyrī' al-Jinā'ī al-Islāmī* (vol. 1/295), *Hāsyiyah Qalyubī wa Umairah*, *Ihyā' Ulūm al-Dīn* (vol 2/167), *Al-Ahkām al-Sultahniyah li al-Mawardī* (p.237), *Fath al-Wahhāb* vol. 2/289), *Al-Yāqūt al-Nafīs* (p. 707), *Al-Hāwiy li al-Fatawiy* of al-Suyūti (h. 117), *al-Fiqh al-Islāmī wa Adillatuhu* of Wahbah al-Zuhaili (vol. 8/114), *Fath al-Wahhāb* (vol 2/289), *Bughiyyah al-Murtasyidīn* (p.142), *al-Fiqh 'ala al-Mazāhib al-Arba'ah* (Vol. 5/407), *Fatāwā al-Ramliy* (vol. 3/13), *Tuhfah al-Muhtāj* (vol. 6/21), *Al-Hāwiy li al-Fatāwī* (p. 120), *Al-Mawsū'ah al-Fiqhiyah al-Kuwaitiyah* (Vol. 12/h.270), and *Ma'ālim al-Qurbah fi Ma'ālim al-Hisbah* (p. 196).

3. Fatwa on Disproportional Nature Exploitation

In addition to the previous issue about the practice of sinking and burning illegal fishing vessels, the 33rd NU Congress at Jombang also discussed the issue of natural resource exploitation. This refers to environmental-unfriendly exploitation which has been becoming a serious problem in Indonesia. Natural resource exploitation is believed to cause inevitable environmental damage while its scope is often destructive, excessive and even unlimited.

The discussion on this particular issue led to the following fatwa decisions: *First*, it is forbidden (*haram,* in the term of Islamic law) and prohibited to do any excessive exploitation of natural resources and cause any environmental damage. *Second*, it is also forbidden for the government to intentionally—without considering administrative and procedural requirements—issue permits for corporations or mining companies that cause irreparable environmental damage. *Third*, it is obligatory for Muslim communities to do *amr ma'ruf nahi munkar* (telling others to do the good and forbidding them to do the bad ones) according to their abilities.[20] Along with these three fatawa, PBNU also recommends Muslims to utilize natural resources in a sustainable and environmentally friendly manner.

4. Fatwa on Land Conversion

The issue of land conversion was another theme that the *Bahtsul Masa'il* forum discussed in the NU 33rd Congress in Jombang. It resulted in two following fatwa. *First,* the conversion of any productive land, such as agricultural land or fields to housing, offices or factories which is believed to give negative impacts (*madhārat āmmah*) on the economy and legal environment aspects is unlawful (forbidden or prohibited). *Second*, buying productive land to convert it to any

[20]The references in formulating this legal treatment are Tafsir al-Razi (vol. VII/146), *Al-Fiqh al-Islamiwa Adillatuhu*, and *Al-Majmu' Syarah al-Muhazzab* (vol. XII/118).

infrastructure is lawful. However, when it is believed to give negative impacts (*madhārat āmmah*), the government is obliged to prohibit it.[21]

5. Fatwa on Lobster Seed Export

According to *the fiqh* perspective, the issue of lobster seed export policy is under the category of *ma'alat fiqh*. It is a branch of *fiqh* that focuses on the impact of any legal actions to various life aspects, mainly public interest (*maslahat*). To this extent, the aspect is particularly about the sustainability of biodiversity-ecosystem as an ecological benefit. This kind of *fiqh* becomes urgent as it observes the impact of any action to consider in a process of determining the legal status of the action.

Ecologically, in a massive volume, the practice of lobster seed export will cause the extinction of not only the seeds but also the lobster itself. The policy, therefore, does not represent Islamic teachings and even contradicts the spirit to conserve biodiversity. More than that, the lobster seed export policy will also give negative impacts on the future generations that they can't get lobsters anymore due to the extinction of their habitat.

Meanwhile, from the perspective of the economy, instead of showing concern to small fishermen, this policy in fact puts the advantage only on those with big capital. Small fishermen will suffer much loss and find their daily income decreased. Additionally, this policy also contradicts one of the Indonesian government's sustainable development goals, namely conserving and utilizing natural resources as well as the oceans in a friendly and sustainable manner.[22]

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[21]The references in determining the law are as follow: *Al-Majmū' Syarah al-Muhazzab* (vol. XV/227), *Hawāsyī al-Syiwaniy* (vol VI/224), *Fatāwā al-Azhār* (vol. VII/79), and *Hāwiy al-Kabīr li al-Mawardī* (vol. VII/1244).

[22] The result of *Bahtsul Masail* of Lembaga Bahtsul Masail (LBM) PBNU Nomor: 06 Year 2020 about The Policy of Lobster Seed Export, see "Hasil-BM-Ttg-Kebijakan-Ekspor-Benih-Lobster-Final," accessed September 20, 2020, https://www.mongabay.co.id/wp-content/uploads/2020/08/Hasil-BM-ttg-Kebijakan-Ekspor-Benih-Lobster-Final.pdf.

6. Fatwa on Combating Plastic Waste

Another environmental specific issue that Nahdlatul Ulama' responses is about plastic waste. Indonesia is experiencing an acute problem of plastic waste. The impact of this damage is so much unavoidable that PBNU launched the book "*Fiqh for Plastic Waste Management*". The book was initiated by a team from *The Bahtsul Masa'il* forum along with PBNU Disaster Management and Climate Change Agency (LPBI; Lembaga Penanggulangan Bencana dan Perubahan Iklim).

Substantially, the book discusses Islamic view on the environment, the law and sanction of littering plastic waste carelessly,[23] the obligation to understand plastic waste management properly,[24] the law for tackling plastic waste,[25] and the responsible party for that.[26] One important point of the book is its effort and initiative for shifting society's paradigm to make them more aware of the environment.[27] In addition, it also tries to increase participation and the role of the community in tackling plastic waste through presenting this discourse within the book. It also accentuates that collective awareness of the environment requires the active participation of all elements in society.[28]

7. Fatwa on Environmentally Friendly Renewable Energy

[23] See, Team Bahtsul Masail Institute and Agency for Disaster Management and Climate Change "Fiqh for Plastic Waste Management," n.d., http: LBM and LPBI, t.th), 17 and 24. Accessed in https://drive.google.com/file/d/1nybueYMH8W_TE0O_pVrxcP3eVGKhnt0O/view, 30/06/2020.

[24] Ibid., 27.

[25] Ibid., 29.

[26] Ibid., 31.

[27] Ibid., 39.

[28] Ibid., 47.

Another book which shows Nahdlatul Ulama's response on the environmental issues was entitled "Renewable Energy *Fiqh*: Islamic Views and Responses to Solar Power Plants (PLTS; *Pembangkit Listrik Tenaga Surya*)". The book was published by PBNU Institute for Studies and Human Resources (LAKPESDAM; *Lembaga Kajian dan Pengembangan Sumber Daya Manusia*) last 2017. In general, the book discusses the discourse of renewable energy from *a fiqh* perspective. However, it does not only talk about lawful and unlawful (*halal-haram*), but also examines the concepts and practices of renewable energy using religious perspective both in terms of its advantages and disadvantages for sustainable community life.[29] The book uses *Bahtsul Masail*'s style as a method to study, answer, and formulate the law of social problems related to renewable energy.[30]

The study on renewable energy from *the fiqh* perspective becomes urgent because the decision to switch the use of fossil to renewable one as the source of energy was driven by several motives, namely country's sovereignty, economic motives, sustainable development and green economic growth. Various renewable energy technologies have been furthermore proven reliable in supplying energy needs for several economic activities both on large and small scales. It is also known for the ability to provide the energy needed for production while simultaneously minimizing negative impacts on the environment.[31]

In this context, the religious view on sophisticated technology through the use of renewable energy is associated with the relationship

[29] Marzuki Wahid, ed., *Fikih Energi Terbarukan: Pandangan dan Respons Islam atas Pembangkit Listrik Tenaga Surya (PLTS)* (Jakarta-Yogyakarta: Kemala Konsorsium Energi Mandiri Lestari, 2017), 5 https://www.researchgate.net/publication/323254703_Fikih_Energi_Terbarukan_-_Pandangan_dan_Respons_Islam_Atas_Pembangkit_Listrik_Tenaga_Surya_PLTS Accessed (30/06/2020).

[30] Wahid, 7.

[31] Wahid, 39.

between humans and the universe. Islam obliges three basic principles to develop in the interaction between Muslim and nature. *The First* is to respect the diversity of the universe or respect for nature, *the second* is to be responsible as a caliph on the earth with moral responsibility for nature, and *the third* is to have cosmic solidarity to save and protect the eco-system.[32]

The study in the book concludes that in the Islamic view, energy in all of its forms is a very vital and urgent need in human life (*min al-umūr al-dharūriyah*) as there is almost no life without energy. Therefore, the provision of energy means an effort to maintain and protect the soul (*hifz al-nafs*) of mankind which is the goal of sharia (*maqāsid syarīah*). At this level, it is obligatory for the government to facilitate the availability of energy for its people at an affordable price and environmentally friendly one for the sake of sustainability on the universal life.[33]

On the basis of it, Nahdlatul Ulama' (NU) as an Islamic organization driven by *kyai* (Islamic scholars) greatly contributes to encouraging the transformation of *rahmat li al-lamin* values to become social-ethic for environmental sustainability. The contribution in fostering people through environmental education is believed to be very urgent as *kiai*'s response to the recent environmental crisis. In this position, Nahdlatul Ulama' does not only enlighten the community through preaching in the field of worship but also responds to socio-ecological problems in order to save environmental ecosystems amidst degradation and crisis.

Philosophically, ecological fatwas of *Bahtsul Masa'il* are an implementation of *maqāsid syarī'ah* values in responding to socio-ecological phenomena on the impact of environmental crisis. Islam itself puts the principle of protecting the environment (*hifz al-bi'ah*) as a logical thinking paradigm in formulating responsive and accommodative law. This is mainly because *hifz al-bī'ah* as an effort to

[32] Wahid, 70.
[33] Wahid, 129.

preserve the environment has become the core of Islamic teachings in relation to Moslem's interaction with the environment (*habl min al-ālam*).

According to its authority, ecological fatwa products have strong literary references that make them scientifically authoritative. However, it needs to be noted that from the reference's type, there found a paradigm shift in the use of contemporary literature as references in discussing environmental issues. This can be understood because environmental issues are relatively new discussion topics that had not been covered in classical literature such as the authority books (*kutub al-mu'tabarah*) that *Bahtsul Masai'l* forum used to refer to. As a consequence, the results of ecological fatwa products contain data from several contemporary kinds of literature such as *al-Tasyri 'al-Jinai al-Islami, Fiqh al-Islam waAdillatuhu, al-Fiqh 'ala al-Mazahib al-Arbaah* and relevant other books.

Meanwhile from a methodological aspect, *The Bahtsul Masa'il* forum uses two approaches in formulating ecological fatwas, namely *qawli* and *manhaji*. The former approach, *qawli*, is a method of making legal decisions (fatwas) based on information from jurists in classical books which nowadays still becomes a dominant method. This approach is clear, for instance, in an ecological fatwa on the law of illegal fishing, sinking and burning illegal vessels which violate the law, prohibiting excessive exploitation of natural resources, and law of land conversion.

Meanwhile, the fatwa on tackling plastic waste and renewable energy as well as the response on lobster seed export policy uses both *qaulī* and *manhajī* approaches. This means that in addition to use references from classical texts in *mu'tabarah* (authoritative) jurisprudence books, it also refers to methodological reasoning with practical principles of legal *istinbath* (law decision making). Additionally, the use of *fiqh* principles in deciding legal conclusions has also become a new feature and characteristic in responding to environmental issues as a part of contemporary jurisprudence.

Therefore, it can be said that practically, the decision-making process in *Bahtsul Masa'il* trials was carried out through in-depth studies along with legal reasoning use both *qaulī* and *manhajī*. This gives very much sense because as one of the contemporary issues, ecological problems require reasoning with a certain methodological approach giving the condition that classical scholars have not previously discussed it.

Socio-Historical Review of *Green Fatwas*

As an Islamic mass organization established by some *kiai*s, Nahdlatul Ulama has made its mind to serve the nation and people (*ummah*) mainly in the social sector. This is obvious in NU's articles of Association, namely Article 9 letter (c) which states that in the social sector, NU aims to strive for and encourage the continuous development in the fields of health service, family's goodness and resilience, as well as concern on marginalized/vulnerable communities (*mustadh'afin*)[34].

As time goes by and society deals with various new challenges, Nahdlatul Ulama is demanded to respond to any social problem that becomes society's discourse and concern. The environmental crisis, in this talk, as a global discussion topic, is not excluded. It catches attention and response from NU *kiai*s especially in relation to cope with people's problems because of environmental crisis. Nahdlatul Ulama seems to really understand that the current environmental crisis is due to human behavior in the environment that tends to be destructive and unfriendly. The excessive use and exploitation of natural resources, for instance, will likely give negative impacts on the development of Indonesia as a country.

On the basis of it, the 33rd Nahdlatul Ulama Congress in Jombang had underlined an obligation that any industrialization as a result of

[34] See the results of the 33rd Nahdlatul Ulama Congress in Jombang, 48. "Hasil-BM-Ttg-Kebijakan-Ekspor-Benih-Lobster-Final."

globalization and current development must be environmentally friendly and paying so much attention to environmental aspects. The same goes on for the process of arranging government development programs in which ecological aspects need to get considered in order to maintain sustainable environment. One point of NU congress recommendation is as follows:

> "Nahdlatul Ulama as one of owners and founders of this country is responsible to guide the establishment of environmentally-friendly development and industrialization. It needs to ensure that any development and industrialization program can guarantee environmental sustainability and the Indonesians' prosperity."

Beginning from this context, Nahdlatul Ulama is committed to contributing in the sense of educating the public on their obligation to interact with the environment in a friendly manner. They are obliged to put the priority of ecosystem sustainability in utilizing natural resources potency.

Among others, this commitment is clear from the issue of some fatwas from LBM-NU after a series of discussions and decision making. The fatwa itself is moral-ethical guidance for *Nahdliyin*. Its making was based on the concern of *nahdliyin kiai* and intellectuals regarding the phenomenon of environmental crisis mainly during the last two decades.

They do realize that environmental crisis can give a negative impact on Indonesian development. Various natural disasters such as landslides, floods, climate change and global warming are among the concerned phenomena that lead them to take preventive action. Unfortunately, most of the time, human's greed in using natural resources becomes the cause of those disasters.

In a further examination, it becomes clear that ecological fatwas that LBM-NU issued are under a categorization, although they all talk

about environmental issues. The category consists of *waqi'iyah* (phenomenon based), *maudhūiyah* (thematic based) and *qānūniyah* (policy based) problems. For example, the fatwa on illegal fishing resulted from *The Bahtsul Masail* forum at the fatwa commission on *al-dīniyah al-waqi'iyah* (religious phenomenon). It occurred the same for fatwa on burning and sinking illegal foreign vessels for carrying out illegal fishing.

Historically, the issuance context of the fatwa on illegal fishing was the phenomenon of illegal fishing around Indonesian water territory which was increasingly massive. The fishery resources were automatically so much overexploited by foreign fishermen. Meanwhile, the fatwa on burning and sinking illegal ships was also because of illegal fishing practice and is an implementation of Law Number 45 of 2009 concerning Fisheries.

Moreover, Article 69 paragraph (1) of Law Number 15 the year 2000 states that "fishery control vessels serve to carry out supervision and law enforcement in the fishery sector within the Indonesian fishery management area." Meanwhile, paragraph (4) states that in the implementation of the function mentioned in the paragraph 1, fisheries investigators and/or supervisors can carry out special actions namely burning and/or sinking fishing vessels with foreign flags based on sufficient initial evidence".

In this case, the Indonesian Ministry of Marine Affairs and Fisheries is given the authority to carry out the mandate of this Law. In accordance with it, the former minister, Susi Pujiastuti, is known for her strict policies against illegal fishing practices and firmness in sentencing the penalty for sinking illegal foreign vessels.[35] Since serving as the minister, the number of destroyed vessels from fisheries crime cases from October 2014 to 2019 had increased to 556. 321 of them

[35] "Tenggelamkan-Kapal-Menteri-Susi-Diganjar-Seafood-Champion-Award-Di-Amerika," accessed September 20, 2020, http://rilis.id/tenggelamkan-kapal-menteri-susi-diganjar-seafood-champion-award-di-amerika.html.

were Vietnamese-flagged vessels, 91 were Philippine, 87 were Malaysian, 24 were Thai, 2 were Papua New Guinean, 3 were Chinese, 1 was from Nigerian and Belize and the rest 26 were from local Indonesian.[36]

For the Ministry itself, this action does not only aim to carry out the mandate of the Fisheries Law but also to support President Jokowi's vision and mission to make the sea as Indonesian future backrest. In more concrete purpose, this aims to ensure the community welfare through allocating potential wealth of marine resources in fulfilling the needs of a fishing community.

Apart from it, ship sinking punishment actually intends to give a deterrent effect for illegal fishers due to their disadvantageous action. This firm attitude shows Indonesian capability in upholding the law and providing legal certainty as a sovereign country. As a result, these efforts resulted in a quite significant change as mentioned in research published in the journal *Nature.* It conveyed that Susi's aggressive policy against illegal fishing has successfully reduced the illegal fishing number by 25% while increasing potenty of catches by 14% and profits by 12%.[37]

Another NU fatwa on the ecology, regarding the prohibition of excessive exploitation of natural resources, was based on socio-ecological facts particularly the unfriendly exploitation of natural resources. The phenomenon of the Indonesian environmental crisis is believed to have close relationship with the bad management and destructive use of natural resources. They both successfully put pressure on environmental sustainability as clear from the following examples:

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[36] "Selama-Menjabat-Menteri-Susi-Tenggelamkan-Berapa-Kapal," accessed September 20, 2020, https://economy.okezone.com/read/2019/10/07/320/2113824/selama-menjabat-menteri-susi-tenggelamkan-berapa-kapal.

[37] Reniel B Cabral, "'Rapid and Lasting Gains from Solving Illegal Fishing," *Nature Ecology & Evolution*, no. 2 April (2018): 650–58.

In Riau, there found many dug pits of ex-bauxite mines while in Kalimantan, thousands of hectares of land are abandoned due to its former use as coal mine areas. Papua suffers from giant puddles of former gold mining, while Aceh is dealing with some abandoned oil and gas production former spots in addition to much-damaged lands due to natural resource exploitation. The damage is partly due to the weak government control as well as ignorance of AMDAL (*Analisis Mengenai Dampak Lingkungan; Environmental Impact Assessment*).

In this specific context, the existence of an ecological fatwa to educate the public on an ethical-religious approach in the use of environmentally friendly natural resources is absolutely necessary.[38] So far, the ethical-religious perspective of natural resource exploitation has been largely ignored. Instead, the exploitation actors focuses on business and capital interest mindset. They exploit the natural resource destructively out of reasonable limits while ignoring consideration of sustainable development vision.

Meanwhile, the issuance context for a fatwa on land conversion is based on the increasing need for residential houses due to a population increase as a result of demographic bonus which peaked in 2020-2030.[39] On the other hand, it is undeniable that massive

[38] Relating to this, the Indonesian Ulama Council has also issued Fatwa Number 22 of 2011 concerning Environmentally Friendly Mining. The fatwa stated that the earth, water, and natural resources contained therein, including mining goods, are gifts of Allah Almighty that anyone can explor and exploit them for the benefit of the welfare and benefit of the community (*maslahah 'ammah*) sustainably. See, "Fatwa-Majelis-Ulama-Indonesia-Nomor-22-Tahun-2011-Tentang-Pertambangan-Ramah-Lingkungan," accessed September 20, 2020, https://mui-lplhsda.org/fatwa-majelis-ulama-indonesia-nomor-22-tahun-2011-tentang-pertambangan-ramah-lingkungan/.

[39] The demographic bonus is a condition in which a region or country has a bigger productive age population (aged 15-64 years) compared to non-productive ones (over 65 years). It is said to be a "bonus" because this condition does not happen continuously and does not last long. Indonesia is estimated to experience a demographic bonus during 2012-2028. See,

infrastructure building certainly leads to the decrease of productive land as the livelihood of low-class communities. The conversion of productive land into factory buildings, shops, real estate, apartments and other properties will surely harm the poors in managing their productive land.

As for the next two fatwas against plastic waste[40] and renewable energy are LBM-NU's responses on very strategic environmental issues. Both are under the category of *maudhū'iyah*. Ecologically, environmental pollution caused by plastic waste is very dangerous. This type of waste takes so much time to decompose while having a significant negative impact on the marine ecosystem as the estuary of garbage flowing from rivers. It certainly endangers and disrupts the sea ecosystem.

In this context, as a religion with ecological moral-ethics teaching, Islam provides guidance for Muslims to interact with and manage plastic waste through an ethichal-religious approach. Such a normative response is the real contribution to create an environmentally literate society in order to build people's high awareness of the importance of a clean and environmentally friendly life.[41]

Meanwhile, the fatwa on renewable energy as discussed in the book "Renewable Energy Fiqh" is *Bahtsul Masail*'s another response to a crucial environmental issue. What makes it urgent is particularly because renewable energy is the alternative to fulfill the energy needs

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Munawar Noor, "Kebijakan Pembangunan Kependudukan dan Bonus Demografi," *Serat Acitya; Jurnal Ilmiah UNTAG Semarang*, n.d.

[40]This fatwa was strengthened by the decision results of *Alim Ulama* National Conference in Banjar 2019 which recommended to the government that littering is forbidden in a religious perspective. Recognized or not, this decision serves as a strategy of institutionalizing values and the result of *ijtihad* to become a part of a social norms that people will likely obey and let themselves be guided.

[41] Said Agil Siraj, *Islam dan Penanggulangan Bahaya Sampah Plastik" Preface in Fiqih Penanggulangan Sampah Plastik* (Jakarta: Lembaga Bahtsul Masa'il PBNU dan Lembaga Penanggulangan Bencana dan Perubahan Iklim, n.d.), vii.

of Indonesian people in an environmentally friendly manner. Through *Bahtsul Masail,* Nahdlatul Ulama responds to these issues by encouraging the government to seek environmentally friendly alternative energy in order to preserve the environment and cope with environmental crisis due to destructive and environmentally unfriendly practices of coal mining and other resources. In this context, Nahdlatul Ulama' provides religious moral-ethical guidelines on how to proportionally use renewable energy.[42]

The last enlisted fatwa regarding the lobster seed export policy is categorized in the *qanūniyah* field because it was a response to government policies regarding the export of lobster seeds in the Ministry of Maritime Affairs and Fisheries Regulation Number 12/Permen-KP/2020 concerning the Management of Lobster (Panulirusspp), Crab (Scylla spp), and Crab (Portunussp) in Indonesian Territory. Nahdlatul Ulama' assumes that this policy must have absolutely considered the benefits aspects and prevented the damage it causes. In general, NU thinks that the making process of any regulations related to the public interest in *fiqh* studies must refer to *a fiqh* rule saying that *tasarruf al-imām ala al-raiyah manūt bi al-maslahah* (the leader's policy on people must be in line with the public interest).

In general, The Ministry of Marine Affairs and Fisheries Regulation 12/2020 intends to "rearrange" the provisions for catching and/or releasing lobsters. This new regulation triggered a polemic especially because it opened the opportunity for exporting clear lobster seeds. Ecologically, the lobster seed export policy can give a negative impact on the lobster habitat itself. Therefore, through *Bahtsul Masail*, Nahdlatul Ulama' recommended the government to evaluate the policy because it threatens the sustainability of the lobster habitat. Besides, it will be disadvantageous for small fishermen who rely their income on the lobster commodity.

[42] Rumadi, *Principal Director of Konsorsium Kemala's Preface in Fikih Energi Terbarukan* (Jakarta: Lakpesdam PBNU, 2017), ix.

Above all, the birth of ecological fatwas by Nahdlatul Ulama' through *Bahtsul Masa'il* (LBM-NU) forum was strongly influenced by socio-ecological reality that has become a public discourse and caught national and global attention. More than that, several ecological fatwas were born due to political, legal and social inequality factors. In this context, the LBM-NU fatwas as products of religious law and moral ethics for Muslim communities, especially *nahdliyin,* have an important role to increase ecological awareness and build a balance in the environmental ecosystem.

Follow Up Steps of *Green Fatwas*: Toward *Nahdliyin*'s Eco-Literacy

The term of eco-literacy or environmental literacy is often used to describe attitudes with high level of awareness on the importance of sustainable environment. Capra often uses another term interchangeably, namely ecological literacy as the eco stands for "ecological."[43]

In this context, those with eco-literacy are typically well motivated to protect and preserve the environment. They will likely arrange and apply a healthy and environmentally friendly lifestyle while making it harmonious with environment balances. This environmentally conscious attitude (eco-literacy), furthermore, will guide the whole aspects of their life and make it strongly-rooted culture that penetrates their mindset to build a sustainable society in a larger scope.[44]

The above characteristic is furthermore in line with Capra's statement that being environmentally conscious requires understanding on the principles of organizing ecological communities to apply in building sustainable communities on ecological

[43] Sonny A Keraf, *Filsafat Lingkungan Hidup: Alam Sebagai Sebuah Sistem Kehidupan* (Yogyakarta: Kanisius, 2014), 127.

[44] Moh. Mufid, "Fikih Konservasi Laut: Relevansi Fiqh Al-Bi'ah di Wilayah Pesisir Lamongan," *Manahij: Jurnal Kajian Hukum Islam* VII, no. 1 June (2018): 10.

preservation. At this point, it needs revitalization in many fields to build a pro-environmental paradigm in the world of education, economics and politics.[45]

The ecological fatwas of Nahdlatul Ulama' as an ethical-religious guide, into this extent, has a strategic role in building public awareness on how they should interact with the environment sustainably equitably. *Nahdliyyin* as a part of Indonesian society, moreover, have moral responsibility to carry out a main mission as caliphs on the earth. Therefore, the ecological fatwas as instruments to educate public to care for the environment need to lead into a real movement through relevant programs that community can carry it out collectively.

On the other hand, it cannot be denied that many *nahdliyyin* still assume that natural resources seem to never run out. In fact, natural resources are limited and will run out soon particularly in an improportional use. Therefore, the challenge of Muslims in general is to make public understand that water, air, climate, minerals and other natural resources need wise management and proper use by applying environmentally friendly treatment.

In responding to those who destructively litter waste randomly which then leads to abundant volume of waste and the deterioration of environmental carrying capacity, *Bank Sampah Nusantara* (Archipelago Garbage Bank) of LPBI standing for *Lembaga Penanggulangan Bencana dan Perubahan Iklim* Nahdlatul Ulama (Agency for Disaster Management and Climate Change) had promoted a campaign of "Zero Waste Archipelago" since its very first establishment. Additionally, the agency keeps discussing the issue of waste management both theoretically and practically that makes it known by more and more people through educational programs for the community from the central to regional levels. People are going to be more aware on the threat of waste problem to the life of mankind.

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[45] Fritjof Capra, *The Web of Life: A New Understanding of Living Systems* (London: Flaminggo, 1997), 197.

In practical terms, the movement of "Zero Waste Archipelago" was followed up by direct assistance for the community, especially in Islamic colleges under the auspices of Nahdlatul Ulama. One of the featured programs to succeed this mission was a roadshow to several regional points in which some actors of LPBI-NU *Archipelago* Garbage Bank conducted training on environmentally friendly community-based waste bank management model.

Conclusion

Ecological fatwa products from NU *Bahtsul Masa'il* forum are very strategic in responding to Indonesian's current environmental crisis. It closely relates to the socio-historical background in which NU has a strong commitment to guard Indonesian sustainable development. NU thinks it is urgent to provide moral guidance for Muslim community, particularly the *nahdliyyin,* to build their environmental awareness by issuing the fatwa. Afterward, some follow-up steps are taken such as through a program called *Bank Sampah Nusantara*. However, culturally, this kind of fatwa is believed to give unsignificant impact without formal suppport of environmental political policies that favor for sustainable development. Without it, it is hard to give neither direct impact on the society nor binding "force" on the wider community.

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al-Ihkam: Jurnal Hukum dan Pranata Sosial, 15 (2), 2020: 201-223
ISSN: 1907-591X, E-ISSN: 2442-3084
DOI: http://dx.doi.org/10.19105/al-Ihkam.v15i2.3677

Moluccas Local Wisdom in the Role of Marriage Arbitrators for Preventing Domestic Violence

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Article history: Received: 06 August 2020, Accepted: 24 December 2020, Published: 28 December 2020

Abstract:

This research aims to reveal the Moluccas local wisdom through the existence of marriage arbitrators among the Muslim community in Salahutu, Leihitu, and West Leihitu, Central Maluku. The data were collected through observation and interviews with community leaders, marriage arbitrators and their married sisters then analyzed descriptively and qualitatively. The research results showed that the marriage arbitrators come from a male distant relative who was appointed by custom as a part of the marriage custom. The appointment aims to strengthen the family relationship between the bride (married sister) and the arbitrator in which they can help each other. Traditionally, an arbitrator serves to help the bride in both material and non-material aspects, particularly in preventing domestic violence. He can become a mediator, peacemaker, and helper of the economic hardship as well as preventing the married sister from psychological domestic violence. Furthermore, he can also provide protection for his married sister from the

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threat of her husband's physical violence. This research found that the role of marriage arbitrators as peacemakers in preventing husband's violence against their married sisters is relevant to *the ḥakamayn* concept in Islamic law as well as the provisions of "safe houses by the community" in Indonesian Law Number 23 of 2004.

Keywords:
Marriage Arbitrator; Domestic Violence; Islamic Law; National Law

Abstrak:
Tulisan ini bertujuan untuk mengungkapkan peran kearifan lokal saudara kawin pada masyarakat Muslim di Kecamatan Salahutu, Leihitu dan Leihitu Barat. Kabupaten Maluku Tengah. Data dikumpulkan melalui observasi dan wawancara kepada tokoh masyarakat, saudara kawin dan saudari kawin kemudian dianalisis secara deskriptif kualitatif. Hasil penelitian menunjukkan bahwa saudara kawin adalah laki-laki dari kerabat jauh yang diangkat secara adat sebagai bagian dari adat perkawinan. Hal itu bertujuan untuk mempererat hubungan kekeluargaan antara saudara kawin dengan saudari kawinnya di mana keduanya bisa saling membantu. Secara adat, saudara kawin bertugas membantu mempelai perempuan (istri) dalam hal material maupun non-material, utamanya untuk mencegah tindak kekerasan dalam rumah tangga si saudari kawin. Saudara kawin bisa berperan sebagai penengah, juru damai, sekaligus membantu kesulitan ekonomi keluarga saudari kawinnya, termasuk mencegah terjadinya kekerasan psikis yang mungkin dialami si saudari kawin. Lebih jauh, saudara kawin juga bisa berperan melindungi saudari kawinnya dari ancaman kekerasan fisik suaminya. Temuan penelitian ini menunjukkan bahwa peran saudara kawin sebagai juru damai yang mencegah kekerasan suami kepada istri relevan dengan konsep *ḥakamayn* dalam hukum Islam serta ketentuan ″rumah aman oleh masyarakat,″ dalam Undang-Undang RI Nomor 23 Tahun 2004.

Kata Kunci:
Saudara Kawin; Kekerasan Dalam Rumah Tangga; Hukum Islam; Hukum Nasional

Introduction

Domestic violence is like an iceberg. What appears on the surface in the reports of various mass media is only a very little part of the reality. Those reports have not yet described the real condition of people's lives, although it might trigger the enactment of relevant and needed regulation.[1]

The National Commission on Violence against Women has reported that in 2016, as many as 259,150 cases of violence against women happened[2] and the number increased in 2017 to 348,446 cases. Of that number, 335,062 cases were domestic violence.[3] For this reason, the government enacted Law Number 23 of 2004 on the Elimination on Domestic Violence.

The existence of this law has changed the perception of public and law enforcers regarding violent action within the household sphere from private (civil) affairs into public or criminal ones. However, many people still do not understand the laws and regulations which include domestic violence as a criminal act. In this connection, most victims of domestic violence are women that makes

[1] See Hanafi Arief, "Domestic Violence and Victim Rights in Indonesian Law Concerning the Elimination of Domestic Violence," *Journal of Legal, Ethical and Regulatory Issues* 21, no. Spesial Issue (2018): 1.

[2] "Kekerasan dalam Rumah Tangga Tertinggi adalah Kekerasan atas Perempuan Di Indonesia," BBC Indonesia, 7 Maret 2017, accessed September 25, 2018, https://www.bbc.com/indonesia/indonesia-39180341 .

[3] "Kekerasan pada Perempuan Selama 2017 Didominasi KDRT dan Pelecehan," Detik News, 7 Maret 2018, accessed September 25, 2018, https://news.detik.com/berita/d-3903861/kekerasan-pada-perempuan-selama-2017-didominasi-kdrt-dan-pelecehan.

domestic violence in Indonesia mostly refers to violence against women.[4]

Unfortunately, a woman's position that seems weak, both physically and socio-culturally, creates a dilemma in responding to the domestic violence she experiences. In one hand, she might experience suffering physically, psychologically, sexually and even economically but on the other hand, reporting her husband to the police will cause disgrace to the family she builds. As a result, many women—wives, in this context—keep the domestic violence a secret in order to avoid public impression of the disharmony on her family.[5]

This occurs mostly due to the attitude of the Indonesian majority on the gender issues and women which are still so patriarchal. In fact, it potentially leads to various forms of injustice for women and provides space for domestic violence to occur more and more.[6] Therefore, it is necessary to prevent domestic violence in many ways to save women from the chain of violence.

Relevant to the description above, the Muslim community of Central Maluku, especially in the sub-district of Salahutu, Leihitu, and West Leihitu, has relevant local wisdom in preventing the violence called the marriage arbitrator. Preliminary research shows that the marriage arbitrator has a role to reconcile his married sister's household conflict and protect her from the threat of violence that her husband might perform.[7]

The role of this local wisdom deserves serious exploration from the aspect of Islamic law, especially on its relevance to the function of *ḥakamayn* (two peacemakers). In Islamic law terms, the *ḥakamayn* are

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[4] Siti Aisyah and Lyn Parker, "Problematic Conjugations: Women's Agency, Marriage and Domestic Violence in Indonesia," *Asian Studies Review* 38, No. 2 (2014): 208.

[5] Elli Nur Hayati, "Elastic Band Strategy': Women's Lived Experience of Coping with Domestic Violence in Rural Indonesia," *Globe Health Action* 6 (2013): 2.

[6] Lily Zakiah Munir, "Domestic Violence in Indonesia," *Muslim World Journal of Human Rights* 2, No. 1 (2005): 34.

[7] Yusuf Laisouw, "Former Village Head Larike," direct interview on August 17, 2017. Hasrul Kilrey, "Head of the District Office of Religious Affairs Salahutu" direct interview on September 14, 2017.

obliged to reconcile husband and wife's conflicts[8] to make them reunite again peacefully. In addition, it is also necessary to trace its relevance to the national law in Law Number 23 of 2004 on the Elimination of Domestic Violence.

Interestingly, in the tradition of this local community, a wife who deals with a dispute or suffers violence from her husband is not justified to complain and ask for help and protection from her parents. Instead, she has to complain and ask for protection from her marriage arbitrator.[9] Therefore, this needs a cross-examination from the perspective of national law since the Law of the Republic of Indonesia Number 23 of 2004 contains a provision on a safe house for domestic violence victims.

Research on domestic violence has been carried out by many scholars. One of which was Hayati, et al. (2014),[10] who examined the involvement of men in the prevention of domestic violence in Indonesian rural areas. However, their research has not mentioned any role of specific local wisdom in preventing domestic violence. Research by Emma Fulu et al[11], meanwhile, took a similar focus with those of Hayati although the violence prevention strategy has nothing to do with the role of marriage arbitrator.

Another research on the experiences of women as the victims of domestic violence is of Siti Aisyah and Lyn Parker.[12] Their research examined the experiences of women in Makassar, South Sulawesi, against domestic violence during their marriage. Additionally,

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[8] See Abū Hamid ibn Muhammad al-Gazali, *Ihyā 'Ulūm Al-Dîn* Vol. II, Ed. 3 (Beirut: Dar al Fikr, 1991), 55–56.

[9] Farid Naya, "Islamic Religious Figures in Liang Village," direct interview on July 12, 2018.

[10] Hayati, "We No Longer Live in the Old Days: A Qualitative Study on the Role of Masculinity and Religion for Men's Views on Violence Within Marriage in Rural Java, Indonesia," *BMC Women's Health* 14 (2014).

[11] See Emma Fulu, "Prevalence of and Factors Associated with Male Perpetration of Intimate Partner Violence: Findings from the UN Multi-Country Cross-Sectional Study on Men and Violence in Asia and the Pacific," Vol 1 October, 2013, 187, www.thelancet.com/lancetgh.

[12] Siti Aisyah and Lyn Parker, "Problematic Conjugations: Women's Agency, Marriage and Domestic Violence in Indonesia," 205, 209.

research by Nabiela Naily[13] revealed the relevance of Law Number 23 of 2004 with Islamic law. She mentioned that they both aim to protect women's rights and prohibit violence against them. However, she criticized that those types of laws are normative instead of applicable.

This paper, in this context, examines the prevention of domestic violence that the previous researches have not discussed yet. It focuses to analyze the role of marriage local wisdom in the Moluccas marriage arbitrator on the prevention of domestic violence on women. In addition to it, it also reveals the relevance of the marriage arbitrator's role with both Islamic law and national law.

Method

This research used a multidisciplinary approach including cultural, Islamic, and juridical ones. A cultural approach aimed to analyze the effectiveness of local wisdom on the marriage arbitrators in Central Maluku district in preventing domestic violence on women. The Islamic approach, meanwhile, would like to find the relevance of the marriage arbitrator's role with the provisions of Islamic law derived from the Quran, hadiths, and the opinions of Islamic theologians regarding the same issue particularly through the concept of *ḥakamayn*. As for the last, the juridical approach was used to analyze the relevance of marriage arbitrators' role with the provisions of Law Number 23 of 2004 on domestic violence prevention.

The research took place in Salahutu, Leihitu, and West Leihitu sub-districts, Central Maluku district. It engaged informants from community leaders, religious leaders, as well as marriage arbitrators and their married sisters in those three sub-districts. The data collection was through observation of appointing the marriage arbitrator procession and direct interviews to 14 informants. The interview materials relate mostly to the marriage arbitrator's role in preventing domestic violence. The data was then processed and

[13] Nabiela Naily, "A Policy Analysis from Gender and Islam Perspective on Regarding Elimination of Violence in Household," *Al-Qanun* 12, no. 1 June (2009): 230.

analyzed in a descriptive qualitative method[14] to make the drawn conclusions in line with the research problems.

Role of Marriage Arbitrators in Preventing Domestic Violence according to Customary Perspective

Muslim communities in Salahutu, Leihitu, and West Leihitu sub-districts have been appointing marriage arbitrators as a part of their own custom since ancient times until today. The binding power of the arbitrator is shown by their habit which still appoints of the arbitrator even though the marriage is carried out outside Maluku. A woman who is married to a local man, furthermore, deserves to appoint a local man whom she knows or trusts as her marriage arbitrator. The first and the main function of this appointment are to fulfill customary marriage requirements for Muslims.

In general, the arbitrators serve to represent the parents of their married sisters or the brides in handing over the duties and responsibilities to take care of her from her parents to her husband. This is in accordance with the prevailing tradition in the area that the marriage contract is carried out at the house of the prospective bridegrooms instead of the brides'. Furthermore, it closely relates to the patrilineal system (following the father's line) in the local community as a clear name from the clan deriving from the father's side instead of the mother's. This is contradictory to those of Minangkabauness with matrilineal ones.[15]

When the marriage contract date has been determined, the appointment of the marriage arbitrator (*leu mata'rima*) will take place.[16] This is particularly because the arbitrator will also play a role to perform '*ījāb* for the prospective bridegroom of his married sister. Based on this background from the early process of marriage, the

[14] See Imam Suprayogo and Tobroni, *Metodologi Penelitian Sosial Agama*, 2nd ed. (Bandung: Remaja Rosdakarya, 2003), 192–95.

[15] See Subhan MA. Rahman, "The Dynamic of Malay of Islamic Law The Rise and Practices of Adat Bersendi Syarak, Syarak Bersendi Kitabullah in Jambi," *Journal of Indonesian Islam* 11, no. 02 December (2017): 389.

[16] Farid Naya, "Islamic Religious Figures in Liang Village," direct interview on July 12, 2018.

arbitrator has the responsibility to help the bride as his married sister in several condition as follow:

1. Preventing Economic-Based Domestic Violence

When a married sister celebrates a rite such as the commemoration of the death of parents, the arbitrator must bring specific gifts to her house, namely food (such as bananas, rice) as well as mats and pillows. As a result, the community will automatically know and understand that the specific gift comes from the arbitrator as a customary obligation. Likewise, when a family member of the arbitrator, like his father or father-in-law passes away, the married sister is also obliged the same.[17]

In principle, the arbitrators' roles are to provide mutual economic and moral assistance to the married sisters. This applies in both happy celebrations (such as childbirth, *`aqīqah* or child naming celebration, circumcision, marriage, pilgrimage) and the grieving ones (hospitalization, death, etc). The obligation to help each other in social relationship is basically the consequence of human's condition and their basic needs. They have many types of need but on the other hand, they have limitations to fulfill them. Therefore, they need help from others ranging from close relatives, marriage arbitrators, to other parties.

In a more specific context, an arbitrator has, in fact, a duty to support his married sister's household economy. It means that if a married sister experiences financial problem and needs help, the arbitrator must be there to help her. The difficulties to this extent include basic necessities such as groceries (salt, vegetables) or other necessities that are not too burdensome. It aims to prevent any economic-based domestic conflicts as it tends to involve the married sister's parents. The role of the arbitrator is particularly needed in this condition because since appointed at the position, he has received duties and responsibilities from his married sister's parents.

Material assistance from the arbitrators is believed to substantially minimize the occurrence of domestic violence due to economic factors. This makes much sense as there found so much

[17] Hasan Lauselang, "An Islamic Religious Figures in Morella Village," direct interview on July 17, 2018.

household need that one day, a couple may experience shortages both for basic needs and the second one such as children's fee tuition. Relating to this, local customs prohibit a married sister to tell the economic hardship she deals with to her parents or siblings. As an alternative, she needs to ask for help from her arbitrator.

The consideration of this custom is because when a married sister asks for help from her parents or siblings, her family will know the incapacity of her son-in-law or brother-in-law. This can be, furthermore, known as a disgrace for the general public. However, if she tells the arbitrator for getting help, he will not tell anyone about it as he has been given the duty to help her.

The description above shows that the assistance of the arbitrator in overcoming economic hardship implies an effort to prevent domestic violence. If this condition remains the same without the help of the arbitrators, it potentially develops into domestic violence because of the economic factors. On the other hand, if a married sister's household economic hardships can be overcome by the arbitrator, the domestic economic violence can be prevented. From this case, the optimal role of the arbitrators can prevent a form of domestic violence in the married sister's household.

From the perspective of Islamic teaching, this kind of help is relevant to the Qur'anic recommendation to help each other in kindness as described in QS. Al-Ma'idah 5: 2

وَتَعَاوَنُوا عَلَى الْبِرِّ وَالتَّقْوَى وَلا تَعَاوَنُوا عَلَى الإِثْمِ وَالْعُدْوَانِ

'*Cooperate with one another in goodness and righteousness, and do not cooperate in sin and transgression.*'[18]

This verse is board in scope and target, including helping humans in general, Muslims, and especially families. However, the material assistance of an arbitrator can specifically save his married sister from any violence that her husband may commit due to the economic problem. Furthermore, his help does not only show his concern for his married sister but also for her husband's obligation to

[18] Department of Religious Affairs of the Republic of Indonesia, *Al-Qur'an Dan Terjemahnya* (Jakarta: Ditjen Bimas Islam, 2009), 142.

make a *ma'rūf* (proper) living adjusted to the local culture.[19] Another scope of the above verse is the importance of helping each other especially between husband and wife in preventing mis-understanding that typically leads to domestic violence.

2. Serving as Mediators and Peacemakers

Besides playing a role in helping material needs, a marriage arbitrator also serves as a mediator and peacemaker in resolving a conflict between his married sister and her husband. In this regard, the arbitrator's obligations include: *First*, protecting his married sister; *Second*, reconciling any conflict between his married sister and her husband.

Interestingly, in a case of household conflict and such, when a person becomes an arbitrator, his uncle(s), aunt(s), other sibling(s), and all of his extended family members are automatically considered as arbitrators right away. As a consequence, the extended family members of the arbitrator also have the same obligation as him to reconcile the conflict.[20] However, the obligation to reconcile the household conflict of a married sister still becomes the main responsibility of the marriage arbitrator himself.

The participation of extended family members only applies when the arbitrator needs it. Likewise, the religious and community leaders can also participate in providing advice to solve the household problems of a married sister and her husband. On the other hand, if the arbitrator does not need their intervention, they cannot interfere at all.

The customary provision that requires a married sister to ask for assistance in resolving domestic conflicts to her arbitrator instead of her parents or siblings aims to avoid larger conflicts of interest

[19] Muslim, "Pencegahan Pencegahan Kekerasan Dalam Rumah Tangga (KDRT) Melalui Konsep Hak Dan Kewajiban Suami Istri Dalam Islam," *Gender Equality: International Journal of Child and Gender Studies* 5, no. 1 (2019): 121 See also La Jamaa, Advokasi Korban Kekerasan Dalam Rumah Tangga Perspektif Hukum Pidana Positif dan Hukum Islam (Ed. 1; Yogyakarta: Deepublish, 2017). .

[20] Farid Naya, "Islamic Religious Figures in Liang Village," direct interview on July 12, 2018.

between her family and her husband. If her family gets involved, this will likely worsen the conflict because the family will typically stand by her. When this happens, it is very possible that the husband's family will also take a part and the condition gets worse because each party cannot act objectively. As a result, the conflict is hard to resolve peacefully and leads to divorce instead.

The role of an arbitrator, therefore, is very strategic considering that household problems are inevitable in every married couple. Each is only different in the level of complexity. Even though a husband and wife can solve the problems through internal dialogue between both, under certain conditions, the assistance of a third party as mediator is needed. Due to the importance of this custom, it also applies to non-native prospective bridegrooms of the area because it assures that a woman will be guided by an advisor, mediator, and peacemaker after the marriage.

Furthermore, the role of an arbitrator becomes more crucial in preventing the husband from committing violence to the wife. In this case, the arbitrator is a third and neutral party because even though he is a relative of the wife, he is a distant one so this will typically lead him to have no conflict of interest in resolving the conflict. Additionally, the role he plays is as mediator and peacemaker instead of an executor of the sentence. As far as he can, he needs to prevent his married sister from any domestic violence committed by her husband according to the philosophical value of this marriage custom. He must bridge them both and resolve the conflict between the couple peacefully using the win-win solution.

Technically, when a seed of conflict appears or after getting a report from his married sister, an arbitrator will ask for information from both parties proportionally in a balanced way to maintain his neutrality. He will not hesitate to warn or reprimand his married sister when it is known that she made a mistake. This happens because the arbitrator will also be ashamed of any mistake she might make.[21] Likewise, he also has the right to reprimand the husband who commits domestic violence against his married sister. However, the

[21] Abdul Gafar Latulanit, "Imam of the Morella Village Mosque," direct interview on July 3, 2018.

warning should be in a friendly and polite manner using a persuasive approach.

For example, an arbitrator can request his favorite food to the married sister and she will ask her husband to take her to the arbitrator's house so that the husband will not consider it as a force. During the visit, with a warm atmosphere, the arbitrator can convey the wife's complaints and asks him questions on whether he commits domestic violence, for instance.[22] Otherwise, he can begin sharing stories then presenting the wife's complaint figuratively and ask the husband's opinion. These actions aim to avoid any partial or missed information while making the husband aware of his mistake.

The arbitrator will then review and investigate the information in order that he can provide proper advice to mediate the dispute appropriately. In short, the marriage arbitrator as the mediator should not take any sides. He must be partial neither to his married sister nor to the husband.[23] In this way, the husband will not feel oppressed by the arbitrator's existence and the role he plays.

Generally, the husband obeys the arbitrator's advice as a part of customary rule obedience. So far, there found no husband who dares to oppose or disobey the advice. More or less, this is much influenced by the way the arbitrator advises him while still making him feel respected and appreciated as well as maintaining his authority.

Later on, an arbitrator also serves to reconcile and find solutions to make conflicted husband and wife return to harmony and peace. This certainly does not only affect wordly life, but also for an afterlife of the couple. In the end, if the conflict can get reconciled by the arbitrator, it will be very useful in maintaining the household harmony and keep the happiness not only for the couple but also for children and families of both.

On the other hand, if the early reconciliation process fails, the household is at the threat of divorce. In this kind of emergency condition, the arbitrator can maximize his role by involving his father to be another mediator, peacemaker, and protector of his married

[22] Sittin Masawoy, "Hila Village Community," direct interview on July 12, 2018.

[23] Abdul Wahab Malawat, "An Imam of the Mamala Village Mosque," direct interview on July 13, 2018.

sister. However, again, this role cannot be turned over to his married sister's parents because as mentioned earlier, she is not allowed to directly complain to her parents or return to their house for avoiding the worst things. Moreover, this shortcut will hamper an arbitrator to play his role objectively.[24]

The description makes it clear that efforts to prevent domestic violence among Muslim communities in the sub-district of Salahutu, Leihitu, and West Leihitu are carried out through the maximization of arbitrator's roles as a mediator and peacemaker. These two functions are carried out simultaneously when dealing with the domestic conflict of a household. It also becomes obvious that the success of the arbitrator in playing their role means the success to prevent domestic violence physically, psychologically, or economically. After all, the couple cannot possibly report or tell the arbitrator on sexual violence she might experience.

3. Protecting the Married Sister from any Domestic Violence

The marriage arbitrator is also given the custom responsibility to protect his married sister from domestic violence that her husband may commit. Therefore, if she experiences any form of domestic violence, she is supposed to directly ask for protection from the arbitrator. Due to this procedure, a husband usually does not have any courage to commit violence against his wife anymore once she tells the arbitrator.[25] He will also consider psychological and social sanctions which put him as ignorant of customs and uncivilized if he keeps doing the violence.

The arbitrator, therefore, plays a very important role in protecting the married sister from various forms of domestic violence. Most of the time, a married sister who experiences physical violence will seek protection to the arbitrator's house. In this condition, according to the local wisdom, a husband is not allowed to force his wife to return to his house without the arbitrator's permission or her own consent. He will not even dare to seek and chase his wife to the

[24] Farid Naya, "Islamic Religious Figures in Liang Village," direct interview on July 12, 2018.

[25] Mas'ad Hatuwe, "A Married Sister in Hila Village,"direct interview on August 20, 2018.

house of the arbitrator. This aims to prevent the husband from committing further violence against his wife.

For the wife, the choice to seek protection to the arbitrator's house is safer than returning to her parents' house. By seeking protection from her parents, the husband might interpret that she has run away from the house for breaking the marriage bond. When this happens, the arbitrator cannot typically solve the problem. It is different if the wife seeks protection to the arbitrator's house as it will be interpreted as her effort to ask for protection and find a solution.

In the midst of conflict, the arbitrator has a strong position in the local customary order which enables him to carry out his roles and functions properly. In this regard, he plays a role as a protector. This role applies whether domestic conflict is followed by physical, psychological, or economic violence or without violence. However, in most of the conditions, household conflict generally leads to the domestic violence and this makes the arbitrator's position very urgent.

After receiving a report or complaint from his married sister, the arbitrator will typically seek a proper approach and a common ground to solve the conflict. Instead of taking action authoritatively, he would prefer to take persuasive steps in accomplishing his mission. Additionally, he will also avoid doing any physical violence to avenge the husband of his married sister.

A marriage arbitrator can successfully accomplish his mission in preventing the occurrence of domestic violence in her married sister's household community is due to the community's obedience and acknowledgment to the customs of the marriage arbitrator. Without it, his role will work nothing. More specifically, the significant role of an arbitrator, for this purpose, is particularly due to the following reasons:

1) The arbitrator has been delegated responsibility by the parents of his married sister. Therefore, in the process of conflict settlement, the intervention of other parties, including family and even parents, is not justified. Likewise, local religious leaders will not be willing to solve the conflict before it is handled by the arbitrator.
2) According to the custom, a husband is supposed not to dare to oppose the arbitrator.

3) Advice from the arbitrator must be obeyed by the couple. Likewise, a husband is obliged to be cooperative in supporting the protection efforts that an arbitrator makes for his wife.
4) The arbitrator's role also works as a preventive tool of domestic violence and therefore contributing significantly to household harmony.[26]

Role of Marriage Arbitrator in Preventing Domestic Violence according to Islamic Law

Household is a part of society in with the basic nature to always dynamically change. This is relevant to the theory of law and social change mentioning that law develops following the stages of community development. The law becomes more and more complex as society experiences further development. Another relevant theory was put forward by Emile Durkheim which emphasized his attention to the phenomenon of social solidarity among society members. He argues on a connection between certain types of law and the nature of social solidarity living in the society.[27]

Meanwhile, Schwartz examines some forms of legal organization as follow: (1) *counsel,* which specialist attorneys out of relatives of a disputing party regularly uses it in resolving a conflict; (2) *mediation*, which a third party out of disputing party's relatived uses it in a conflict resolution; (3) police, as the special armed forces with either part or whole job to enforce the law. A research found that people with no mediation are the ones with the simplest structure because they rarely experience conflicts of interest.[28] On the other hand, complex societies need mediation because its complexity may grow the seed of conflict among one another.

The same goes on in a cultured society in terms of the need for mediation. Handling domestic violence, for instance, requires a mediation institution outside the court by either family members or third party out of family line. The existence of the third party can

[26] See La Jamaa, *Fiqih Kontemporer (Kajian Problematika Hukum Islam di Era Kontemporer)* (Yogyakarta: Deepublish, 2017), 38.

[27] Satjipto Rahardjo, *Hukum Dan Masyarakat*, 4th ed. (Bandung: Angkasa, 1980), 102–3.

[28] Satjipto Rahardjo, 110.

guarantee objectivity and neutrality in resolving domestic disputes or conflicts.

Relating to this, some of Islamic teachings have been crystallized into customs in Muslim community, such as *ḥakamayn* concept which turns to a form of marriage arbitrator on the perspective of Moluccas local custom. However, some differences are inevitably found. The main different is because in the Qur'an, two people are recommended as peacemakers consisting of one from the husband's side and another from the wife's side. Meanwhile for this local cucstom, there is only one arbitrator from the wife's side.

Besides, *ḥakamayn* is chosen after the conflict occurs while the arbitrator has been prepared before the conflict takes place even before the marriage ceremony procession happens. The arbitrator has been formalized since the day of the marriage contract to anticipate all possibilities while the *ḥakamayn* appointment is only in the midst of conflict. Meaning to say, if there is no conflict, there is no need to choose *ḥakamayn*. In Indonesia, *ḥakamayn* is also appointed in the Religious Courts during the divorce process.[29]

Furthermore, two peacemakers (*ḥakamayn*) in the Islamic law do not need to come from the couples' family. They can come from other parties who are believed to be able to reconcile the conflict. The number of two representing both sides is one of efforts to create balance or justice to resolve conflict peacefully. The same role is also be manifested in the role of marriage arbitrator no matter he is only one in number as he keeps in neutral position. In short, no matter they are different in many aspects, both *ḥakam* and arbitrator have the same mission and right to reconcile husband and wife conflicts .

Theoretically, the concept of *ḥakamayn* is transformed into a custom in certain communities in which Islamic law usually calls it as '*urf*. '*Urf* itself means general actions of a community, both in the form of oral and deeds, which have become habit as it is acceptable by common sense and good character.[30] In essence, '*urf* is a custom that a

[29] See Nirmala Hasan, "Pengangkatan Hakamain Dalam Proses Perceraian (Studi Kasus Di Pengadilan Agama Kotamobagu)," *Jurnal Ilmiah Al-Syir'ah* 3, no. 1 (2006).

[30] See Fauziah, "Konsep 'Urf Dalam Pandangan Ulama Ushul Fiqh (Telaah Historis)," *Nurani* 14, no. 02 December (2014): 16–17.

community carries it out continuously due to consideration that it has beneficial values in their social life.

'*Urf* is further recognized as a binding legal rule for the Muslim community as clear at one of of Islamic law basic rules; *al-'ādah muḥakkamah* (customs can be used as (consideration) law).[31] From this point, '*urf* is also called *al-'ādah* as it is something that (local) people know it well then repeat it more and more through their words and deeds that it then becomes a common thing and generally accepted.

In this regard, custom (*'urf*) bridges the divine values and human values in Islamic teachings as an effort to take heavenly God's teachings into earthly human life. It becomes important because in fact, Islamic teachings have established all the rules of conduct for Muslim[32] although it needs further exploration from Muslim themselves to make them concrete and applicable.

The existence of a marriage arbitrator in carrying out the role of mediator in conflict while preventing domestic violence of his married sister has therefore two positions. *First*, it is a custom that the local Muslim community adhere to that it becomes '*urf* in the perspectif of Islamic law. *Second*, it has similar duty and function as *ḥakamayn*. The arbitrator, therefore, has carried out the mission of Islamic law in reconciling husband and wife conflicts[33] particularly through the concept of *ḥakamayn* so that marriage as an institution of procreation[34] can be well maintaned.

The following definition of '*urf* has strenghthened the assumption on the common aim between *ḥakamayn* and the arbitrator. According to Jalāl al-Dīn `Abd al-Raḥman, as mentioned by A. Djazuli, 'urf or custom is as follows:[35]

إِنَّمَا تُعْتَبَرُ الْعَادَةُ إِذَا اطَرَدَتْ فَإِنْ اضْطَرَبَتْ فَلا

[31] A. Djazuli, *Kaidah-Kaidah Fikih* (Jakarta: Kencana, 2006), 78.

[32] Jan Michiel Otto, ed., *Sharia Incorporateda Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present* (Leiden: Leiden University Press, 2010), 24.

[33] Bustanul Arifin and Lukman Santoso, "Perlindungan Perempuan Korban Kekerasan Dalam Rumah Tangga Perspektif Hukum Islam," *De Jure: Jurnal Hukum Dan Syariah* 8, no. 2 (2016): 113.

[34] Bustanul Arifin and Lukman Santoso, 117.

[35] A. Djazuli, *Kaidah-Kaidah Fikih*, 85.

A habit can be considered (in Islamic law perspective) due to general acceptance and repetition. When there found so much deviance, it cannot be used as a legal basis.'

The existence of an arbitrator at the Moluccas custom fulfills the above formula. Marriage arbitrators' existence strongly binds the Muslim community in those three subdistricts even for those who live outside. Also, the role of arbitrator is relevant to *ḥakamayn* because it does not deviate the Islamic law.

Furthermore, the marriage arbitrator as a part of custom meets the requirements of another following rule:

اَلْعِبرَةُلِلْغَالِبِ الشَّائِعِ لَالِلنَّادِرِ

The recognized custom is customary which generally occurs and is known by humans instead of customary that rarely occurs.'[36]

In short, although the verses and hadiths do not regulate on the existence and role of the arbitrator textually, the existence of *ḥakamayn* institution can contextually be used to protect wife from potential husband's violence using analogical reasoning. Moreover, a husband is not only obliged to meet the needs of his wife, but also to protect her. Therefore, there must be a third party who supervises the husband to treat her well by not making her as the object of domestic violence.

Role of Marriage Arbitrator in Preventing Domestic Violence according to Indonesian Law

This research reveals that Muslim community of Salahutu, Leihitu, and West Leihitu district consider domestic violence as a type of public affair. It is quite different from the research finding of Elli Nur Hayati mentioning that domestic violence was still seen by most people as a private matter.[37] This shifting mindset is partially clear from serious action of a marriage arbitrator in preventing and

[36] A. Djazuli, *Kaidah-Kaidah Fikih*.

[37] Elli Nur Hayati, "Domestic Violence Against Women in Rural Indonesia Searching for Multilevel Prevention" (Umeå University Sweden, 2013), v.

protecting her married sister from any domestic violence as well as the maintenance of this customary role among the society across generations.

The role of the arbitrator in resolving household conflicts and preventing any domestic violence is furthermore relevant to the provisions of articles 51 to 53 in the Law on the Elimination of Domestic Violence. This is mainly because the official law enforcers cannot carry out any investigations, examinations, and prosecutions without complaints or reports from domestic violence victims or their families. Likewise, the arbitrator will only carry out his role when he receives a request from either his married sister or her husband.

The existence of the arbitrator as mediation institution in protecting wife from being domestic violence victim is not textually regulated in the whole part of Law of the Republic of Indonesia Number 23 of 2004. Instead, it is only relevant to the provisions of temporary protection regulated in specific articles, mainly the Article 16 as follow:

(1) Within 1 x 24 (one time twenty four) hours after knowing or receiving reports of domestic violence, the police are obliged to immediately provide temporary protection to the victim;
(2) Temporary protection as referred to in paragraph (1) shall be given no later than 7 (seven) days after the victim is handled;
(3) Within 1 x 24 (one time twenty four) hours from granting protection as referred to in paragraph (1), the police are obliged to request a letter of protection order from the court.[38]

Although addressed for police as one of official law enforcers, the provisions of Article 16 above, mainly the first and the second, are relevant to the role of the arbitrator in providing protection to his married sister. He is always available to be the one whom her married sister will visit to and make complain about her household conflict, particularly dealing with domestic violence. Moreover, a wife who complains and asks for protection from her arbitrator cannot be bothered by her husband.

[38] Republic of Indonesia, *Undang-Undang RI Nomor 23 Tahun 2004 tentang Penghapusan Kekerasan dalam Rumah Tangga* (Jakarta: Sinar Grafika, 2005), 7.

Another article, namely 22 of this Law on the provision of 'safe house', is also relevant to the role that the arbitrator plays. Paragraph (2) of the Article mentions a formula for a 'safe house' that needs to belong to the government, local government, or the community.[39] Although the house of the arbitrator is not intentionally built with a special purpose as a "safe house" for protecting domestic violence victims, it can be categorized as so-called a safe house belonging to the community.

The above-mentioned provisions show that domestic violence victims have rights during the justice-seeking process even before the prosecutor has officially proposed a criminal charge.[40] This means a lot in protecting women's rights in Indonesian Islamic family law.[41] However, the role maximization of a marriage arbitrator in protecting his married sister, in this sense, does not mean ignoring the state's criminal justice system in solving domestic violence.

It is a form of appreciation on the capacity of local communities in adopting the principles of protection on violent victims by their local cultural context and due to the power of customary law.[42] Moreover, the role of the arbitrator has made so much effort to prevent and protect the domestic violence victims long before the birth of any relevant Indonesian Law.

[39] Republic of Indonesia, 9.

[40] See Paul G. Cassell, "Crime Victims Rights During Criminal Investigations? Applying the Crime Victims Right Act Before Criminal Charges Are Filed," *Journal of Criminal Law and Criminology* 104, no. 1 (2014): 103.

[41] See Abu Rokhmad and Sulistiyono Susilo, "Conceptualizing Authority of The Legalization of Indonesian Women's Rights in Islamic Family Law," *Journal of Indonesian Islam* 11, no. 2 (2017): 489.

[42] Philippa Venning, "Marrying Contested Approaches: Empowerment and the Imposition of International Principles: Domestic Violence Case Resolution in Indonesia," *The Journal of Development Studies* 46, no. 3 March (2010): 397.

Conclusion

This research finds that the local wisdom of marriage arbitrator in the Muslim community of Salahutu, Leihitu, and West Leihitu districts, Central Maluku district, has a very important role in preventing domestic violence. More specifically, his existence could potentially prevent economic-based domestic violence, resolve household conflict, and protect the domestic violence victims. For the last role, an arbitrator can play both preventive and curative functions. In addition, to have a strong rooted foundation at the customary perspective that it maintains across generation, the role of the arbitrator is relevant to the *ḥakamayn* concept in the Islamic law as well as the Law of the Republic of Indonesia Number 23 of 2004 through the scheme of "safe house"

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al-Ihkam: Jurnal Hukum dan Pranata Sosial, 15 (2), 2020: 224-250
ISSN: 1907-591X, E-ISSN: 2442-3084
DOI: http://doi.org/10.19105/al-lhkam.v15i2.3787

Fiqh and Custom Negotiation in Avoiding Inheritance Dispute Tradition among *Mataraman* Society East Java

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Article history: Received: 10 September 2020, Accepted: 24 December 2020, Published: 28 December 2020

Abstract:

This article reveals the negotiation models to avoid inheritance dispute among *Mataraman* society at East Java responding to potentially high number of inheritance dispute cases which often becomes an acute family social problem. Conducting a field research on seven families carrying out inheritance distribution process, this article classifies three models of *Mataraman* society's negotiation in inheritance dispute settlement. They are negotiation using theology *cum* tradition procedure, negotiation using *fiqh cum* tradition, and negotiation using indigenous mainstream wisdom procedure. Among the three, the procedure of *fiqh cum* tradition comes as the mainstream solution because it offers a middle way to settle inheritance disputes for the sake of assets unity and harmonious family relationship. It also becomes a role model for social based negotiation process for settling inheritance distribution in a multicultural society.

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Keywords:
Negotiation; *Mataraman*; *Fiqh Mawārith*; Inheritance Dispute; Settlement

Abstrak:
Artikel ini menggali model negosiasi dalam rangka mencegah sengketa waris pada masyarakat Mataraman Jawa Timur sebagai respon atas tingginya potensi angka sengketa waris yang muncul di masyarakat dan acapkali menjadi problem sosial akut dalam sebuah keluarga. Dengan melakukan riset lapangan terhadap tujuh keluarga yang mengalami proses pembagian waris, artikel ini mengklasifikasi tiga model prosedur dalam proses negosiasi penyelesaian sengketa waris di masyarakat Mataraman. Ketiganya adalah negosiasi dengan prosedur teologi agama cum adat, negosiasi dengan fiqh cum adat, dan negosiasi dengan prosedur kearifan mainstream lokal. Dari ketiga formulasi tersebut, model fiqh cum adat menjadi tawaran sekaligus solusi mainstream karena merupakan jalan tengah penyelesaian sengketa waris di masyarakat demi keutuhan aset dan keharmonisan hubungan keluarga. Kategori tersebut sekaligus menjadi role model atas proses negosiasi dalam penyelesaian sengketa pembagian waris berdimensi sosial dalam masyarakat multikultur.

Kata Kunci:
Negosiasi; Mataraman; Fiqh Mawaris; Sengketa Waris; Penyelesaian

Introduction

In Javanese tradition, every life aspect becomes urgent and is well marked with each distinctive feature. It shows specific, unique, as well as significant acculturation between socio-cultural life and Islam as the religion of Javanesse majority. This can be seen from the process of childbirth, spouse matchmaking, marriage, divorce, inheritance, *waqf*, until death.[1] One of acculturation portraits is clear from *Mataraman* community living in the West part of East Java

[1] Ter Haar, *Asas-Asas Dan Susunan Hukum Adat*, ed. Soebakti Poesponoto (Jakarta: Pradnya Paramita, 1983), 188.

province, including Madiun, Ponorogo, Ngawi, Magetan, and Pacitan. The Islamic tradition has been very well acculturated with its people's local tradition.

Relating to this, Woodward mentioned that dialectic between Islam and Java has occurred regeneratively since the entrance of the religion to the land of Java. The relationship between the two has further becomes a new tradition in which any custom connecting them both still has its existence until today. As another consequence, the relationship between the two shows its own distinctive and unique patterns. The main and the most common issue on this is about any habit across some generation with each theoretical importance as a major source of socio-religious either conflict or integrity.[2]

Into some extent, not all Javanese customary practices on socio-religious rituals violate Islamic basic principles. They reflect diversity of opinion among Javanesse people. Therefore, it is impossible to determine the exact definition on, for instance, traditional students (*santri)* or the concept and correct interpretation of *Kejawen*. This is partly due to some attempt to clash Javanesse values and Islamic teaching on what to do and what not to do as a normal and inevitable dialectic while the concept of syncretism becomes a big debate issue. Nevertheless, there remains a common view among traditional students (*santri)* community which is not quite different from that of Javanese Muslims.[3]

Inheritance distribution, for instance, is included as living law which shows the acculturation. The fusion between local culture and Islamic teaching leads to a meeting point, a point of tension, and even a point of difference that makes negotiation necessary. In this context, negotiation becomes an effort to build peace and harmony in the process of inheritance distribution as it tends to trigger internal social conflict in a family.[4]

In particular, negotiation functions to manage conflict as well as identifying possible solution. It is a process between two or more

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[2] Mark R Woodward, *Islam Jawa Kesalehan Normaif Versus Kebatinan* (Yogyakarta: LKiS, 2004), 326.

[3] Woodward, *Islam Jawa Kesalehan Normaif Versus Kebatinan*.

[4]Cik Hasan Basri, *Pilar-Pilar Penelitian Hukum Islam dan Pranata Sosial* (Jakarta: Rajawali Press, 2004), 116–17.

parties to find mutually beneficial solutions from a common problem involving them all together. It also means willingness to look for creative options in formulating the solution.[5] At least, there found two forms of negotiation, namely the preparatory-interaction-conclusion negotiation model and the pre negotiation-negotiation-post-negotiation model.[6]

In the academic realm, the research on inheritance traditions has been carried out by some scholars. One of which was on the inheritance distribution on children from non- formal marriage among *Kebonan Lumajang* community. It was found that the local people tends to use cultural inheritance procedure.[7]

In another study, Hipni argued that women in Madurese society were considered not only as a passive family member, but also a symbol of honor and family survival.[8] Such a view leads to more comprehensive understanding on the inheritance in which women are put on an equal position with men in the sense of traditional inheritance distribution.

Meanwhile at *Mataraman* society, there are at least seven procedures of inheritance distribution namely *sepikul segendong* (men get two portions while women only get one, almost the same as those in Islamic law), *sigar papat* (divided equally) peace-seeking, *nyusuki* (purchasing inheritance asset from the follow heir), suspension of the distribution, distribution for adopted children and equal distribution.

The deeply-rooted tradition of *Mataraman* people in inheritance distribution is of special interest of this paper. At the same time, some local people strictly uphold the norms of Islamic law while ignoring inherited traditions and customs.[9] Based on it, this paper aims to offer the formulation of settlement in negotiating inheritance potential disputes among *Mataraman* community. It starts with the description

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[5]M Mukhsin Jamil, *Mengelola Konflik Membangun Damai* (Semarang: WMC IAIN Walisongo, 2007), 89.

[6]Jamil, *Mengelola Konflik Membangun Damai*.

[7]Qurrotul Ainiyah, Syarifah Marwiyah, and Sri Lumatus Sa'adah, "Pembagian Waris Etnis Madura Terhadap Anak Luar Nikah Di Dusun Kebonan Kecamatan Yosowilangun Kabupaten Lumajang," *Al- Ihkam* 11, No. 2 (2016): 359.

[8]Muhammad Hipni, "The Study of Maqâshid Syarî`ah toward Maduresse Traditional Inheritance by Using System Approach," *Al-Ihkam* 14, No. 1 (2019): 68–69.

[9]Interview with Ihsan, a Ponorogo citizen, November 20, 2019.

of *Mataraman* community, existed negotiation process, procedure(s) for avoiding any potential dispute and the formulation offer.

Methods

This is an exploratory field research which pays very much attention to phenomena and realities living in the society. In addition to be descriptive, it also portrays data on distribution of Javanesse and Islamic traditional inheritance using the theory and relation of culture. Contestation between Islamic values and local custom that *Mataraman* society adheres to has happened.

Kaplan categorizes the relation between religious and customary norms in three following assumption. *First* is a pattern of two closely related things which come from the same source. *Second* is a pattern of two different things which, instead of blaming and ignoring, appreciate each others's existence.[10] *Third* is as a pattern of dynamic relation on the agent of change and agent of social engineering which then leads customary norms permeate into religious ones intertwinnedly. The last pattern seems similar with Van den Berg's complex reception theory.[11]

It is furthermore a study of living law among Muslim *Mataraman* community which grows and develops through internalization process and social interaction. Therefore, this reaearch uses adaptation and assimilation framework between Islamic values and local norms that can be mutually either pervasive or problematic and thus leading to agreement on how local people are supposed to behave, especially in giving response and running dialogue for avoiding any potential inheritance dispute.[12]

The primary data for this research comes from in-depth interviews result with seven families as representatives of those who passed throgh this kind of process. Meanwhile, the secondary data is from relevant literature information. The two types of data are then

[10]David Kaplan, *Teori Budaya*, ed. Landung Simatupang (Yogyakarta: Pustaka Pelajar, 2000), 184.

[11]Kaplan, *Teori Budaya*.

[12]Basri, *Pilar-Pilar Penelitian Hukum Islam dan Pranata Sosial*, 116–17.

analysed through editing, organizing, and research results clustering.[13]

The Description of *Mataraman* Society East Java.

The cultural-based areas in East Java are divided into four regions. *First,* the Madurese culture which is popularly known as the horseshoe region. It refers to those who live in Madura Island or *Pandalungan* area on the North coast of East Java such as Pasuruan, Probolinggo, Bondowoso, and Situbondo Districts. *Second,* the Arek culture which includes Malang, Mojokerto, Sidoarjo, Lamongan, Gresik, and Surabaya. *Third*, the culture of *Wong Kulon* (Javaness languange means the West People) which consists of those who live at the South coast areas namely Lumajang and Jember Districts. Besides, people who inhabit around the Bali Strait coast and the Tengger areas are also included in this category. *Fourth,* the *Mataraman* culture, namely the East Javanese who speak Central Java languange and dialects, such as Pacitan, Magetan, Madiun, Bojonegoro, Tuban, Nganjuk, Kediri, Blitar, Tulungagung, Trenggalek, and Ponorogo Districts.[14]

In this paper, the author focuses on discussing the western part of *Mataraman* area which includes Pacitan, Madiun, Ponorogo, Magetan, and Ngawi Districs. *Mataraman* itself refers to an area which is still culturally close to the custom and tradition of the Mataram Kingdom based in Yogyakarta and Surakarta. The name of *Mataraman* was given historically because of its close relationship with Mataram Kingdom at that time.

Most of the time, the customs of *Matraman* people have similarities or at least likeness to people in Yogyakarta and Surakarta. Of the several similarities, the most striking one is in terms of language. The use of Javanese *Kromo* with a smooth intonation, although not as smooth as the indigenous people of Yogyakarta and Surakarta, really supports this. The *Mataraman* area, apart from being identical in terms of culture to *Mataram* kingdom, features unique

[13]A Michel Huberman Matthew B Miles, *Qualitative Data Analysis* (Jakarta: Universitas Indonesia Press, 1994), 20.

[14]Nurhasanah Leni, "Demokrasi Dan Budaya Politik Lokal di Jawa Timur," *Jurnal TAPIS* 8, No. 1 (2012): 23–24.

historical note from the fragment of spread and development of Islam. The Islamization in *Mataraman* area occurred after Islam had developed on the Northern coast of Java.[15]

As a consequence, *Mataraman* Islam has its uniqueness in comparison with Islam in other areas. Javanese culture and heterogeneous Islamic teachings in Java are manifested in a dialogue. This is in contrast to Malay culture and Islamic teaching which shows an integrative ones. Accordingly, Islam deals with a variety of challenges and sometimes clash with local traditions. The tensions and conflicts between *Kejawen* (Javanesse tradition) and Islam still became a special feature of Islamic evolution in Java, especially in the late 19th century or the colonial period.[16]

Javanesse ethnic, meanwhile, is the largest ethnic group in the Southeast Asia. It numbers around forty percent of more than two hundred million Indonesians. As Indonesian population, the majority of Javanesse are Muslim numbering more than 85%. However, this large number shows a variety of cultures not only because of enormous diversity in Indonesian itself, but also of the sub-cultural variations among the Javanese themselves.[17] *Matraman,* in this talk, is a part of Javanesse Moslems who were under the rule of the Islamic Mataram Kingdom and therefore shows intergrated background among Javanese culture, kingdom and Islam in the social and religious life. It further implies in the whole aspect of its people, including the custom and rule of inheritance distribution.

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[15]A. Jauhar Fuad, "Tlatah dan Tradisi Keagamaan Islam Mataraman," *TRIBAKTI: Jurnal Pemikiran Keislaman* 30, No. 1 (2019): 3–4.

[16]Fuad, "Tlatah Dan Tradisi Keagamaan Islam Mataraman."

[17]Since a long time ago, they, including those who live at the East Java, have an old identification on two major types of religious commitment, namely those who pray (*salat,* in Indonesian) five times a day and those who do not. The first category is called "*putihan*", (derivatively coming from the root word *putih* or white) consisting of those who are purely religious and are marked by practicing five daily prayers in routine. Another category is called "*abangan*", (derivatively coming from the root word *abang* or red) referring to those who only pray when they have time or are only seen as religious people in few occasion, such as in Islamic holiday celebration like Eid while on other days, religion is only attached to their Id Card. See Abdul Chalik, "Islam Mataraman and Its Political Orientation in the History of Elections in Indonesia," *Islamica* 5, No. 2 (2011): 216.

The Negotiation Process of *Mataraman* Community in Avoiding Inheritance Dispute

The law of inheritance regulates the transfer of property from a deceased to his/her heirs. It is under the scope of *mu`āmalah* discussion or family law to be more specific.[18] The main issues of inheritance are on how the property is distributed, to whom it is delivered and and how it is transferred.[19] In this context, Islamic jurisprudence of inheritance is deduced from the Qur'anic rule which explores the first and second issues in details. The list of heirs as well as the number of share for each are stated clearly. The receipents consist of children (son and daughter), spuose (husband or wife), parents (mother and father), brothers, and others. The shares, meanwhile, are even mentioned in definite percentage starting from half, one-quarter, one-sixth, one-eighth, two-thirds, to the remainder of the distribution.[20]

Apart of it, Islamic law does not ignore the existence and role of local custom as a source of law because it has played an important part in regulating social relation and creating order in the society for long time. Furthermore, the deeply rooted customs in a society usually have strong cultural power that it is difficult to get changed or replaced. As unwritten law, local people also obey the customs on their legal awareness. In the context of inheritance distribution, *Mataraman* community puts their priority on the principle for enacting justice for the fellow heirs by conducting deliberation in resolving any inheritance problem. Following is the list of resolution procedure that *Mataraman* community usually relies on:

First is suspending inheritance distribution when a partner of the deceased (benefactor or those who bequeathed inheritance) is still alive. In Slahung, Ponorogo, for instance, the inheritance distribution takes time when two parents have passed away. If a husband passed away first, the inheritance will be divided after the wife follows him. This means that if one of a couple is alive, the inheritance will still be

[18]Hazairin, *Hukum Kewarisan Bilateral Menurut Al-Quran Dan Hadis* (Jakarta: Tintamas, 1982), 27.

[19]Ahmad Azhar Basyir, *Hukum Waris Islam* (Yogyakarta: Fakultas Ekonomi UII, 1990), 2.

[20]Amir Syarifuddin, *Hukum Kewarisan Islam* (Jakarta: Prenada Media, 2004), 40–41.

suspended. Relating to this, Muhaimin, a citizen of Slahung, mentioned as follow:

> "We distributed the inheritance to the heirs after our father then mother died. Before she died, she still managed the inheritance"[21]

The same thing also happens in Jetis, Ponorogo. A person who died leaving his/her spouse cannot directly inherit any property to his/her heirs before the spouse died. The property automatically belongs to the spouse and will be distributed when she/he passes away. In other word, the heirs, or the children, in this context, will get the inheritance after both parents died. The condition when the children have not received any share also applies whether the living spouse (particularly the wife) live with children or not.

Another citizen, Marzuki, mentioned his experience as follow:

> "Regarding inheritance, local people in my village tend to use customary law. Inheritance distribution, mainly that comes from a father, takes place after both parents pass away. Therefore, as long as his wife is still alive, the property belongs to her and becomes her own right."[22]

Having this first procedure, children, siblings, or other heirs of the deceased usually do not dare to talk about or discuss the inheritance as long as the spouse of the deceased is still alive. Furthermore, this suspension closely relates to the existing form of inheritance and its role as the common property as well as the binding rope of the family unity. Apart from that, this aims to keep respecting the living spouse and making the inheritance, mainly when it is in a property form, as the place for gathering family members.

Second is distributing inheritance equally for all heirs. This mainly occurs in Babadan, Ponorogo. Local people distribute the inheritance assets equally relying on the principle of kinship and equality among all heirs. Saringatun, for instance, told that she shared

[21]Interview with Muhaimin, one of villagers in Slahung, Ponorogo on January 2020.

[22]Interview with Marzuki, a teachers and a community leader in the village of Karanggebang, Ponorogo on March 2020.

the inheritance from his deceased husband to his children equally among men and women as follows.

> "In 2017, I distributed inheritance for my five children, 4 sons and 1 daughter. One of them asked me to distribute it soon so I decided to do so after asking for consideration and agreement of others. As witnessed by Mr. Sambong, the distribution run well and smoothly. The inheritance itself was the joint property of mine and my husband's so that after he died, I brought up the entire asset with me. I divided the assets for them equally for the sake of fairness and to avoid any disputes in the future. The distribution is written in a stamped statement.[23]"

Another case also shares the same story. Yunita, an undergraduate degree holder, a housewife and a civil servant in Ponorogo based vocational school mentioned the following story:

> "As the heirs of our parents, Usman, and Sri Muryati, me and my sibling did not worry about the inheritance. We are so grateful for having 4 siblings with 2 boys and another 2 girls who commonly agree to have equal shares of the inheritance. The asset distribution took time in 2014. We agreed and accepted the assets we got because we prioritize peace without questioning further on the distribution."[24]

The two above cases show that in Babadan, Ponorogo, local people still like to make deliberation in order to reach an agreement for a fair inheritance distribution. They aim it to maintain family integrity and keep a harmonious relationship. Through this procedure, they tend to reach agreement on equal inheritance distribution between male and female heirs based on reliable argument and consideration on the social-economic condition of each.[25]

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[23]Interview with Saringatun, one of villagers in Ngunut, Ponorogo, on March 2020.

[24]Interview with Yunita, one of villagers in Babadan, Ponorogo, on March 2020.

[25]Yunita, "interview".

The same custom of equal inheritance distribution is also found at Sooko, Ponorogo, in which some of its people choose to solve or avoid inheritance distribution problems by giving equal shares. This is clear from the statement of Salam, a local citizen, as follow:

> "In my family, if someone dies and leaves any asset, it will be divided among his/her heirs. We do not differentiate between male and female portions nor do we distinguish whether they believe in the same religion with the benefactor or not."[26]

Being asked about a dispute regarding the inheritance distribution, the informant responded as follow: "There have never been any disputes because this kind of distribution avoids conflicts within families."

Salam's statement implied that the custom inheritance distribution in his surrounding is based on the agreement among the heirs. They use a kinship system in which if all heirs agree for equal inheritance distribution, it can directly take place in a one-to-one formation, namely a part for men and another same part for women.

Additionally, the practice of distributing inheritance with an equal sharing system also applies in Magetan. Suwaji, a local villager, explained that he got an inheritance from his parents after Suwaji's father passed away even though his mother was still alive. Therefore, the distribution used the grant (*hibah*) procedure because it took place when his mother was still alive. He and his siblings, both brothers and sisters, got an equal share as authoritatively regulated and determined by her mother.

The procedure for using the grant procedure in this case aims to avoid any future conflict among fellow heirs. This possibly happens in the future as we might often see it in our surroundings. The choice to use this procedure aims to minimize this risk in addition to the consideration that the grant offers a fair share. In this kind of case, the mother has the absolute right to give and distribute her property to Suwaji and his siblings without involving any interference of third parties.

[26]Interview with Salam, one of the villagers in Sooko, Ponorogo, on April 2020.

Third is distributing inheritance through deliberation procedure as it usually happens in Babadan, Ponorogo, from generation to generation. As the previous two procedures, this runs in a peaceful way through common agreement of all heirs based on reliable and strong consideration. Technically, the procedure is told by a villager called Samsul as follow:

> "The inheritance distribution in my family occurred in 2012 when my mother and my father were still alive. I have 5 siblings with 2 boys and 3 girls. As the heirs, we had not thought about the inheritance distribution particularly because our parents were still with us. However, in 2014, my mother asked to share the inheritance, perhaps because she thought that she grew older. The distribution took place through deliberation and was witnessed by a religious leader or so-called *modin*. Both benefactors and heirs were also there. The *modin* explained each portion according to Islamic law for the first then asked for our opinion or consideration for each portion. With careful consideration, we reached a peaceful agreement on the distribution as well as the portion. We validate the decision by making a letter of agreement that the whole part signatures it to prevent any possible future droblem.[27]

This third category shows how the *Mataraman* community bequeaths the inheritance while maintaining kinship values and involving living heirs as well as local auhority holders. Practically, this method of inheritance distribution runs peacefully although it is implemented after both benefactors passes away.

Fourth is inheritance distribution model as found in Jogorogo, Ngawi, which relies on collective customary inheritance law. When a citizen dies, the asset left behind will automatically turn into his/her immediate family's ownership. When a husband dies, for instance, his property will automatically belong to his wife and children as the closest family members. Meanwhile, other relative such as siblings, parents, uncles, and so on does not deserve any portion. When a

[27]Interview with Samsul, one of the villagers in Babadan Ponorogo, on January 2020.

deceased do not have any child or and spouse, the inherited asset can be given to his/her relatives.

Local people of Jogorogo, Ngawi Regency still maintain the traditional value that any inheritance asset, both movable and immovable, is a gift from a deceased to his/her family. Therefore, inheritance distribution according to this local community aims to comply with the existing rules while establishing family relationships among relatives.[28]

The local community usually distributes the inheritance by gathering some of the heirs which are available to come or living nearby because some others might live far away. On this occasion, a spouse of the deceased, mostly a women, will distribute the inheritance left behind by her husband. This procedure comes from the following reasons: *First*, the inheritance of a husband is under full control of a wife that makes the children not dare to beg for these assets. *Second*, most children think that their mother (or wife of a deceased) is the representative of the benefactor that makes her entitled to share the inheritance. *Third*, a wife will really consider the role of service of each of the heirs to her and the benefactor during their lifetime and this will influence the distribution. *Fourth*, the children generally think that if they obey their mother (or wife of the benefactor)'s decision, the family relationship will be closer and more intertwined. *Fifth*, talking about inheritance distribution is taboo so they do not need to tell other people about except those in the inner family circle.[29]

Fifth is practicing peace-seeking procedure according to the local customary law of individual inheritance system as found in Jetis community, Ponorogo. It means that the inheritance distribution process can take place among the heirs peacefully. However, the list of heirs is still unclear and confusing as the customary law still has no established standard on it. It is only regulated culturally in unwritten materials.

In fact, according to the Javanese customary law, children are the most important part of the heir compared to others. However practically, it is a wife (or spouse) who absolutely gets entitled to the

[28]Interview with Marno, a resident of Ngawi, on April 2020.
[29]Marno, "Interview."

first and the most prominent heir. They both (spouse and children, either biological or adopted one) are actually the first who deserve for inheritance asset. When a couple does not have any biological children and then adopts a child, his/her position is the same as the biological one. However, if a couple has both biological and adopted children, the latter will only get a grant from the adoptive parents as long as the biological children give consent on the amount of share. This procedure is clear from what Hasani told as follow:

> "It becomes a habit here that a wife gets an inheritance from her late husband's assets. It also goes the same for other heirs like children either biological or adopted. Culturally, there is no definite provision on the list of heirs. However, again, usually, if a couple does not have any biological child and therefore adopts a child, his/her position is the same as the biological ones.[30]

Sixth is practicing *sagendhongan sepikul*[31] procedure as it develops very well in Kauman, Magetan. This involves a religious leader in distributing inheritance assets according to the provisions of the Qur'an, in particular Surah an-Nisa verse 11. The distribution is based on a-two-to-one-ratio between men and women and therefore, men get two parts while women only get one share due to these following factors: *First*, referring to Islamic law teaching; *Second*, considering that the procedure contains complete values of faith and Islam; *Third*, implementing the teachings of *mawārith* fiqh; *Fourth*, obeying Allah's commandment and the *Fifth*; considering that the amount contains high wisdom. [32]

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[30]Interview with Hasani, a community leader in the village of Karanggebang, Ponorogo, on February 2020.

[31]Literally, *sapikul sagendhongan* means one shouldering and one carrying. This expression means that men receive two much more portions (*sapikul*) than women's share (*sagendhongan*). Shouldering means having two baskets in the arm. One is at the front and another is behind the back. Meanwhile, women-only carry one basket which they put it on their back. The point here is that the share of men is twice bigger than those of women as in the Islamic teaching, namely 2: 1. See Anggita Vela, "Inheritance Distribution in Javanese Society in Terms of Islamic Law and Its Impact," *As-Salam* 4, No. 2 (2015): 79–80.

[32]Vela.

Seventh is practicing *dum dum kupat* or *sigar semangka*[33] distribution as what occurs in Kauman, Magetan. On the contrary to the previous one, the community using this procedure distributes the asset using a one-to-one ratio between men and women through the role of a religious leader as well. In this case, therefore, both men and women receive one portion for each. As for factors driving the religious leaders in choosing this procedure are: *First*, all heirs agree to share that way; *Second*, the family gets used to doing equal distribution; *Third*, one of the heirs needs much more portions than others; *Fourth*, parents request so *Fifth,* ensure fairness for all parties; *Sixth*, it does not give any difference or discrimination; *Seventh*, the role of women is no less than that of men. [34]

Three Procedures of Javanese Negotiation on Inheritance Distribution

There are at least three procedures of negotiation among *Mataraman* community for distributing inheritance. It consists of theology *cum* custom procedure, *fiqh cum* custom procedure, and the indigenous custom procedure. The three procedures contain different meanings in maintaining the integrity of family relationships and assets as well as different implications for avoiding inheritance distribution disputes. Following is details on the three:

1. Theology *cum* Custom Procedure

In *Mataraman* community, particularly at the west part of it, a quite common procedure of inheritance distribution is to share the asset equally for all the heirs no matter what their gender is. Therefore, it applies the same for both sons and daughters or either husband or wife of the descendant. This tradition has been well kept and maintained across generations in dealing with the

[33]Most of the Javanese family prefer inheritance distribution with the principle of *sigar semangka.* It applies equal distribution to both men and women relying on the assumption that both will respectively build families that require a lot of money. The share aims for covering household basic and initial capital. This system considers it fair for the equal share because both wife and husband contribute to the family economy so that the wife does not fully rely on her husband economically. Instead, she helps to build the economic family as well. Vela.

[34]Vela.

controversy on its lawfulness when confronted with Islamic law or *sharia*.

Practically, one or some of the heirs probably questions and confronts this procedure as it contradicts the 2:1 scheme in *fiqh* rule. The protest might come from worries in breaking a religious rule, doing sinful action to falling into *kāfir* (infidel) as the Qur'an mentions the inheritance shares clearly. Meanwhile, some others may prefer the equal share due to custom and family unity consideration. This will inevitably lead to dispute and anxiety which potentially gets worse by *kāfir* labeling and other ideological problems such as coercion and others.

The relevant story was told by Salam as mentioned in the previous part. Salam's statement shows how the equal share is based on the kinship system. Therefore, this practice becomes a solution to avoid the dispute through a variety of technical procedures. For instance, the nominal of each share varies based on the agreement and the type of property. If the oldest child gets rice fields, the second gets a yard and livestock, the youngest can get a prefab house and so on. It is very rare to find the physical distribution of a single object or to sell it as long as the heirs are still able to take care of the assets. However, if all the heirs live far away or earn money overseas, for instance, it is highly likely that the assets are sold and the money will be equally divided.

The second most common practice is to suspend the distribution as long as a spouse of the descendant is still alive. This aims to respect the spouse and to avoid any dispute in inheritance distribution as well as to keep the family's property in good condition. Another reason closely relates to the Javanesse value on the a husband-wife relationship, particularly on the ownership of joint property. Therefore, when one of them passes away, the common property is not directly distributed as an inheritance to the heirs. On the other hand, the heirs of the descendant might have some need to fulfill using the joint property of their parents.

Among others, this can be found in Jetis, Ponorogo, as told by a villager called *Mesiran*. He told the experience when his family suspended inheritance distribution after his father died and had

just made it after his mother had gone afterward.[35] For maintaining this tradition, as mentioned by Mr. Badowi, the heirs usually do not dare to talk about the inheritance, or so-called *pusoko,* as long as the spouse of a defendant is still with them. He himself also urged that the inheritance should be well distributed after the death of the spouse for maintaining the local tradition as well as avoiding possible conflict seed to grow.[36]

Although this practice is problematic and likely leading to any conflict as some heirs might prefer direct distribution while others might think otherwise, it is proven as a negotiation method to lower the tension. Moreover, the heirs potentially dispute each other in getting the highest amount of inheritance which naturally creates tension. In most the cases, internal negotiation does not work well for settling this so that the suspension can take place as an alternative.

The dispute settlement practices from those two contexts show the fusion between theology and custom tradition. The 2:1 scheme as mentioned clearly in the Qur'an was interpreted contextually according to the real condition of heirs, so that a rich son, for instance, does not get 2 if his sister is not economically well established. Meanwhile, the custom consideration in maintaining harmonious relationship, equal fairness and deliberation habit can also be well reached using this practice.

As for the second negotiation technique, the suspension works well both for respecting parents and avoiding conflict among heirs as taught in religious teaching and local custom. Suspension enables heirs and the living parent to make deliberation and deep consideration to decide fair inheritance distribution for the sake of goodness of the whole parties.

2. *Fiqh cum* Custom Procedure

The provision of *fiqh* inheritance in the Qur'an is among the detailed subjects of Islamic law. The Qur'an mentions the number as well as those who deserve it very clearly, including the different portion of men and women with a 2:1 ratio. In the perspective of

[35]Interview with Mesiran, one villagers in Kambeng Ponorogo, on February 2020.

[36]Interview with Badowi, a secretary of the village of Karanggebang, Ponorogo, on March 2020.

`uṣūl fiqh, the Qur'anic inheritance text is under the category of *qaṭ'ī al-dalālah* (the divine definite argumentation) in which clarity of the text is undeniable and agreed among '*uṣūliyyīn* ('*uṣūl fiqh* or jurisprudence basic expert).[37] However, many views, interpretations and alternative insights are emerging due to consideration of the present reality in which the text will be applied in.

Mas'udi, for example, said that instead of merely textual and rigid, *qaṭ'ī* concept is actually inherent and universal. He defines it as the core of universal Islamic teachings such as justice and providing *maṣlaḥah* (benefit) for people's welfare. Therefore in the inheritance distribution, the most important thing is not to rely on mathematical distribution, but rather to emphasize fair division and availability of benefits for those who deserve it.[38]

In the same tone, Sadjali argued the necessity to reinterpret the Qur'anic text on inheritance distribution considering that *sabab nuzūl* (the cause of revelation) of the inheritance verse is different from the context of this present era. He assumed that the verses were revealed in a patriarchal society in the midst of unequal relationships between men and women which puts women as complementary and even subordinate positions compared to men.

He further argued that at that time, Islam actually brought up the social revolution spirit in turning the inheritance portion of women who previously had no right at all into getting one share. However, at present time, the context and situation show different phenomenon in which men and women respectively have the same opportunity in both public and domestic sphere that makes a social distinction between the two disappears.[39]

In the *Mataraman* traditional practice of inheritance distribution, identification of *aṣḥāb al-furūd* or those who deserve the inheritance as well as the details of each share or so-called *furūd al-muqaddarah* is made prior to any effort to settle inheritance dispute. This is considered important because the initial problem of inheritance

[37]Abdul Wahab Khalaf, *'Ilm `Uṣūl Al Fiqh* (Beirut: Dar al Mu'arrafah, n.d.), 35.

[38]Masdar Farid Mas'udi, *Agama Keadilan Risalah Zakat (Pajak) dalam Islam* (Jakarta: P3M, 1991), 17–19.

[39]Munawir Sadjali, *Ijtihad Kemanusiaan* (Jakarta: Paramadina, 1997), 67–71.

distribution usually comes from these two things; those who deserve it and the portion of each.

Pratice of avoiding dispute through peace-seeking effort, for example, actually relies on *fiqh* inheritance rules. Along with its element and variation, this type of settlement procedure is literally unique although at glance, it contradicts the strict division portion on *farā'id* or inheritance fiqh distribution. Local people at Babadan, Ponorogo, as a case example, give no different portion between men and women as mentioned in both the Qur'an and Islamic Law Compilation. Furthermore, they do not have any definite list of those who deserve for inheritance because it will be later determined when the inheritance asset is ready to share, namely after the death of both parents, on the agreement of their children.

Marzuki, a local villager, furtherly mentioned that because the distribution takes place after both parents die, a living parent might grant gift to any child as a common gift instead of a inheritance. Therefore, when the distribution period comes, the child also gets another share as the inheritance portion of his/her own. This later division, according to him, is based on peace-seeking effort considering the role of each child in serving their parents during their lifetime.[40] It is clear, therefore, about three cumpulsory elements to fulfill in the peace-seeking distribution procedure.

The first is the heirs' awareness to accept that the rule of *faraid* or inheritance *fiqh* might change dramatically because of accountable consideration. Each heir's portion might either decrease and increase so that everyone is required to accept the agreement willingly.

The second is a common understanding that the formulation to adjust each portion with the main aim for peace-seeking procedure has nothing to do with expiring *farā'id* concept or impression that it provides no justice and benefit for all. This alternative does not replace the divine and definite concept of inheritance distribution as mentioned in the Qur'an.

[40]Interview with Marzuki, one of villagers in Karanggebang Ponorogo, on February 2020.

The third is the existence of mutual sincerity, acceptance and pleasure among the heirs for sharing the inheritance through this procedure. This is important to avoid any further legal claim, conflict, dissatisfaction, even family disintegrate after inheritance distribution takes place and has become a collective agreement. It automatically makes this point as the main essence in the legacy of peace-seeking distribution procedure according to its main role for seeking mutual good and benefit.[41]

The three above elements make it clear on the synergy and meeting point between inheritance *fiqh* on one hand and the traditions of society on the others in which both sides have points of relevance and mutual support. Inheritance *fiqh* serves as the basic principle, while implementation takes form from local tradition and value. Another common case of traditional inheritance dispute settlement is the portion for adopted children. This is interesting because according to *fiqh* rule, when there found any *maḥjūb* or the main heir(s) who prevent another heir candidate to get the inheritance, adopted children will get no share. This particularly happens when benefactors have no biological child then adopted a child whom they treated him/her like their own child.

Most of the time, the adopted child gives a big contribution and takes care of the benefactors as well as replacing their roles when they get old. Therefore, local people consider it necessary to provide the child inheritance portion from his/her adopted parents. However, as an adopted child, the portion she/he deserves is not the same as biological one and is within certain limits

Moreover, the Indonesian traditional inheritance jurisprudence has a concept of an obligatory message (*waṣiyah wājibah)*, a cumpulsory portion for those outside the family lineage or out of the heirship standard channels. The maximum amount of this portion is no more than one-third of the benefactor's total assets that will be distributed to the heirs. This concept seems very relevant for settling (potential) dispute resolution by allocating it

[41]Sugiri Permana, "Implications Munawir Sadjali and Hazairin Thoughts in Establishent of Islamic Inheritance in Indonesia," *AHKAM* 18, no. 2 (2018): 392.

for the adopted child's share. This procedure will keep him/her from getting inheritance assets from the adopted parents. Again, an effort like this shows the existence of a strong relationship and connecting point between inheritance *fiqh* and the local traditions of *Mataraman*.

Both peace-seeking and portion for adopted children procedures show a variety of how inheritance *fiqh* takes form in the real life. Both also require preconditions to avoid any unexpected condition such as violations of the basic rules. In the former procedure, for example, it is necessary to know a respective portion of each heir according to *fiqh* before deciding the real distribution of inheritance with peace-seeking procedure. Meanwhile, for the latter case, the maximum limit, one third, requires exact application so that the portion for an adopted child does not exceed it. The negotiation between *fiqh* rule and customary tradition among *Mataraman* community indicates serius efforts to give mutual benefit for the whole parties. *Fiqh* itself gives space for tradition in addressing living problems of society through the concept of *'urf* in order to create common benefit (*maṣlaḥah)* for all. This puts '*urf* as the most realistic concept to integrate in exploring the law of customs within the framework of Islamic law objectives, namely benefit (*maṣlaḥah*).

3. The Indigenous Mainstream Wisdom Procedure

The tradition of inheritance distribution among *Mataraman* community strongly shows Javanese customs, such as in *sepikul segendong* procedure. This is mainly based on the common view of *Mataraman* people which puts much more responsibility for men in the future than those of women, particularly in the economic aspect. Literally, men are future husbands in which they need to afford some kinds of funding for family, such as dowry, family support, living cost *(nafkah)* and so on while women do not do so.

This local procedure shares the basic concept with the mainstream inheritance distribution model in Islamic *mawārith* (inheritance) jurisprudence as also mentioned in the Qur'an. However, *sepikul segendong* concept does not show mathematical details by mentioning the number of 2 and 1. It only accentuates the men's portion exceeds the women using the analogy of

carrying things on two arms for men and on the back for women. Apart from it, both the local concept and Islamic rule show the spirit of equality according to the economic responsibility of each.

Among others, this practice can be found in Magetan in which local people prefer to distribute the inheritance using the procedure of *sapikul sagendhongan*.[42] Usually, it takes place by engaging a religious leader who distributes the asset. The distribution is mainly based on the provision as mentioned at the Qur'an, especially QS. al-Nisa' 4: 11 containing literal share using two to one ratio between men and women.

Another procedure is the collective distribution of inheritance. This aims to maintain the existence of family assets under one management. All the heirs have a common purpose to keep the family asset in their inner and collective circle eventhough both parents have passed away. They prefer this procedure in order the asset remains safe and does not turn its ownership to other people outside family circle. Local people assume that it is not good to immediately turn the ownership of inheritance assets to other people out of the family line.

Just in case one of the heirs really needs to sell the asset for fulfilling an urgent financial need, for instance, other heirs will try hard not to sell it to people outside their circle by making a purchase on their own or ordering fellow heirs to do that. They will likely use *nyusuki* procedure in which one of heirs will make a purchase of the asset so that it still returns to family members instead of being other people's assets.

This solely aims to maintain the existence of the family asset to make it still under the control of the heirs or the family. Additionally, this is believed as an effort to maintain the honor of family by not hurriedly selling the inheritance asset. *Mataraman* community thinks it not good to immediately sell inheritance assets right after the distribution even though each heir has their own right on the asset.

Meanwhile, the portion of share of each heir is under the control and decision of a living spouse, usually a wife, after the death of

[42]Tira Widyasari, *Praktik Pembagian Waris di Kalangan Pemuka Agama Islam di Kauman Kabupaten Magetan* (Surakarta: Pascasarjana UNS, 2017), 10.

her husband as told by Budi, a villager of Magetan Regency.[43] He told that in his surrounding, the wife usually determines the portions of each heir as the inheritance her husband left behind was of her right, including the portion for each man and woman.

However, he stressed that the portion that each heir gets usually depends on how each heir plays the roles and services for the benefactors when they were alive. An heir who lives in the same house as the benefactor, for instance, certainly has a bigger responsibility in caring for, helping, or bearing all the needs so that he/she deserves to receive much more shares than others even though she is a woman.

Unlike the others, the collective inheritance sharing procedure can actually neither be confronted nor integrated with Islamic jurisprudence of *mawārith*. What really makes it different is the commitment after receiving the share of inheritance as well as its management. *Nyusuki* tradition from one heir to another is an interesting phenomenon within this collective inheritance procedure. It occurs when an heir needs urgent money or funds then thinks about selling the inheritance. In this condition, other family members who respectively gets the inheritance is supposed to purchase it using *nyusuki* model or providing an immediate fund to cover the urgent need he/he's needs to fulfill soon.

In short, the existence of both *sepikul segendong* and collective inheritance distribution procedures shows that negotiation process in avoiding dispute among *Mataraman* community is very flexible that all heirs can likely accept it. Generally, they have a common understanding of the paradigm and background beyond the procedure so that they likely accept what has been practiced from generation to generation with no complaint. The procedure automatically becomes a common ground as well as mainstream tradition in settling any inheritance dispute.

Fiqh cum Custom Procedure; An Alternative Offer in the Avoiding Inheritance Dispute

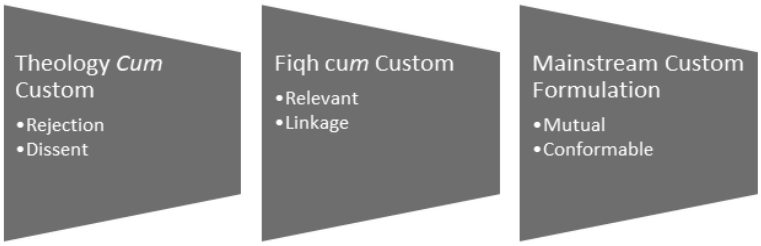
As the religion of grace for the universe (*raḥmah li al-'alamīn*), Islam accepts local culture and customs as long as they do not

[43]Interview with Budi, one of villagers in Magetan, on January, 2020.

contradict its basic teaching. This is mainly valid for any customs which has settled, been well implemented and perceived in the society as something they have to obey. Therefore, both customs and culture can be a foundation for Islamic law which recognizes their power in any legal interpretation.[44] The relationship between Islamic law and tradition is very close[45] and mutually supportive, particularly in the law of inheritance in Indonesian contemporary societies.

In Islamic teaching, the rule of inheritance distribution can at least be found in the Qur'an and *Sunnah* of the Prophet. It is among the core teachings of sharia with detailed provision and condition in addition to power in governing Moslem's life. However, practically, each society has different patterns in implementing the spirit of the distribution. In this context, how *Mataraman* community negotiates religious teaching and local customs in inheritance distribution portrays interesting and important phenomenon as clear from the following figure:

Figur 1. Inheritance Dispute Resolution Scheme
Among *Mataraman* Community, East Java.



[44]This is in line with one of the basic rules of Islamic jurisprudence namely العادةمحكمة which means that customs can become law. See Abdul Karim Zaidan, *Al Wajiz fi Syarhi Al-Qawa'id Al-Fiqhiyyah fi Asy-Syari'ah AlIslamiyyah*, trans. Muhyiddin Mas Rida (Jakarta: Al-Kautsar, 2008), 133.

[45]Islamic law does not accept all of the traditions, including those which have become custom in society. The requirement for this acceptance is as follows: *First*, the tradition is logical, making any sense and relevant to human common sense so that it excludes any immoral action. *Second*, the actions or repeated or have become ingrained in people's behavior. *Third*, it does not bring any fatality or damage and is in line with the spirit to create a prosperous soul and healthy common sense. *Fourth*, the act does not contradict with the provisions of the text, both the Koran and the *Sunnah*. Abdul Mudjib, Kaidah-Kaidah Ilmu Fiqh *(Al-Qowa'idul Fiqhiyyah)* (Jakarta: Kalam Mulia, 2001), 45.

The three procedures show many values and moral teaching which play an important role to create harmony in family relationships. This is because the philosophy of any procedure for avoiding inheritance disputes is nothing but the willingness to create harmony among family members, especially the heirs. The traditional practice of dispute settlement using peace-seeking procedure, for example, prevents misunderstandings among one another and strengthens harmonious family relationships especially at the context of each procedure's implication on the welfare of the family economy.[46]

Among others, *fiqh* cum custom procedure is the most possible alternative to choose. This is partly because too much intervention from people outside the family lineage will likely worsen the problem and reduce harmony as well as intimacy in a family. Many cases show how bad management of inheritance distribution leads to family conflict. In this context, *Mataraman* community maintains family unity by making a set of rules that most of its people agree upon such as through the procedure of peace-seeking, collective distribution, as well as providing a portion for the adopted children while justifying and preserving them well.

Conclusion

There are three models of negotiation formulation in avoiding inheritance distribution dispute in the *Mataraman* community, namely: a) theology *cum* custom procedure which will typically lead to mismatch and further disagreement among family members. This is due to the potential insecure feelings because being labeled as a deviant of religious law, specifically on the inheritance *fiqh* system in which they prioritize customary law better than religious rules. b) *fiqh cum* custom procedure which likely creates a close relationship among family members as well as flexibility in responding to the local custom or tradition on inheritance distribution. This model therefore becomes an alternative pattern of the settlement procedure. c) indigenous mainstream wisdom procedure which practically leads to

[46]Dian Berkah and Tjiptohadi Sawarjuwono, "Inherintence Wealth Distribution Model and Its Implication to Economy," *Humanities & Social Sciences Reviews* 17, no. 3 (2019): 01–10.

dispute settlement using Javanese traditional value. This model allows local tradition to solve the dispute by returning to indigenous wisdom and cultural diversity. However, it does not directly engage religious teaching although the negotiation process usually runs smoothly because engaging parties have a common aim for the sake of assets integrity and harmonious family relations.

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ISSN: 1907-591X, E-ISSN: 2442-3084
DOI: http://doi.org/10.19105/al-lhkam.v15i2.2714

Gender Sensitivity at Judge's Verdicts in Samarinda and Magelang Religious Courts; The Implementation of PERMA Number 03 of 2017

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Article history: Received: 14 November 2019, Accepted: 17 Juli 2020, Published: 28 December 2020

Abstract:

Allegedly, some of judge's verdicts are gender-biased that it makes this an interesting research topic. This paper aims to observe gender sensitivity of judges' verdicts in Samarinda and Magelang Religious Courts as the implementation of PERMA Number 03 of 2017 during 2017-2019. As empirical normative legal research, this study used a qualitative descriptive method as the data analysis. The findings of research are: *First*, judges' verdicts, both in *ṭalāq* and divorce cases, in Magelang Religious Court showed very good gender sensitivity. The different condition occurred in *ṭalāq* divorce verdicts at Samarinda Religious Court during 2017 and 2018 although in 2019, it showed a little improvement on gender sensitivity. However, verdicts of divorce lawsuit from 2017 to 2019 did not show likewise and it was very poor in gender sensitivity. *Second*, in Magelang Religious Court, PERMA Number 03 of 2017 had been very well implemented whereas in Samarinda Religious Court, it did not so as there found no much differences between verdicts before issuence of the PERMA and afterward.

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Keywords:
Gender Sensitivity; Judges' Verdicts; PERMA Number 03 of 2017

Abstrak:
Beberapa putusan hakim dinilai bias gender sehingga topik ini menjadi menarik untuk diteliti. Tulisan ini ingin mengkaji sensitivitas gender dalam putusan hakim di Pengadilan Agama Magelang dan Samarinda serta implementasi PERMA Nomor 03 Tahun 2017 selama 2017-2019. Sebagai penelitian hukum normatif empiris, tulisan ini menggunakan metode analisis data deskriptif kualitatif. Temuan penelitian adalah: *Pertama,* putusan hakim di Pengadilan Agama Magelang, baik dalam kasus cerai ṭalāq maupun cerai gugat, sudah menunjukkan sensitivitas gender yang sangat baik. Sementara itu untuk Pengadilan Agama Samarinda, putusan cerai ṭalāq pada 2017 dan 2018 tidaklah demikian meski ada sedikit kemajuan dalam hal sensitivitas gender pada putusan-putusan tahun 2019. Buruknya sensitivitas gender juga tampak di berbagai putusan cerai gugat di Pengadilan Agama Samarinda sejak 2017 sampai 2019. *Kedua,* PERMA Nomor 03 Tahun 2017 sudah terimplementasi dengan sangat baik di Pengadilan Agama Magelang. Namun demikian, hal yang sama tidak ditemukan di Pengadilan Agama Samarinda sebab keberadaan PERMA tersebut tidak berpengaruh signifikan terhadap putusan-putusan yang dikeluarkan sebelum maupun sesudahnya.

Kata Kunci:
Sensitivitas Gender; Putusan Hakim; PERMA No. 03 Tahun 2017

Introduction

The dynamic of women's struggle for their rights encourages the enforcement of gender justice in all life aspects ranging from political, economic, social, to law. In the field of law, gender discrimination is allegedly found at three aspects, namely on the content of law, culture of law and the structure of law. The

discrimination at the law structure is clear, among others, from the low gender sensitivity among law enforcement officers.[1]

The Religious Court (later abbreviated as RC) is one of the legal institutions which function to enforce various legislations.[2] It deserves to receive, examine, adjudicate and resolve some Islamic sharia matters such as divorce which recently is getting higher and higher in number. Nationally, at the last 2018, the divorce cases in RC reached 97% of all cases.[3] It rose from number at 2015 which still showed that 90% of 445,568 cases that the RC dealt with divorce.[4]

This high number is not automatically in line with gender sensitivity found at the judges' verdicts. Some judges' verdicts are still gender biased due to some reasons: *First*, educational background of judges which influences their mind-set and attitude. *Second*, value of patriarchy in family and social environment which exist in the miliue where the judges grow up; and *third*, the materials and legal rules which are, into some extent, still gender biased.[5]

Apart of those factors, the RC judges are essentially required to have sensitivity and concern on women in enforcing justice according to their authority. The active role of RC, meanwhile, is indispensable in order to influence matters relate to family law, especially related to women's rights.[6]

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[1]Achie S. Luhulima et al., *Perempuan dan Hukum: Menuju Hukum yang Berperspektif Kesetaraan dan Keadilan* (Yayasan Pustaka Obor Indonesia, 2008), 131.

[2]Faqihuddin Abdul Kodir and Ummu Azizah Mukarnawati, *Referensi bagi Hakim Peradilan Agama tentang Kekerasan dalam Rumah Tangga* (Komnas Perempuan, 2008), 4.

[3]Cate Summer, *Memberi Keadilan bagi Para Pencari Keadilan: Sebuah Laporan Penelitian tentang Akses dan Kesetaraan pada Pengadilan Negeri dan Pengadilan Agama di Indonesia Tahun 2007 – 2009* (Jakarta: Mahkamah Agung dan AUSAID), 7.

[4]Wahyu Widiana, "Prolog", in Kustini & Ida Rosidah (ed.) *Ketika Perempuan Bersikap: Tren Cerai Gugat Masyarakat Muslim* (Jakarta: Kemenag RI, Badan Litbang dan Diklat: Puslitbang Kehidupan Keagamaan, 2016), ix.

[5]Ahmad Jalaludin, "*Budaya Hukum Bias Gender Hakim Pengadilan Agama dalam Perkara Cerai Talak*," *Muwazah* 7 (December 2015), 203.

[6]Defi Uswatun Hasanah, "Hak-Hak Perempuan dalam Putusan Pengadilan Agama (Studi Perbandingan Hukum Keluarga Islam dan

Sensitivity on women's right is essentially required in order to establish a fair adjudication process. Therefore, judges are required to be prudent and wise in paying attention to the principle of gender equality living in the society, be it legal norm, religion, morality, and general social phenomenon while considering the consequences of verdicts they issue.[7]

Regarding to wife's rights after divorce, chapters 149 and 158 of Islamic Law Compilation (ILC) explicitly oblige the husband to give; (a) proper *mut'ah*; (b) living (*nafqa*), *maskan* (shelter) and *kiswah* (clothes) during *`iddah* (waiting) period; (c) settling owed dowry for wives and *haḍānah* fees for children under 21 years old.

However, the article 41 letter (c) of Law number 1/1974 explains that the wife can not earn an '*iddah* living if she is proven for doing *nushūz* (recalcitrance) or gets a *bā'in sughra* divorce (irreconcilable ones). This unfortunately makes some RC, through their divorce verdicts, do not impose this obligations and ignore the right of wife although she is proved not doing any *nushūz*.

Relating to this, Edi Riadi's study showed that the demand for '*iddah* living more frequently found at *ṭalāq* divorce cases than the divorce lawsuit one. From 156 *ṭalāq* divorce cases as his sample, he mentioned that 81 cases or 51.92% of it filed for '*iddah* living lawsuit. Meanwhile, there only found 45 of 146 divorce lawsuit cases with '*iddah* living demand or 30.84 of the total number.[8] In fact, the comparison between *ṭalāq* divorce and divorce lawsuit rates was 1 out of 3. Based on national *Badilag* data from 2014, there were only 113,850 *ṭalāq* divorce cases while the divorce lawsuit cases were 268,381.[9] A year ahead, at 2015, the *ṭalāq* divorce number decreased to 99,981 cases and the rest of 253,862 were divorce lawsuit cases. Next at the

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Konvensi CEDAW)," 2017, 9, http://repository.uinjkt.ac.id/dspace/handle/123456789/38598.

[7]Siti Musdah Mulia, ed., *Keadilan dan Kesetaraan Jender Perspektif Islam* (Jakarta: Tim Pemberdayaan Perempuan Bidang agama Departemen Agama Republik Indonesia, 2001), 127.

[8]Edi Riadi, "Dinamika Putusan Mahkamah Agung Republik Indonesia dalam Bidang Perdata Islam," 2011, 199.

[9]Lilik Andaryuni, "*Pemahaman Gender dan Tingginya Angka Cerai Gugat Di Pengadilan Agama Samarinda*," *Fenomena* 9, no. 2 (December 1, 2017): 156–57, https://doi.org/10.21093/fj.v9i2.946.

2016, the *ṭalāq* divorce cases number got higher again at 113,968 while the divorce lawsuit cases were the same with 289,102 cases. As for 2017, the *ṭalāq* divorce cases rose unsignificantly to 113,987 while the divroce lawsuit cases decreased to 273,771.[10]

Responding to the number, the Supreme Court has been making various efforts to ensure the rights of women after divorce enforced. Among of them are through the cassation verdict number 347 k/Ag/2010, 410k/Ag/2010, 137k/Ag/2007 and number 276k/Ag/2010. This jurisprudence provides legal power related to the provision of '*iddah* living for divorce lawsuit case as long as the wife is officially proved for not doing *nushūz*. Nevertheless, not all Religious Courts implement it.

Not only that, in order to enhance efforts for improving the wives' rights after divorce, on July 11, 2017, the Supreme Court issued PERMA number 3 of 2017 on the guidelines for judging women in law cases. The article 6 of the PERMA explains the guidelines for judges to consider and to explore some values in ensure gender equality. The existence of the chapter is expected to bring out gender-responsive decisions or verdict. Therefore, this study was conducted particularly to examine whether existence of the PERMA affects in making a better accommodation for women's rights both in *ṭalāq* divorce and divorce lawsuit.

One of RC with relatively high number of divorce is Samarinda RC with 1,706 lawsuit divorce cases last 2017.[11] This number raises concerns especially related to the rights of wife and child after divorce. Another one is Magelang RC as the subject of a pilot project called PUG or *Pengarusutamaan Gender* covering gender mainstreaming as well as the rights of children and women since the beginning of 2017. The program itself is a cooperation between Kalijaga Institute for Justice (KIJ) and *Badilag* Supreme Court. Those factors become consideration to choose the two RC. Particularly for the later, this research wants to uncover whether the status as the

[10]"Melihat Tren Perceraian dan Dominasi Penyebabnya - Hukumonline.Com," accessed December 9, 2019, https://www.hukumonline.com/berita/baca/lt5b1fb923cb04f/melihat-tren-perceraian-dan-dominasi-penyebabnya/.

[11]Buku Laporan Tahunan Pengadilan Agama Samarinda Tahun 2017.

subject of PUG pilot project influences the judges' verdicts on rights of women.

Studies on this theme have been many time taken by previous researchers. One of them was Nurcahaya et al who found that the implementation of the verdict on the wife's right after *ṭalāq* divorce in RC was generally done before recitation of the *ṭalāq* pledge. However, they underlined that the amount is relatively less than how the wives demand.[12]

Another study which focused on '*iddah* living earning in the case of *ṭalāq raj'ī* (reconcilable divorce) found that the wives generally do not get their rights if proved to do *nushūz*. Nevertheless, the judge in South Jakarta Religious Courts provides the '*iddah* living in the divorce lawsuit case on their initiative everytime the wives are proven not doing *nushūz*.[13]

Taking another focus, namely *mut'ah* and *'iddah* right after *ṭalāq* divorce, a study by Alef Musyahadah et.al. found that judges generally consider gender sensitivity as clear from gender-unbiased verdicts. Almost all judges in Purwakarta RC, as they found, had good gender sensitivity as clear from the efforts in fulfilling the grant of *mut'ah* and *`iddah* living for wives.[14]

Those all studies show limited number of a specific study on gender sensitivity in judges' verdicts in relation to PERMA number 3 of 2017 on the guidelines for prosecuting women toward the law. Therefore, this study is conducted to complete the discussion on the discourse.

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[12]Nurcahaya et al, "*Studi Penegakan Hukum Hak-hak Harta Istri Cerai Talak (Analisis Gender Terhapa Realisasi Eksekusi Putusan Hak Nafkah dan Mut'ah Istri Cerai Talak di Pengadilan Agama*", Laporan Penelitian Kompetitif Unggulan 2016, Universitas Islam Negeri Sumatera Utara Medan, 2016.

[13]Erwin Hikmatiar, "*Nafkah Iddah pada Perkara Cerai Gugat*," *SALAM: Jurnal Sosial dan Budaya Syar'i* 3, no. 2 (September 9, 2016), https://doi.org/10.15408/sjsbs.v3i1.3316.

[14]Alef Musyahadah Rahmah, Noor Asik, and Wismaningsih Wismaningsih, "*Perspektif dan Sikap Hakim dalam Memutus Perksara Mut'ah dan Nafkah Iddah di Pengadilan Agama Purwokerto, Banyumas, Purbalingga*," *Prosiding* 7, no. 1 (November 30, 2017), http://jurnal.lppm.unsoed.ac.id/ojs/index.php/Prosiding/article/view/493.

Research Method

This study is empirical normative law research that considers the law as the norms of rules and regulations implemented at a certain time as a government product.[15] The research itself examines judge's verdicts relying on documentation method while applying library study principles. The primary data come from legal materials, namely PERMA Number 03 of 2017, the verdicts of judges, KHI, and Law number 01 of 1974, while the secondary data are obtained from interview results with judges and information from several articles journals, and books with related themes. The tertiary one, on the other hand, is obtained from legal dictionary.

The data analysis uses a qualitative descriptive method as well as a legal approach. The later is particularly done by reviewing the rules on the specific issue of law that this study focuses on. Additionally, the court verdicts as the subject of this study were examined using a case approach.[16]

Theoretical Framework of Gender Sensitivity, Judges' Verdicts and PERMA Number 03 of 2017

Judges' gender sensitivity is defined as the ability to understand, feel, and think about the gaps in a men-women relationship. In this context, it is expected to be an alternative perspective in seeing injustice regarding with the relationship both in public and domestic areas.[17]

Meanwhile, the law of gender equality is much influenced by legal awareness as an integrated value in human being on existing laws or rules they expect to exist.[18] In general scope, it also comes

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[15]Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana Prenada Media Group, 2009), 294.

[16]Peter Mahmud Marzuki, *Penelitian…,* 295.

[17]Abd. Moqsith Ghazali, *Kumpulan Referensi Standar Evaluasi Hakim Dalam Menerapkan Sensitivitas Jender Di Mahkamah Syar'iyah Aceh*, 2009, 119–21, //digilib.stital.ac.id/index.php?p=show_detail&id=66.

[18]Soerjono Soekanto, *Kesadaran Hukum & Kepatuhan Hukum: Suatu Percobaan Penerapan Metode Yuridis-Empiris untuk Mengukur Kesadaran Hukum*

from society's legal culture so that to realize the gender-justice-based law, the legal culture that the society establishes is essentially needed. If the society's culture is gender-biased, the gender-justice laws will not be tangible.

On another hand, the judges' verdict is legal as a law material.[19] Therefore, it is supposed to enforce the legal objectives namely justice, certainty and benefit.[20] Sudikno Mertokusumo defines the verdict of judges as an official authoritative statement by the judges pronounced before the trial in order to terminate or settle a case or dispute between parties.[21]

Unfortunately, as mentioned by Ninik Rahayu, gender sensitivity or justice has not been generally found in judges' verdicts because of these triggering factors. *First*, judges have not gotten any comprehensive understanding on gender-based violence or discrimination. *Second*, the die-hard patriarchy culture in the society which lowers women's bargaining values both in domestic and public areas. *Third*, the limitation of authority on behalf of law that makes the rights of women and children less considered.[22]

According to Artijo, as cited by Syamsudin, judges play a role as the main actor of law enforcement along with moral obligation and professional responsibility to control the common perception of people. They are supposed to master legal-technical capacity skills as well as show moral capacity. With good capabilities, including scientific and technical skills; the judges will be able to provide proper

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dan Kepatuhan Hukum Mahasiswa Hukum terhadap Peraturan Lalu Lintas (Rajawali, 1982), 152.

[19]Sulistyowati Irianto and Lim Sing Meij, "Praktik Penegakan Hukum: Arena Penelitian Sosiolegal Yang Kaya," n.d., 212.

[20]Achmad Ali, *Menguak Tabir Hukum: Ed.2* (Kencana, 2015), 96.

[21]Roihan A. Rasyid, *Hukum Acara Peradilan Agama* (Raja Grafindo Persada, 1991), 199.

[22]Ninik Rahayu Maksoem, *Penanganan Hukum Yang "Berpihak" Guna Mewujudkan Kesetaraan dan Keadilan Gender",* paper presented in A Day Seminar about Religious Court's Role and Civil Society in the Perspective of Islamic Law Pembaharuan di Bidang Penegakan HAM dan Penyetaraan Gender, Surabaya, PPHIMM PTA Surabaya, 24 Oktober 2014, 12.

and correct legal reasoning in bringing in a verdict.[23] In addition, as the main pillar of law enforcement, judges are also required to have sensitivity and concern on the elements of justice, tangible commitment, comprehensive understanding and courage for justice enforcement in every verdict they formulate. The Court's verdicts as the results of the judges' performance become the determinant of their quality and credibility because their crown or authority lies in the verdicts they issue.[24] The judges are identical with the judiciary itself.[25] In line with this, citing Friedman, Abu Tolhah explained that human are the important element of law enforcement.[26]

The basic adage also states that "all the law is judge-made law" which means that all the law basically comes from judges' verdicts. Moving on from this assumption, position of judges becomes very central in the context of law formation.[27] Therefore, the judges' verdicts become law materials that must be in line with its own purpose namely justice, certainty, and benefit.[28]

In practice, the three objectives of the law are difficult to achieve simultaneously at the judges' verdicts. There is often a collision between legal certainty and benefit, between justice and certainty, or between justice and benefit. Therefore, according to Radbruh, there needs to be a priority scale where the first rank is fairness followed by

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[23]M. Syamsudin, "Keadilan Prosedural Dan Substantif Dalam Putusan Sengketa Tanah Magersari," *Jurnal Yudisial* vol. 7, No. 1 (March 24, 2014), 23, https://doi.org/10.29123/jy.v7i1.91.

[24]Zudan Arif Fakrulloh, "*Penegakan Hukum Sebagai Peluang Menciptakan Keadilan*," March 2005, 24, http://publikasiilmiah.ums.ac.id/handle/11617/1034.

[25]Hj. Jamillah, "Judges According To Islamic Law and Indonesian Law in Islamic Court," *IOSR Journal of Humanities and Social Science* 22, no. 01 (January 2017), 91, https://doi.org/10.9790/0837-2201068793.

[26]Abu Tolhah, "*Peluang dan Tantangan Kompetensi Peradilan Agama Pasca Amandemen Undang-Undang Nomor 7 Tahun 1989 Tentang Peradilan Agama*," *Asy-Syari'ah* 18, No. 1 (August 31, 2015), p. 131, https://doi.org/10.15575/as.v18i1.654.

[27]Darji Darmodiharjo and Shidarta, *Pokok-pokok Filsafat Hukum: Apa dan Bagaimana Filsafat Hukum Indonesia* (Gramedia Pustaka Utama, 1995), 138.

[28]M.H, *Menguak Tabir Hukum*, 84–86.

benefits and then certainty. Meanwhile, Achmad Ali recommends using a basic case priority adjusted to the context of each case.[29]

Relating to this, Mukti Arto mentions that as the verdict maker, judges should be able to be flexible by not too stick in the rule of the basic law in order the core of the benefit can be achieved in each verdict. The criteria of a qualified verdict in RC, meanwhile, are: (1) well appointed, (2) systematic, (3) harmonious, and (4) indicating the renewal of Islamic law.[30]

PERMA Number 03 of 2017 on guidelines to prosecute women's cases dealing with the law comprises of 12 articles. It began its implementation since August 4, 2017. This PERMA explains the principle of judges in prosecuting women's cases dealing with the law, namely; (1) Appreciation for human dignity, (2) non-discrimination, (3) gender equality, (4) equality toward the Law, (5) justice, and (6) benefits as well as legal certainty[31]

Meanwhile, the parameters of gender-sensitivity on judges' verdict regarding to the wive's rights after divorce are as follow;

a) Substantially, the law refers to; (1) Article 66 S/d 86 UU No. 7/1989, amended by Law No. 3/2006, the reamended by the Law number 50/2009; (2) Article 14 S/to 36 PP number 9/1975 on the implementation of law number 1/1974; (3) Article 148 KHI on Presidential Decree number 1/1991; and (4) PERMA number 3/2017 on the guidelines for prosecuting women's cases against the law.
b) The judge's perspectives rely on the following principles; (1) *maqāṣid sharī`ah* perspective use in order to protect weak parties; (2) divorce process which can be in divorce lawsuit, *ṭalāq* divorce or *khul'i* divorce; (3) each divorce causes separation between husband and wives then leads to different legal consequences; (4) negative effects of divorce mostly affect

[29]M.H, 96.

[30]Pustaka Pelajar, "Pembaruan Hukum Islam Melalui Putusan Hakim Pustaka Pelajar," 3, accessed November 23, 2019, https://pustakapelajar.co.id/buku/pembaruan-hukum-islam-melalui-putusan-hakim/.

[31]The article 2 PERMA Number 03 of 2017 on the guidelines on adjudicating women's cases on law.

women and children; (5) making the verdict which grants *mut'ah* and *`iddah* living either on the demands of wives or ex using ex-*officio* judges' right; (6) mediation procedure as an attempt to settle matters.[32]

Gender Sensitivity in Judges Verdict

1) Magelang Religious Court

The verdicts of *ṭalāq* divorce in Magelang Religious Court are as follow:

No.	Verdict number	Wives'/children's rights
1	No. 89/Pdt.G/2017 in *verstek*	Punishing the plaintiff to grant defendant as follow: a. *Mut'ah* 1.000.000,- IDR b. Children living Rp. 300.000,- IDR/month
2	No. 0113/Pdt.G/2017 in *verstek*	Punishing the plaintiff to grant defendant as follow: a. *Mut'ah* 5.000.000,- IDR b. *Iddah* living 1.500.000,- IDR
3	No. 255/Pdt.G/2017	Punishing the plaintiff and the defendant to obey the peace agreement as follow: a. The plaintiff grants *`iddah* living to the defendant 6.000.000,- IDR b. The plaintiff grants defendant *mut'ah* in the form of a gold ring weighing 10 grams
4	046/Pdt.G/2018/PA.Mgl,	Punishing the plaintiff and the defendant to obey the mediation agreement, which

[32]Siti Ruhaini Dzuhayatin et al., "*Pedoman Modeling Institusionalisasi Proses Peradilan Responsif Gender, Hak Perempuan dan Hak Anak di Pengadilan Agama*," n.d., 30–31.

		is to punish the plaintiff to grant the defendant as follow: a. *Iddah* living 2.100.000,- IDR b. *Mut'ah* 1.000.000,- IDR c. Each child is granted living. 700.000,- IDR/ month.
5	025/Pdt.G/2018/PA.Mgl	Punishing the plaintiff and the defendant to obey the mediation agreement, which is to punish the plaintiff to grant the defendant as follow: a. *'Iddah* living 3.000.000,- IDR b. *Mut'ah* in the form of a gold ring 75% weighing 2 grams
6	258/Pdt.G/2017/PA.Mgl in *verstek*	Punishing the plaintiff to grant the defendant as follow: a. *Mut'ah* 3.000.000,- IDR b. *Iddah* living 6.000.000,- IDR c. Children living 2.000.000,- IDR/ month

6 sample of *ṭalāq* divorce verdicts mentioned at the table, 3 cases from 2017 and 3 cases from 2018, makes it clear that wives get their rights after divorce, ranging from the provision of '*iddah* living, *mut'ah* and also children's living. The amount and number, however, are not equal each others.

Interestingly, in some of those verdicts, wive's and children's rights are fulfilled in *verstek* cases, as seen in the verdict number 089/PDT. G/2017/PA. Mgl., number 0113/Pdt. G/2017/PA. Mgl., and number 258/Pdt. G/2017/PA.Mgl. The verdict of *verstek* is a verdict in which one party is absent even though she/he has been called appropriately and worthily and sending no one to represent. The verdicts also show that the grant for wives after divorce is through *ex officio* right.

The *ex officio* right, as Subekti disclosed, is the right because of position as a judge instead of because any assignation or promotion.

It means that *ex officio* is automatically attached to the judge because of his/her position aiming to bring in verdicts of the case into decision more than what the plaintiff demands.

The use of *ex officio* rights as clear at the above verstek verdicts is based on the following considerations. *First*, the respondent (wife) was proved not doing *nushūz*. *Second*, it refers to the article 149 letter (a) and (b) KHI which confirms that after divorce, husband is obliged to provide living both for *iddah* and *mut'ah* as long as the wife is proven not doing *nushūz*. *Mut'ah* also aims to please her while reducing grief due to divorce. *Third*, the plaintiff (husband) has the ability and willingness to afford such rights.[33]

It is further explained that *ex officio* in those cases (*ṭalāq* divorce in *verstek*) is given because most of the wives in those cases are ill-treated. Unfortunately, the grant through *ex officio* is not always well fulfilled because the plaintiff sometimes has no enough money to afford. The most important of this procedure is to show that *ex officio* right intends to educate society that when women are divorced, they have rights to seek and grant.[34]

Conversely, if the parties are present at the trial, mediators should try hard to play their roles. Despite failing to reconcile the parties, the mediators are suppossed to manage in order to make a deal between both through an agreement which accommodates the rights of wife after divorce as shown in the verdict number 255/PDT. G/2017/PA. Mgl., number 046/Pdt. G/2018/PA. Mgl., and number 025/PDT. G/2018/PA. Mgl. In Magelang RC, the mediator is the judge himself/herself. He/she plays the role flexibly through explaining rights and obligations of each party on *ṭalāq* divorce case. It is obvious, therefore, that the role of mediator is not merely seeking peace but also trying to lead the parties understand their rights. Consequently, the divorcee can access her right.

Meanwhile, the data on divorce lawsuit verdicts in Magelang RC during 2017-2018 is as follows;

[33]Interview with some judges of Magelang Religious Court, April 24, 2019. See the judge's consideration in the verdict No. 113/Pdt.G/2017/PA.Mgl., 17.

[34]Interview to the judges in Magelang RC, 24 April, 2019.

No.	Verdict Number	Wives' / Children's Rights
1	No. 076/Pdt.G/2017/PA.Mgl	Punishing the defendant to grant the plaintiff as follow: a. *Iddah* living 3.000.000,- IDR b. *Mut'ah* 5.000.000,- IDR
2	No. 94/Pdt.G/2018/ PA.Mgl in *verstek*	Assigning the custody of children to the plaintiff
3	No. 098/Pdt.G/2018/ PA.Mgl in *verstek*	Assigning the custody of children to the plaintiff
4	No. 060/Pdt.G/2018/PA.Mgl	a. Assigning the custody of children to the plaintiff b. Punishing the defendant to give the children's custody to the plaintiff. c. Punishing the defendant to grant children's living 1.000.000,- IDR/ month.
5	No. 015/Pdt.G/2018/PA.Mgl	a. Assigning the custody of children to the plaintiff b. Punishing the defendant to provide living for children 1.000.000,- IDR/month
6	No. 052/Pdt.G/2018/PA.Mgl in *verstek*	Assigning the custody of children to the plaintiff

The table above explains that some of verdicts of divorce lawsuit in Magelang RC were made in *verstek* and some were not. Cases attended by the parties lead to a verdict that grants wives and children get their right. It can be seen in the verdict number 076/Pdt. G/2017/PA. Mgl., number 060/Pdt. G/2018/PA.MGL, and number 015/PDT. G/2018/PA. Mgl. In those verdicts, all parties were present which enabled the judge to do mediation although it did not lead to any deals. However, copies of the verdicts show that plaintiffs of the three verdicts are proven not doing *nushūz* so that

the Court shall grant its *ex officio* right by referring to the considerations as follows;

For a case number 076/PDT. G/2017/PA. Mgl, the wife as the plaintiff did not require an '*iddah* living and *mut'ah.* However, the article 41 (e) UU number 1/1974 Jo Article 149 (A and B) and MA jurisprudence number 137K/AG/2007 show that the wife who filed for the divorce and was proved not doing *nushūz* enables the judges to use *ex officio* right. Using this right, the judges can demand the husband to provide an '*iddah* living for her wife because she must go thorugh the period of '*iddah*. Furthermore, the MA jurisprudence number 02K/AG/2002 clearly mentions that even if not requested in the Court, the judge using *ex officio* right can impose the husband to provide '*iddah* living and *mut'ah* to his wife.[35]

In addition to law materials as mentioned above, the verdict number 015/PDT. G/2018/PA. MGL is also reinforced by SEMA number 4 2016 on the implementation of the plenary meeting results formulation of Supreme Court and the formulation of the Religious Court. It states that RC through *ex officio* right can set a child's living to his/her father when he/she is under custody of the mother.[36]

The above explanation clarifies that the use of *ex officio* right provides more protection and benefits for wives and children. This is in line with Ibrahim's study concluding that *ex officio* right aims to accommodate women's rights after divorce in which husbands sometimes neglect them.[37]

As for another verdicts in *verstek* form, namely number 094/Pdt. G/2018/Pa. Mgl. and number 098/Pdt. G/2018/PA. Mgl., the plaintiffs (wife and children, in this case) did not get their rights. The wives only got custody of the child because it was they who filed for the divorce and during the trial process, the parties in dispute (the defendant or the husband) were not present.

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[35]See the verdict No. 076/Pdt.G/2017/PA.Mgl, 27.

[36]See the verdict No. 015/Pdt.G/2018/PA.Mgl, 27.

[37]Ibrahim AR Ibrahim AR and Nasrullah Nasrullah, "*Eksistensi Hak Ex Officio Hakim dalam Perkara Cerai Talak*," SAMARAH: Jurnal Hukum Keluarga dan Hukum Islam 1, No. 2 (December 30, 2017): 463, https://doi.org/10.22373/sjhk.v1i2.2378.

Meanwhile, most of the divorce case lawsuits are brought in a verdict by *verstek* due to various reasons such as because the defendant is in unknown address, deliberately leaving his wife, and other various reasons. In this condition, the husband tends not to attend the trial that it leads to *verstek* verdict. Another reason for a wife to file a divorce lawsuit is because the husband does not work and earn living. In this kind of case, it is very unlikely for the wives to get their rights after divorce such as *'iddah* living and *mut'ah* because the husbands possibly cannot afford it.

2) Samarinda Religious Court

The verdicts of *ṭalāq* divorce in Samarinda Religious Courts during 2017-2018 are as follow:

No.	Verdict Number	Wives/Children's Rights
1	857/Pdt.G/2017/PA.Smd	Punishing the reconvention defendant to provide: a. Living of *'iddah,* 9.000.000,- IDR b. *Mut'ah,* 6 million,- IDR c. Living for child, 2.000.000,- IDR/month
2	1014/Pdt.G/2017/PA.Smd	Punishing the reconvention defendant to provide the neglected living, 3.000.000,- IDR and *'iddah* living, 3.000.000,- IDR
3	429/Pdt.G/2018/PA.Smd	-
4	1843/Pdt.G/2018/PA.Smd, in *verstek*	-
5	1694/Pdt.G/2018/PA.Smd	Assigning child custody to the defendant
6	194/Pdt.G/2019/PA.Smd, in *verstek*	Punishing the plaintiff to provide the defendant as follow: a. *'Iddah* living 3.000.000,- IDR b. *Mut'ah* 500.000,- IDR

		c. *Hadhanah* to the defendant d. *Child's* living, 1.000.000,- IDR/ month
7	371/Pdt.G/2019/PA.Smd, in *verstek*	Punishing the plaintiff to provide the defendant; *a. 'Iddah* living, 6.000.000,- IDR *b. Mut'ah,* 2.000.000,- DIR

The table gives an overview on the wife's rights after divorce in *ṭalāq* divorce verdict at Samarinda RC. Among the mentioned examples, some of them were administered in *verstek* while others were with the presence of litigants. Three verdicts in non-*verstek* procedure came from cases in which the defendants were present at the trial and their rights after divorce were obtained.

Acquisition of the wives' rights, consisting of *'iddah* living, *mut'ah*, and the child's living, comes from consideration on the condition in which from the beginning of process, they requested the rights through the reconvention. It means that defendant's knowledge and understanding on the rights they deserve are good enough.

The result of Mansari & Moriyanti's study asserts that cases in which the judge does not grant the living right for wives is due to the wives themselves. They do not understand their own rights or simply accept their destiny while only focusing on the main purpose to gain divorce certificate. From the beginning of trial process, they actually do not want a divorce hoping that resolution can be achieved and the family unity can be rebuilt. Therefore, they do not sue any living at all.[38]

In more details, the case number 857/PDT. G/2017/PA. SMD portrayed a condition in which the defendant (wife) obtained her rights because she was accompanied by a lawyer. Meanwhile, the case number 1014/Pdt. G/2017/PA. SMD) did not enable the defendant to gain her rights because of her own insufficient knowledge and

[38]Mansari Mansari and Moriyanti Moriyanti, "*Sensitivitas Hakim terhadap Perlindungan Nafkah Isteri Pasca Perceraian*," Gender Equality: International Journal of Child and Gender Studies 5, no. 1 (October 14, 2019): 53–55, https://doi.org/10.22373/equality.v5i1.5377.

understanding on what she deserves for. Moreover, she was not being accompanied by a lawyer during the trial.

Another case, namely number 429/PDT. G/2018/PA. SMD, also did not grant the wife's right even if she was present at the trial. It turned out that the wife did not request her rights in the reconvention. This is possibly due to her ignorance and for this kind of situation, the role of judges is particularly important. The judge needs to consider a principle that in order to reduce the divorce bad effect to wife and children, they need to get the rights whether they requested it or not.[39] Additionally, the mandate of Article 149 letter (a) and (b) KHI also obliges him/her to tell this type of wife about what she deserves for. The wife, at this case, does not work and furthermore she lives with three children who still need living expenses.[40]

The next case, a verdict in *verstek* form number 1843/Pdt. G/2018/PA. SMD did not grant the wife's rights due to another cause, which is the absence of the defendant at the trial. This indicates the absence of good etiquette from the wife. On the judge's side, the absence is also unexpected because it can impede him/her in confirming plaintiff's lawsuit materials. The judge will therefore get difficulties in granting the rights of wife in such conditions.[41]

Overall, samples from *ṭalāq* divorce cases in 2017 and 2018 show that the *ṭalāq* divorce in *verstek* form did not grant the wive's rights even if they attended the trial. On the contrary, in 2019, specially at the case number 194/PDT. G/2019/PA. SMD and number 371/PDT. G/2019/PA. SMD which were in the *verstek* forum, the wives gained their rights such as *`iddah, mut'ah, haḍānah* and child's living through *ex officio* right.

The use of *ex officio* right in the those verdicts issued in 2019 was with the following considerations; (1) The wives were proved not doing any *nushūz*, (2) The article 41 ACT number 1/1974 and article 149 KHI (b) mention that due to divorce, a wife deserves for *mut'ah* and *`iddah* living except if she is still virgin (*qobla dukhūl),* (3) The plaintiffs can afford the obligation, and (4) the existence of the

[39]Dzuhayatin et al., "*Pedoman Modeling Institusionalisasi Proses Peradilan Responsif Gender, Hak Perempuan, Dan Hak Anak Di Pengadilan Agama*," 30–31.

[40]See the verdict No. 429/Pdt.G/2018/PA.SMD, 5.

[41]Interview with a judge of Samarinda Religious Court, June 2019.

jurisprudence of Supreme Court number 608K/AG/2003 dated March 25, 2003 and number 280K/AG/2004, dated November 10, 2004 concerning the range of the number of *iddah* and *mut'ah.*[42]

In addition to it, referring to the principle of *ex aequo et Bono,* the Religious Court which argues otherwise than the lawsuit of a plaintiff can make the verdict as fair as possible.[43] This clause makes it possible for judges to do *ijtihad* in order to make a justice-based verdict putting much benefit for the wife and child as the divorce victims. At the same time, it also asserted that the judge is not only a statute of law, but also the (representation of the) law itself because the verdict he/she makes becomes a legal product.

Following is the data of samples of divorce lawsuit verdicts in Samarinda Religious Court during 2017, 2018 and 2019.

No.	Verdict Number	Wives' /Children's rights
1	0580/Pdt.G/2017/PA.Smd	-
2	30/Pdt.G/2018/PA.Smd	-
3	1057/Pdt.G/2019/PA.Smd,	-

On the contrary to *ṭalāq* divorce cases in which the rights of wives and children are mostly fulfilled through either reconvention or the judge's *ex officio* right, the samples of divorce lawsuit cases show otherwise. Among 7 samples of lawsuit divorce verdicts taken either in form *verstek* or in the presence of litigants, such rights are nothing to obtain.

The condition when a wife filed the divorce lawsuit in the Religious Courts usually comes to these following models; (1) She knows her rights from a lawyer because accompanied by the legal authority during the trial process; (2) She knows her rights based on understanding and knowledge she has without the help of lawyer; (3) She knows her rights yet chooses not to demand it because she only focuses on one goal to get divorced while ignoring other issues, and (4) She doesn't know her rights at all that she proposed very minimum lawsuit, namely request for divorce.

[42]See the verdict No. 371/Pdt.G/2019/PA.SMD, 9.

[43]Interview with a judge of Samarinda Religious Court, July 2019

The case number 580/PDT. G/2017/PA. SMD, for example, comes from a background that the plaintiff did not work and earn regular income, while the defendant was the chief of a government office, graduated from master degree and had two children. The copy of verdict mentioned that the cause of lawsuit divorce was because the husband had affair with another woman and used to be in anger when he was warned off not doing so.

The same cause for a divorce lawsuit was found at the case number 30/PDT. G/2018/PA. SMD. The plaintiff was a housewife with a child, while the defendant was the porter of online goods. Meanwhile, in the case number 1057/PDT. G/2019/PA. SMD, the plaintiff was a mother with 3 children whom works as private worker. Her husband, on another hand, had never given a living and only lazed around at home. When he was warned off not doing so, he used to be in anger. To be short, the plaintiff did not get her material rights that ensures her to file for divorce.

Another similarity among those three lawsuit divorce verdicts mentioned at the table was the wives' attitudes which were proven by not doing *nushūz.* Instead, they filed divorce lawsuit due to their husband's behavior such as having affair with another woman (number 580/PDT. G/2017/PA. SMD and number 30/PDT. G/2018/PA. SMD) and earning nothing for live expenses at the case number 1057/PDT. G/2019/PA. Smd.,. The verdict number 580/PDT. G/2017/PA. actually portrayed background in which the defendant (husband) worked as the head of one governmental offices in Samarinda and were S2 educated. In terms of wealth or material, it is obviously adequate to provide *'iddah and mut'ah* living for his ex-wife compared to the verdict number 30/PDT. G/2018/PA. SMD where the defendant (husband) worked a porter of online goods. Unfortunately, those two got the same in term in obligation for fulfilling wives' rights after divorce.

In fact, when a wife was proven not doing ***nushūz***, referring to the article 41 ACT Number 1/9174, the Court, through the judge, can oblige a husband to give her the rights. The diction "can" becomes the base for the judge, with his *ex officio*, to force the husband to give the

right even though it does not exist in the lawsuit.[44] In such circumstance, the judge should be able to use the authority attached to him/her by granting rights for wife and children. She/he will then produce a justice values based verdict although the right is not sued by the plaintiff.

On the other hand, as divorce is included in civil law scope, one of its bases requires the judge not to impose any verdict outside the wishes of the parties (plaintiffs) or as known with the *ultra petitum* principle[45] according to the mandate of Article 189 (3) RBg. This seems to be the reason for judges in Samarinda Religious Courts in making the verdict on divorce cases. When the plaintiff or wife just asked her divorce verdict while ignoring her rights, the judges just pronounced that.

In fact, a deeper observation shows that all wives engaged at the cases, either in *verstek* or not, were free from any *nushūz* suspicion. Therefore, *ex officio* right used at previously outlined cases should also been used in divorce cases, particularly when the husband can financially afford his obligation. This is also in line with the jurisprudence of MA Number 02K/AG/2002 mentioning that although not requested by the wife in her suit, judges through *ex officio* right can impose a husband to grant *'iddah* and *mut'ah* living for the wife. Other jurisprudence materials as the legitimacy of granting the wife's rights after divorce as long as she were proven not doing *nushūz* are number 347 k/Ag/2010, 410k/Ag/2010, 137k/Ag/2007 and number 276k/Ag/2010. If one of those things is made into consideration, the rights of the wife and child after divorce will be well accommodated.

Data Analysis

The sampling data from Magelang Religious Court vividly explained that the right of women and children after divorce are well

[44]Muhammad Aqwam Thariq, "Hak Ex Officio Hakim: Pertimbangan Hukum Hakim terhadap Pembebanan Nafkah *Iddah* dan *Mut'ah* dalam Perkara Cerai Talak Verstek Perspektif *Maqashid Syariah* (Kasus di Pengadilan Agama Kabupaten Malang)," n.d., 3.

[45]M. Yahya Harahap, *Hukum Acara Perdata: Tentang Gugatan, Persidangan, Penyitaan, Pembuktian, dan Putusan Pengadilan* (Sinar Grafika, 2005), 801.

fulfilled both in *ṭalāq* and divorce lawsuit. This, again, is due to chapters 149 KHI and PERMA Number 03 of 2017. Additionally, the judges also considered more on the benefits and protection toward wives and children as the most suffering parties due to divorce. The husband, therefore, is obliged to provide living and *mut'ah* either over the suit of the wife or over the judge's *ex officio* and the optimal role of the mediator. Based on it, it can be fairly said that the verdicts of both *ṭalāq* divorce and divorce lawsuit in Magelang Religious Court show gender sensitivity because they have fulfilled the requirements as mentioned above. It even went the same way when the verdict was in *verstek* form because the judges used their *ex officio* right. In short, this certainly provides benefits and fairness for the wives and children

Granting the rights of wife and child in *verstek* verdict through *ex officio* right is highly recommended and useful as mentioned by a study of Muhammad Aqwam. He confirmed the advantages of using *ex officio* right in *verstek* and enlisted some following reasons: (1) As the defendant, most wives does not understand the law specifically the rights they deserve for. Therefore, when a husband filed a *ṭalāq* divorce, she chose neither to attend the trial nore appoint a lawyer to be represent her; (2) The rights that the wife deserves for becomes warranty for the her life after the divorce in which she used to get it from her husband before the divorce took place; (3) The pronouncement of *ṭalāq* divorce verdict means the granting of husband's desire for divorce so that he needs to provide justice for her wife by giving her rights through judges' *ex officio* right; (4) The fulfillment of a wife's right is a mandate of LAW in article 41 (c) UU number 1/1974 and article 149 (A and B) KHI; (5) The husbands have financial ability to carry out his obligations.[46]

These all imply that in Magelang Religious Court, PERMA Number 03 of 2017 has already been well-implemented. It is quite reasonable because Magelang RC have become the pilot project for

[46]Thariq, "*Hak Ex Officio Hakim: Pertimbangan Hukum Hakim terhadap Pembebanan Nafkah Iddah dan Mut'ah dalam Perkara Cerai Talak Verstek Perspektif Maqashid Syariah* (Kasus di Pengadilan Agama Kabupaten Malang)," 9.

gender, rights of children and wives mainstreaming between Kalijaga Institute for Justice (KIJ) and Indonesian Supreme Court Badilag.[47]

Among the indicators of this sensitivity are dignity and respect for parties which suffer most due to the divorce, namely wives and children. This is clear from verdicts which grant what they deserve in the form of *'iddah* living, *mut'ah* and child's living. Most importantly, the verdict, either in *ṭalāq* divorce or lawsuit divorce, brings the value of legal certainty or gives benefits as well as justice to the wife. Instead of putting her in uncertain condition, wifes and children get benefits by earning *'iddah* living, *mut'ah* and child's living. This is in accordance with the legal objectives namely justice, benefit, and legal certainty although these three things are difficult to implement simultaneously altogether.

In line with that, Alef explained that the judges should compromise all three objectives proportionally although in the end, only one element is chosen and prioritized in each verdict as it so very difficult to accommodate them altogether.[48] In this case, Mukti Arto asserted that the legal certainty must be enforced in all cases as each verdict must result in legal certainty. Conversely, justice concept in different cases has its own characteristic because there must be a balance among the parties and there is no exact same case among one another.[49]

Because of the differences among one case and another, the principle of priority should be well adjusted to the type of the case. This means that the justice is not necessarily the first priority. In some cases, priority can be given to legal certainty then followed by justice

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[47]www//http:pa-magelang.go.id. (Online) accessed on June 2019.

[48]"*Hermeneutika Hukum Sebagai Alternatif Metode Penemuan Hukum Bagi Hakim Untuk Menunjang Keadilan Gender | Rahmah | Jurnal Dinamika Hukum*," 303, accessed November 23, 2019, http://dinamikahukum.fh.unsoed.ac.id/index.php/JDH/article/view/211.

[49]Mukti Arto, "*Het Beleid Van De Recheer dan Upaya Penegakan Undang-undang Penghapusan Kekerasan Dalam Rumah Tangga Oleh Hakim di Lingkungan Peradilan Agama*", https://badilag.mahkamahagung.go.id/artikel/publikasi/artikel/ Het-Beleid-Van-De-Recheer-dan-Upaya-Penegakan-Undang-undang-Penghapusan-Kekerasan-Dalam-Rumah-Tangga-Oleh-Hakim-di-Lingkungan-Peradilan-Agama. (Online) Retrieved on Agustus 14, 2019.

and benefit. In the case of divorce, this seems to be more appropriate. The pronouncement of the divorce verdict enables the wife to gain divorce certificate as well as obtaining legal certainty. Next on, as soon as the wife and the child get their rights, it means that the verdict gives value of legal certainty, justice and benefits for them both.

Furthermore, Mukti Arto asserted that the legal certainty is in the category of *waḍ'ī* law which regulates the relationship between individuals. The legal breakthrough is not possible to formulate on this domain. Meanwhile, the justice is in the scope of *taklīfī* law which regulates the rights and obligations between individuals in civil territory. In this realm, the judge can do *ijtihād* to produce a justice based verdict.[50]

Meanwhile, in the case of Samarinda Religious Court, some of its *ṭalāq* divorce verdicts accommodated the rights of wives and children through reconvention. However, there found no verdict of *ṭalāq* divorce in 2017 and 2018 with *ex officio* rights among the taken samples on this research, both pronounced in *verstek* and the presence of parties. Based on this, it can be said that PERMA Number 03 of 2017 was still not fully implemented in *ṭalāq* divorce cases in Samarinda RC during 2017 and 2018. Not all verdicts are worth justice and beneficial for wives and children, as can be seen in the verdict Number 429/PDT. G/2018/PA. Smd. and Number 1843/Pdt. G/2018/PA. Smd. In fact, the mandate of article 2 PERMA obliges judges in the adjudication of women to produce a verdict that is worth justice, certainty, and benefit. In addition, they should be able to tell wives about their rights when they are litigated so that those who do not understand their rights might get access to obtain them.

On the contrary, for two *ṭalāq* divorce verdicts (Number 194/PDT. G/2019/PA. SMD and Number 371/PDT. G/2019/PA. SMD) during 2019 which were pronounced in *verstek*, wives and child got their rights through *ex officio* rights consisting of *'iddah* living, *mut'ah* and child's living. The use of *ex officio* right in those two verdicts were based on these following considerations; (1) The wives were proven not doing *nushūz*, (2) Article 41 ACT Number 01 of 1974 mentioned that in case of divorce, the Court may oblige the husband to provide a living to his wife while article 149 KHI (b) stated that due

[50]Mukti Arto, "Het Beleid…

to divorce, a wife deserves for *mut'ah* and *'iddah* living except in the condition when she is still virgin (3) The verdicts were based on plaintiffs' financial ability, and (4) The jurisprudence of MA Number 608K/AG/2003 dated on March 25, 2003 and Number 280K/AG/2004, dated on November 10, 2004, which regulate the range of number of *mut'ah* and *'iddah.*[51]

Those two examined *ṭalāq* divorce verdicts certainly shows considerable gender sensitivity because wives and children were entitled to their rights through the *ex officio* right of the judges, even though it was not proposed. This means that PERMA Number 03 of 2017 began to get well implemented because the rights of wives and children have been well-accommodated with judges' *ex officio* right. Accordingly, the verdict was not only worth the legal certainty, but also contains justice and benefit. The copy of the verdict also showed how the judges attempted to lead the plaintiff to fulfill his obligation by granting the wives and children's rights.

Unfortunately, for divorce lawsuit during 2017 to 2019, samples of the verdicts did not show concern on the rights of wife and children both in *verstek* form and otherwise. The right of wife and child is only given when being asked by the wives as litigants. The judges rarely used their *ex officio* right even though the wives were not doing *nushūz* while the husband could afford the right.

In addition, the mediator did not play his role maximally by not producing any agreement between the parties who dispute each others. The presence of the parties should be utilized by the mediator to play the role well, mainly to make them understand about their rights and obligations in the event of divorce. At least, the mediator needs to faciliate in order the parties in dispute can create an agreement that accommodates the rights and obligations of each. However, a copy of existing verdict showed that mediation did not result in any agreement that accommodates the vulnerable party. It means that the mediator was less able to play the role optimally in giving the rights of wives and children after divorce.

This means that judges' gender sensitivity was still poor. The divorce verdicts only contained legal certainty; while the justice for the wife who filed the suit and was hurt either by knowing

[51]See the copy of verstek No. 371/Pdt.G/2019/PA.SMD, 9.

herhusband had affair with another woman or neglected her has not been enforced. In fact, the purpose of law should at least contain the value of justice, certainty and benefit.

From the gender perspective, the verdicts of divorce lawsuit from 2017 to 2019 have not shown concern towards the wives and children. In fact, article 2 PERMA Number 3/2017 explained that the principle of judges in the adjudication of women dealing with the law consists of gender equality, equality in the face of law, justice, benefit and legal certainty. This is valid for women who become litigants (chapters 2 and 3 PERMA). In addition, in assuring the enforcement of gender justice, judges had to explore the legal values, local wisdom and the value of justice in the community (Article 6 letter C). They are also expected to convey to the women regarding their rights in certain particular cases. (Article 8 paragraph 2 PERMA Number 03 of 2017).

As a consequence, the sample verdicts of divorce lawsuit from 2017 to 2019 at Samarinda RC showed that no one has fulfilled the rights of wives, either by *verstek* or the presence of the parties. This means that PERMA Number 03 of 2017 has not been implemented properly as it is only worth the legal certainty. There is no significant differences on the acquisition of the rights of the wife and child after divorce by the existence of PERMA as clear from the comparison between verdicts in 2017 before the PERMA and the verdicts in 2018 and 2019 after the PERMA.

Conclusion

The study comes to these following conclusions. *First*, both *ṭalāq* divorce and divorce lawsuit verdicts in Magelang RC during 2017-2019 already show excellent gender sensitivity. On the contrary, for Samarinda RC, the condition was otherwise during 2017-2018 although there found a little improvement on gender sensitivity in *ṭalāq* divorce verdicts issued in 2019. Accordingly, the verdicts of lawsuit divorce from 2017 to 2019 at Samarinda RC had not shown good gender sensitivity. This is in line with the implementation of PERMA Number 03 of 2017 in those two Religious Court units. It was well implemented in Magelang RC and went otherwise in Samarinda RC as there is no significant differences between verdict issued before the issuence of PERMA and those which came afterward.

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ISSN: 1907-591X, E-ISSN: 2442-3084
DOI: http://dx.doi.org/10.19105/al-lhkam.v15i2.2734

The Development of *Fiqh Munākaḥah* (Marriage Jurisprudence) Material Course in Madurese Islamic Universities and Its Relation with Gender Equality and Divorce Prevention

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Article history: Received: 20 November 2019, Accepted: 24 October 2020, Published: 28 December 2020

Abstract:

Explanation of Law 1/1974, number 4 point e, obviously accentuates the principle of complicating divorce. It requires specific reasons beyond the lawsuit and, in line with article 115 of KHI (Kompilasi Hukum Islam; Islamic Compilation Book), obliges the process to take place in the court trial. This implies that divorce needs prevention from the whole parties both persons and institutions, including Islamic universities. Islamic universities have both academic and social responsibilities to prevent divorce due to their strategic duties and function in community development and empowerment, specifically for spreading knowledge. This research aims to identify how far Madurese Islamic universities perform their roles and function by designing fiqh *munākaḥah* (marriage jurisprudence) materials for students as prospective husbands and wives. It focuses on

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whether the materials get developed and are compatible with gender equality and divorce prevention efforts. Using a qualitative approach particularly its phenomenological type, this study took place in three Madurese Islamic universities. It revealed that the latest development of fiqh munākaḥah materials are still mostly about the normative perspective from classical fiqh literature with very little relevances to either gender equality spirit or divorce prevention effort.

Keywords:
Fiqh Munākaḥah; Madurese Islamic Universities; Gender Equality; Divorce Prevention

Abstrak:
Penjelasan UU Nomor I Tahun 1974, angka 4, huruf e, jelas menekankan prinsip untuk mempersukar perceraian dengan mewajibkan alasan-alasan tertentu serta, senada dengan KHI Pasal 115, mengharuskan proses perceraian terjadi di depan sidang pengadilan. Ini menunjukkan bahwa tugas mencegah perceraian harus dilakukan siapapun, baik perorangan ataupun instansi, termasuk Perguruan Tinggi Islam. Perguruan Tinggi Islam memiliki tanggung jawab akademik dan sosial karena tugas dan fungsinya yang strategis dalam pengembangan dan pemberdayaan masyarakat, terutama dalam penyebaran pengetahuan. Untuk mengetahui sejauh mana Perguruan Tinggi Islam di Madura menjalankan peran dan fungsinya tersebut, penelitian ini menelusuri kajian *fiqh munākaḥah* sebagai bahan konsumsi bagi calon-calon suami dan istri, khususnya apakah materi-materi tersebut sudah berkembang dan sesuai dengan wacana kesetaraan gender dan upaya pencegahan perceraian. Menggunakan pendekatan kualitatif berjenis fenomenologis, penelitian ini mengambil *setting* di 3 Perguruan Tinggi Islam di Madura. Hasil penelitian menunjukkan bahwa perkembangan terbaru kajian *fiqh munākaḥah* masih didominasi kajian normatif dari sumber *fiqh* klasik sehingga belum relevan dengan semangat kesetaraan gender maupun upaya pencegahan perceraian

Kata Kunci:
Fikih Munākaḥah; Universitas Islam Madura; Kesetaraan Gender; Pencegahan Perceraian

Introduction

In recent years, the number of divorces increases at both local and national levels. Last November 2016, for instance, there found 315.000 divorce cases registered at the whole Indonesian Religious Court and Supreme Court.[1] The number consists of both judicial divorces in which the case was filed by a wife and repudiation or divorce from a husband's initiative.

Interestingly, the judicial divorce cases were higher in number than the repudiation numbering 224.240 received reports. 152.395 of them were legally divorced by the Religious Courts while the rest varied, ranging from submission withdrawal, rejection, unaccepted submission to removal from the registration. Whereas, repudiation divorce had a fewer number about 90.000 cases with 60% accepted cases. The number still excluded the cases sentenced by the State Court.[2]

Furthermore, three provinces in Java were identified as the top three regions in contributing the number of divorce cases, namely Central Java, East Java, and West Java. In East Java itself, the Religious Courts of Sampang and Pamekasan contributed mostly to judicial divorce case numbers. This type of divorce became a new trend among the married couples in those two districts which then led to the increasing divorce number. Pamekasan Religious Courts on 2014/2015 recorded divorce cases numbering 496 and judicial one with 766 cases. The number of cases exceeded in Sampang with 1.037 judicial divorce cases and 782 divorce cases.[3] The numbers increased significantly in the following years, specifically at Sampang Religious Court.

Some previous research show that the increasing number of divorce cases were due to both internal and external factors. The internal factor, they mentioned, closely relates to inadequacy of

[1]Liputan6.com, "Divorce Cases," 17th November, 2016, https://www.liputan6.com/news/read/2654870/224-ribu-istri-di-indonesia-ceraikan-suaminya-selama-2016.

[2]Liputan6.com.

[3]Harian Terbit, "Talaq Divorces," *Mei 29th*, 2015. Accessed on April 3rd, 2017. Compare to Radar Madura, "Talaq Divorce," *May 2th*, 2015.

education in which most of women divorcees graduated from primary school while the men were from secondary school. This factor might indirectly trigger the number, but in reality, intellectual, spiritual and emotional intelligence, skill, as well as conceptual capability about marriage really matter. Available working opportunities, furthermore, are also in line with educational level which then influences the economic prosperity of a household.

Meanwhile, the external factor is clear from the high accessibility of the court as a part of the public service facility in addition to the third party's contribution and support from both relatives and local public officials. The religious teaching, on another hand, makes it possible for either wife or husband to file for a divorce lawsuit. This gets worsened by ineffective pre-married education by the Ministry of Religious Affair with outdated materials, old methods, boring learning strategies, and unsupportive learning venues.[4]

Sufficient conceptual understanding of marriage life is believed to significantly contribute to the household's integrity. Any household will certainly and inevitably cope with both sweet and bitter moments as a common natural circle. A couple with good conceptual maturity in the marriage itself can likely survive and go through both moments. Therefore, content or material in marriage conceptual lesson becomes an important theme to discuss, mainly about the relation among the ontology of marriage, task and responsibilities of each, balanced right and obligation between both spouses, equality in role and function according to the recent necessity of modern family and so forth.

Base on it, rearrangement of *fiqh munākaḥah* (marriage jurisprudence) lesson is necessary particularly to identify its relevancy with current development and reality. However, it needs participation from several parties out of the Ministry as the publisher of the marriage handbook. Islamic boarding schools (*pesantren*) and universities are also supposed to actively participate due to their main role and responsibilities to the public. At least, they can contribute

[4]Maimun ; Muhammad Thoha, "Fenomena Cerai Gugat dan Wacana Kesetaraan Gender (Studi Alasan di balik Trend Kasus Cerai Gugat di Pengadilan Agama Kabupaten Sampang dan Pamekasan Madura)" (Pamekasan, 2017), 147.

any insight in formulating the curriculum to produce fair and equal content based material lessons.

Relating to that, this research wants to portray how three Madurese Islamic Universities developed their *fiqh munākaḥah* materials. It focuses on the issue of gender equality and the effort to reduce divorce rate through the following steps; *Firstly*, it describes the profile of *fiqh munākaḥah* materials of the universities. *Secondly*, it describes the development procedure of the materials. *Thirdly*, it describes the feasibility level of *fiqh munākaḥah* materials at the universities as a part of divorce prvention effort.

Method

This research used qualitative approach which according to Bogdan and Taylor, resulted in descriptive data either written or spoken from observed subject and its behavior.[5] On the other hand, Kirk and Miller explained that qualitative research is a specific convention in the social study which fundamentally depends on human's observation and relates to them in terminological field.[6] The qualitative research furthermore puts its basic concern on phenomenology by observing people's behavior as the result of the way they predict and understand the world.[7]

Accordingly, this is also field research as clear from its characteristic to accentuate research object on people, event, setting and document. In this type of research, each object will be comprehensively examined and observed according to their background and context to understand various relationships among its variables.[8]

This research itself took place in three Madurese Islamic universities namely IAIN Madura (located in Pamekasan), INSTIKA

[5]Lexy J. Moleong, *Metode Penelitian Kualitatif* (Bandung: Remaja Rosdakarya, 2005), 4.

[6]Suharsimi Arikunto, *Prosedur Penelitian, Suatu Pendekatan Praktik* (Jakarta: Rineka Cipta, 2002), 2.

[7]Robert Bogdan ; Steven Taylor, *Dasar-Dasar Penelitian Kualitatif,* transl. *A. Khozen Afandi* (Surabaya: Usaha Nasional, 1993), 44.

[8]Imron Arifin, ed., *Penelitian Kualitatif dalam Ilmu-Ilmu Sosial dan Keagamaan* (Malang: Kalimas Sahada, 1997), 57.

Guluk-Guluk (located in Sumenep), and UIM (located in Pamekasan). The three are deemed representative of two Madurese districts, namely Pamekasan and Sumenep. Additonally, they are quite popular in Madura Island and its surroundings so that every year, they admit a thousand of university students.

Researchers came to the locations serving various roles ranging from observers, interviewers, data collectors, as well as participants. During the visit, researchers got along with research subjects without any space or distance. Therefore, occasionally, research subjects did not recognize the researchers' purpose even existence that enables us to obtain real and objective data.

The data source of this research is divided into two, namely human and non-human. Human category consists of *fiqh munākaḥah* lecturers, university rectors, students, and other related parties. Meanwhile, the non-human sources are relevant documents, books, news, SAP (learning plan details) and RPS (semester learning plan) of the subject, module of the subject, and students' worksheet. Meanwhile, as the characteristic of qualitative approach, data were collected commonly through observation, interview, and documentation complying with standard data procedure to ensure its quality.[9]

As the next step, data analysis of this research uses three following steps: *First* is data reduction consisting of arrangement on the obtained data systematically then highlighting the main problems and findings to get the data reduced or shortlisted. *Second* is data displaying through simplifying abundant data by the use of model, mapping, table, and diagram to get it clustered into relevant details. *Third* is data heuristic by discovering both differences and the similarities found in the data then comparing the interrelated themes.

The Profile of *Fiqh Munākaḥah* Course Material at Madurese Islamic Universities

Identifying profile of *fiqh munākaḥah* course materials at Madurese Islamic universities becomes crucial considering that it influences effectiveness of the learning process itself. Moreover, it is

[9]Sumadi Suryabrata, *Metodologi Penelitian* (Jakarta: Rajawali Press, 1992), 84.

typically set under systematic arrangement in either written form or not. It consists, at least, of cognitive, skill, and behavior based material which requires students to accomplish the outlined competencies through the detailed learning themes.[10]

In determining the theme as well as the series, lecturers usually rely on each institution's curriculum and syllabus. In the context of *fiqh munākaḥah,* the theme is usually classified into three. *First* is basic concept of marriage namely definition, purpose, advantage, related law and its authority, principles, as well as the right and obligation of the married couple. *Second* is the reason for divorce and related solution such as *nushūz* (recalcitrant), *shiqāq* (irresolvable family dispute), *ḥakamayn* (two peacemakers from both parties), *'iddah* (waiting period), and *rujū'* (reconciliation). *Third* is about polygamy and its problems. Recent problems such as early marriage, interfaith marriage, and other issues are also included.[11]

Systematically, the series of theme is already appropriate with outlined competency standard (cognitive, affective, and psychomotor) as well as reliability test. The scope of themes is also adjusted to students' necessities as a part of society. This also aims to attract their interest in learning *fiqh munākaḥah* so that the learning goals and expected competencies can be easily achieved. Therefore, learning materials must be systematically ordered and complete consisting of its suitable delivery method, rule, and evaluation procedure.[12]

In a closer look, it becomes clear that the course starts from the easiest and the most basic concept to more difficult one which requires the most attention, such as solving any household conflicts. Meanwhile, the material presentation is generally by lecturing method then assigning students to investigate the problem in surrounding society so that they can integrate it along with their

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[10]Ali Mudlofir, *Aplikasi Pengembangan Kurikulum Tingkat Satuan Pendidikan dan Bahan Ajar dalam Pendidikan Agama Islam* (Jakarta: Rajawali Press, 2011), 184.

[11]Masyhuri, "The Lecturer of *Fiqh Munakahah* Subject, Department of Islamic Religious Education, INSTIKA Guluk-Guluk Sumenep, *direct interview* on March 24th, 2018."

[12]Ika Lestari, *Pengembangan Bahan Ajar Berbasis Kompetensi* (Padang: Akademi Permata, 2013), 1.

theoretical understanding. This combination is among those which influence students' interest on the material because it reflects surrounding realities, relates to their future life and directly affects their personality.[13]

However, this does not mean that students must directly practice the marriage by themselves. Instead, they are required to observe how society build the marriage relationship by comparing between harmonious and broken marriages. Getting *fiqh munākaḥah* materials cognitively and practically furthermore means a lot for them to get comprehensive understanding on marriage from its various aspects. Additionally, they can get lesson learned to apply for the future family they are going to build because establishing an imperishable marriadge requires adequate knowledge.

Sending students to directly observe and interact with society also enables *fiqh munākaḥah* lecturers to correct any common misleading understanding about marriage through students. For example, some people still consider engaged couple the same as marriage couple that it leads to some unexpected condition such as adultery and illegal pregnancy. If this remains the same and those people do not get any right and comprehensive explanation, problems will remain hard to solve even lead to other further problems.

Meanwhile, most of references in *fiqh munākaḥah* course refer to *fiqh* books by big schools' Islamic scholars (*`ulamā' madhḥab)* specifically those affiliated to *ahl al-sunnah.*[14] However, some lecturers mentioned that those references have been less relevant to Indonesian contemporary development. They mentioned some sampling themes namely the meaning and essence of marriage, forced marriage for women, inequal right and duty of wife under husband's authorities in any circumstances, the concept of breadwinner, polygamy, age limitation for marriage, and others that are hard to apply in Indonesian nowadays context. Consequently, they need to conduct

[13]Abdul Jalil, "The Lecturer of Fiqh *Munakahah* Subject, Department of Islamic Family Law, IAIN Madura, *direct interview* on April 3rd, 2018."

[14]Ainul Haq, "The Lecturer of Munakahat Fiqh in Islamic Religion and Education Department of Tarbiyah Faculty IAIN Madura, Direct Interview on March 22nd 2018."

deeper analysis on those old references while integrating them with contemporary based references.[15]

On the essence and meaning of marriage, for instance, the old jurisprudents of the four big schools of law defined it as a process towards legalization of cuddling or sexual relations (*istimtā'*) between men and women. They base their definition from this literal meaning referring to intercourse, gathering, and the likes. *Ḥanafiyah* scholars defined marriage as a contract which is advantageous for intentional joy-sharing,[16] while *Ḥanābilah* scholars defined it as a contract with the concept of *inkah* which means *tajwīz* referring to taking benefits for fun.[17] Accordingly, *Shāfi'iyah* scholars provide a literal based definition, namely the contract which legalizes sexual relations between men and women.[18]

Certainly, delivering these definition for students in doctrinal-textual manner will greatly affect their understanding. They will likely consider that marriage only aims to justify and legalize sexual relationship without any concern on responsibility, rights, obligation, and so on. Therefore, it is necessary to reformulate the concept of marriage so that it will not lead to any narrow understanding in both society and students. Apart of it, the lecturers are still obliged to deliver definition of old scholars as students' basic knowledge while accentuating a more comprehensive perspective on the definition. Marriage, for example, can be defined as a gateway to get peaceful life with full of love and affection, responsibility of each and one another, and so forth.

The lecturers engaged of this research are all aware of this misleading potency so that in delivering materials, they combine those two concepts. While mentioning old concept of classical Islamic scholars which tend to put women as objects with men as the subjects,

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[15] Jalil, "The Lecturer of Munakahat Fiqh in the Act of Islamic Family Department Syari'ah Faculty of IAIN Madura, Direct Interview on April 3rd 2018." Compare with Ahmad Farid Mawardi, "The Lecturer of Munakahat Fiqh in Islamic Religion Faculty of UIM Pamekasan, Direct Interview, May 3rd 2018."

[16] `Abd al-Rahman Al-Jazīrī, *Al-Fiqh 'Ala Al-Madhāhib Al-Arba'ah*, 4th ed. (Beirut: Dar al-Kutub al-Ilmiah, 2003), 3.

[17] Al-Jaziri, 4.

[18] Al-Jazīrī, *Al-Fiqh 'Ala Al-Madhāhib Al-Arba'ah*.

they offer newer concept of marriage by current conditions. For instance, they stress in delivering materials on the fulfillment of both right and obligations for husband and wife fairly and proportionally manner. They believe that this must be well developed and promoted to change society's mindset on rights and obligations of husband and wife.[19] A lecturer mentioned that he liked to deliver the concept of marriage as a contract which aims to build an eternal and lifetime household. Therefore, it needs strong foundation by having well knowing each others as it will lead to mutual understanding, mutual commitment for each right and obligation, as well as continual fostering on peace, love and affection.[20]

Development of *Fiqh Munākaḥah* Material Course with Gender Equality Issues

Developing course material is among the lecturers' obligations and responsibilities. Normatively, the duties of lecturers are explicitly stipulated in the regulations of the Minister of Research, Technology, and Higher Education, which reads: "Lecturers are professional educators and scientists with the main task of transforming, developing, and disseminating science and technology through education, research, and community service".[21]

Regarding that, lecturers in the three Madurese Islamic universities have already done so. They have all developed material courses in both written form such as textbooks or lecture modules and

[19] Masyhuri, "The Lecturer of The Act of Marriage Subject Islamic Religion and Education Department of INSTIKA Guluk-Guluk Sumenep, Direct Interview on March 24th 2018."Jalil, "The Lecturer of Munakahat Fiqh in the Act of Islamic Family Department Syari'ah Faculty of IAIN Madura, Direct Interview on April 3rd 2018."Mawardi, "The Lecturer of Munakahat Fiqh in Islamic Religion Faculty of UIM Pamekasan, Direct Interview, May 3rd 2018."

[20] Jalil, "The Lecturer of Munakahat Fiqh in the Act of Islamic Family Department Syari'ah Faculty of IAIN Madura, Direct Interview on April 3rd 2018."

[21]"Decree of Minister of Riset, Technology, and Higher Education in the Republic of Indonesia Number 2 in 2016 about the Amandement of Ministerial Decree Number 26 in 2015 about Lecturer's Registration in Higher Educational Institute Subsection 1" (2016).

unwritten ones when explaining the topics of discussion. Course materials themselves can be in printed version, audio, audio-visual, as well as interactive one such as digital.[22] Nevertheless, it is out of this research's scope to analyze the form of course materials. What is important here is the way the lecturers develop their course material, the foundation of its development and delivery methods.

Data from interviews, observation and document analysis shows that *fiqh munākaḥah* lecturers have developed the course material following the procedures in their respective institutions. They adjust the material to the aims and targets of the course while the level of breadth and depth of study and the mapping are made in line with the procedures of the university curriculum. More specifically, the development they make is clear from the description of the courses contained in the semester learning plan. This plan will then be explored in details of learning activities as needed.

One of the things that lecturers considered in developing the course material is the need of students as a part of society. For instance, they review the concept of the marriage essence and meaning that encourages strong and harmonious relationships. To fulfill this need, lecturers do not only introduce the concept and essence of marriage normatively, but also elaborate it by telling and analyzing family figures of prophets, companion, and scholars who were successfull in fostering eternal households. Those figures can therefore be role models for students and society in general.

The development of the course material is also a subject to adjust to the recent contemporary situation particularly with its social change. Social change requires changes in other related things, including the law. In this case, Islamic family law must carry out its function as a law to be compatible as both social control and Moslem's guidance. Specifically to *fiqh munākaḥah*, it needs to be the firm law on the one hand while flexibly responsive to social change on the other hand. In other words, it is neither rigid nor permanent in any case and situation. Instead, it is open for any review, reformation, modification, and such with considerable argument due to the basic values of

[22]Abdul Majid, *Strategi Pembelajaran* (Bandung: Remaja Rosdakarya, 2013), 174.

justice and people's benefit. This becomes urgent to consider as a truth of law is relative, as well as those of scientific theories.[23]

Moreover, to fulfill basic requirements and principles as good course material, it needs to be contextual with society's real needs and conditions. This means that the material needs to reflect society's situation so that students can easily relate it with their surrounding phenomenon. Relevance to the recent phenomenon also makes them easier in finishing any assignment as a part of the learning method.[24]

It is also interesting to note that the lecturers rely the course material development on the spirit of justice and gender equality. They typically design specific discussion on this issue in several meetings or make it included in the discussion of each meeting as the mainstream perspective.[25] This makes so much sense because the course material of *fiqh munākaḥah* mostly talks about family law, specifically about the behavior of husband and wife in the household.

One of the most relevant discussion themes with the gender equality perspective is on duties and responsibilities of a husband and wife in a household. This theme used to be gender-biased, anti-equality, and portraying mindset which puts the husband in a superior position while the wife is the inferior one. At worse, this theme often reduces or exploits women's rights in a family. [26]

Other related themes are found fragile to promote gender injustice relationships in a family, such as the wife's obligation to obey her husband in any situation and her obligation to get the husband's consent for doing any uncompulsory worship such as *sunnah* (uncompulsory) fasting. Old course material of *fiqh munākaḥah* liked to cite a hadith narrated by al-Bukhārī-Muslim literally mentioning the prohibition for a wife to do uncompulsary fasting when her husband does not allow her. It reads, "don't let a wife fast for a day while her

[23]Masyfuk Zuhdi, *Masail Al-Diniyah Al-Ijtimaiyah* (Jakarta: Gunung Agung, 1993), 177.

[24]Chomsin S Widodo and Jasmadi, *Panduan Menyusun Bahan Ajar Berbasis Kompetensi* (Jakarta: PT Elex Media Kompetindo, 2008), 50.

[25]Mawardi, "The Lecturer of Munakahat Fiqh in Islamic Religion Faculty of UIM Pamekasan, Direct Interview, May 3rd 2018."

[26]Masyhuri, "The Lecturer of *Fiqh Munakahah* Subject, Department of Islamic Religious Education, INSTIKA Guluk-Guluk Sumenep, *direct interview* on March 24th 2018."

husband is at home except with his permission, except for *Ramadhan* fasting".

In fact, Islamic scholars are different in responding to this hadith. Some of them, with textual interpretation, assumed that fasting is forbidden for a wife unless her husband allows it. This is valid for the compulsory fasting and when the husband is staying at home. Some others mentioned that a wife can do uncompulsory fasting without her husband's permission as long as it does not interrupt his right. Therefore, although a husband allows his wife for fasting it makes her neglecting the husbands' rights, she will still have sinned.[27]

Although look quite different, those two opinions are gender-biased and ignoring the justice values. It implies husband's absolute authority over his wife even in the matter of worship. This is certainly very contrary to Islamic concept which teaches independence of each individual in doing worship without any gender discrimination. Moreover, it is only valid for wife and not otherwise.

Another fragile theme in the course implying gender injustice is the concept of guardianship which has been, again, the absolute authority of men. If a father of a bride is still alive, he will become the guardian. If he passes away or unavailable for serving the role, the guardianship rights will turn to other male family members such as grandfather, brother, uncle and so on. The majority of Islamic scholars believe that guardian is one of the marriage pillars and because the brides are women, either girls or widows, the guardians must be men.[28] As a consequence, women cannot be any marriage guardian for another woman.

A lecturer of *fiqh munākaḥah* mentions that he likes to discuss this specific theme in his class using the perspective of gender equality.[29] He usually relates it to other guardianship requirement outside the marriage contract such as in reconciliation, divorce, and so on. However, he stressed that he always said at every early step of

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[27]Sofyan & Zulkarnain Suleman, *Fikih Feminis Menghadirkan Teks Tandingan* (Yogyakarta: Pustaka Pelajar, 2014), 89.

[28]Suleman, 103.

[29]Jalil, "The Lecturer of *Fiqh Munakahah* Subject, Department of Islamic Family Law, IAIN Madura, *direct interview* on April 3rd 2018."

discussion that the majority of (old) Islamic scholars, or so called *jumhūr `ulamā,* assume that it is illegitimate for women to be the witnesses because the legal requirements for witnesses must be two men.[30] He then compares this to *al-Ḥanafī* school, a well-known rational jurisprudence school, which allows women's witnesses even though two women are counted the same as a man. Therefore, two witnesses (*shāhidayni*) according to the Koran counts four women witnesses.

The last most striking household theme which also tends to be gender biased is girls' authority to decide their future partners. It turns out that the lecturers are aware of this so that they have included this theme in the course material they arrange and develop in their respective universities. Some of them, for example, also explained that Abu Hanifah had relatively different opinion from the rest in which, according to him, a growing up girl (*bālighah*) may decide their future partner independently. Moreover, he thought that she, either girl or widow, might also make their marriage contract as long as the spuose is commensurate (*kufū'* or in line with her in various aspects) and able to afford the common local dowry (*mahr mithil*).[31]

However, they do not only deliver the opinion of Abu Hanifah without the reason or context beyond. They generally explain that the opinion which allows women to choose their own partner is based on consideration that it is her who will go through her own married life. Times have changed a lot of things along with fast development of science and technology and globalization tide that it demands people to rethink about what they used to thought and had opinion about.

The Feasibility of *Fiqh Munākaḥah* Material Course to Prevent Divorce Cases

Universities or tertiary institutions with religious faculties do not only have academic roles, but also social responsibilities to foster and develop the community. Through the implementation of higher education's *tri dharma*, those universities find their space for

[30]Al-Jazīrī, *Al-Fiqh 'Ala Al-Mazahib Al-Arba'Ah*, 23–24.

[31] Muḥammad Ibn Ali al-Ḥanafī al-Haskafī, *Al-Durr Al-Mukhtār*, 3rd ed. (Beirut: Dar al-Kutub al-Ilmiyyah, n.d.), 64.

accomplishing the mission. They carry out education and learning processes for students, promote research and development for the academic circle, and devote lecturers as well students for community service. For the last mission, they greatly help resolve existing social issues, including divorce cases which the current numbers are increasing day by day.

In this context, to prevent the increasing number of divorce rates in Madura, Madurese universities have a very crucial and vital role. PTKI based universities have much more responsibilities than general tertiary institutions given their "Islam" label attachment although on the other hand, general universities are also trying to promote Islamic studies in the integration with social sciences.[32] They are supposed to be a center for brainstorming agenda and development of Islamic mission not only among students, but also for Moslem society in general.[33] Accordingly, they have much more chance to accomplish this mission due to their human resources' expertise in Islamic studies with relevant curriculum and courses.

Therefore, one of the real actions that universities can do for coping with this situation is to develop relevant course materials with proper content, method and approach. They must formulate feasible course materials to prevent divorce which society can easily apply. *Fiqh munākaḥah* course is among the most highlighted points that lecturers and universities need to pay much attention to not only because it is a part of Islamic law in *mu'āmalah* (human interaction) scope, but also due to its urgencies for students and society.

Appropriate and feasible *fiqh munākaḥah* materials should contain materials that complicate or discourage the divorce process without impressing any prohibition. It also needs practical exposition, not merely a therotical one. Unfortunately, the course materials of those three universities are found not quite feasible to support the mission. This is clear from references in which most of them come from scholars of old jurisprudence schools. There only found a few lecturers who explicitly mentioned contemporary references from

[32]Rafi'ah Gazali, "Tradisi Keilmuan Islam di Perguruan Tinggi Umum; Suatu Tinjauan Di Bidang Hukum Islam dan Pranata Sosial," *Ijtimaiyya* 6, no. 1, February (2013): 98.

[33]Ishomuddin, *Spektrum Pendidikan Islam* (Malang: UMM Press, 1996), 81.

modern thinkers even as secondary sources. It appears that *fiqh munākaḥah* course material is still not feasible enough to contribute to minimizing high rate divorce cases in Madura, especially in Pamekasan and Sumenep Regencies. Neither have they provided a solution for coping with the phenomenon.

A few lecturers are even still hesitant to walk out from authority or hegemony of classical scholars about the concepts and essence of marriage, equal rights and obligations between husband and wife, as well as other issues which so far are viewed by textual approach. The textual approach often leads to difficulties even threatens the relevance of Islamic law in responding to the recent challenges and current social change. It furthermore closely relates to the characteristic of classical *fiqh* which centered on one particular school with narrow mindset while ignoring society's living law.[34]

However, it is important to note that in the sense of learning method, lecturers have used proper delivery technique which does not only rely on cognitive knowledge. They equipped students with technical skill to solve real problems they likely deal with in the real life through continual and gradual training. This makes them ready and accustomed to cope with complicated society problem and challenge.

This then comes as an irony considering that actually, those lecturers support the concept to complicate divorce process.[35] However, they are not brave enough to leave classical jurisprudence references. The best thing that they can do is by developing delivery methods to make students understand that permissibility for divorce is not valid for any situation. They tell students that the permission for divorce shouldn't be understood in *ḥaqīqī* or absolute way. Instead, it needs *majāzī* (contextual) interpretation because the better choice is avoiding divorce and maintaining the marriage when it is possible.

Additionally, they intensively equip students with tips for finding a good and proper partner according to Prophet's guidance which prioritizes religious aspect. This is deemed important because

[34]Muhammad Jayus, "Menggagas Arah Baru Studi Hukum Islam di Indonesia," *Al-'Adalah* XI, no. 02 July (2013): 261.

[35]Mawardi, "The Lecturer of *Fiqh Munakahat* Subject in Faculty of Islamic Religion, UIM Pamekasan, *direct interview*, May 3rd 2018."

criteria for a future spuose will determine the process to build *sakinah* (peaceful), *mawaddah* (full of love) and *raḥmah* (merciful) household. Another strategy that the lecturers used is identifying some common causes of divorce, such as polygamy. They accentuated that polygamy is not a suggestion to do. Instead, it is only allowed under very strict requirements which is almost impossible to fulfill without breaking any rule.[36] A lecturer even mentioned that instead of building a *sakīnah, mawaddah* and *raḥmah* household relationship, polyamy is destructing the household.

Another common cause of divorce is early marriage. This also becomes one of issues that lecturers mentioned in class discussion particularly about its disadvantages. Furthermore, they also explored some causes that make this practice popular, ranging from parental low understanding on the marriage purpose, illiteracy on reproductive health to minimum awareness on physchoogical and physical threats on the children.[37] Early marriage is also believed to be triggered by very rushed decisions in resolving dating relationship problems among teenagers. These all show that indirectly, lecturers have taken part in preventing divorce in their surrounding environment although this still needs much more improvement and follow-up steps.

For instance, the course material of *fiqh munākaḥah* needs serious review and development so that it can guide the public into new perspective in dealing with contemporary problems. For instance, early marriage should not always be solution for any adolescent problems such as dating relationship or free sex. Review and improvement of the course material will provide more complete understanding on both concept of marriage and related problems, including those that adolescence deal with, such as regarding with the importance of maintaining reproductive health. It will be very

[36]Haq, "The Lecturer of *Fiqh Munakahat* Subject, Department of Islamic Religion Education, IAIN Madura, *direct interview* on March 22nd 2018."

[37]Masyhuri, "The Lecturer of *Fiqh Munakahat* Subject, Department of Islamic Religion Education, INSTIKA Guluk-Guluk Sumenep, *direct interview*, on March 24th 2018."

reasonable to include materials on the awareness of reproductive health for children and teenagers at the course material.[38]

Moreover, formulating contextual and applicable course materials require a variety of discussions and perspectives, including gender equality on both right and obligation of each spuose. It also needs to accentuate that marriage is not merely to justify an intimate relationship, but rather to build a strong bond in building an eternal family with the proportional concept of division of labor. This becomes possible when all lecturers expand their insight and the discussion models while being brave to move from doctrinaire-normative point of view to non-doctrinaire-sociologists one or from textual understanding to contextual ones.

This certainly does not mean randomly or irresponsible contextual way of thinking without considering the type of normative text either it is *thawābit* (constant, unable to change) or *mutaghayyirāt* (flexible, a subject to change). Instead, it is more about how to find proper ways to treat the texts proportionally according to balanced or moderate methodological corridors which are neither right nor left extremes. Moderate *fiqh munākaḥah* means *fiqh* which seeks to combine literary comprehension of the text and *maqāṣid al-sharī'ah*.[39]

Another characteristic of moderate *fiqh munākaḥah* is its concern to the aspects of the times, technology, and recent development of society's life. This is mainly because the study of Islamic law in any tertiary institutions is suppossed to be responsive for dynamic needs of Muslim communities both at the local and global levels.[40] To make this comes true, Islamic universities, to be more specific, needs to make themselves as centers of study which continuously update epistemological concepts and knowledge to provide relevant understanding among Muslim communities.

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[38]Sanusi, "Konsep Pembelajaran Fiqh dalam Perspektif Kesehatan Reproduksi," *Edukasia: Jurnal Penelitian Pendidikan Islam* 10, no. 02 Agustus (2015): 367.

[39]Muh. Nashiruddin, "Fikih Moderat dan Visi Keilmuan Syari'ah di Era Global (Konsep dan Implementasinya pada Fakultas Syari'ah IAIN Surakarta," *Jurnal Hukum Diktum* 14, no. 01 July (2014): 29.

[40]M. Atho Mudzhar, "Kajian Ilmu-Ilmu Syariáh di Perguruan Tinggi: Sudahkah Merespon Tuntutan Masyarakat?," *Asy-Syir'ah; Jurnal Ilmu Syari'ah dan Hukum* 46, no. 02 July-December (2016): 369.

Conclusion

This research results in some following findings: *First,* the profile of *fiqh munākaḥah* materials in three Madurese Islamic universities are in line with the aim and target of learning, students' need and ability, easy to apply, and in line with respective syllabus materials of each. However, most of references still come from scholars of old jurisprudence schools which tend to use literal perspectives while ignoring contemporary development. *Second,* the development of *fiqh munākaḥah* material course occurred through the production of text-books or lecture modules. The lecturers furthermore change the course description at semester learning plan by making proper adjustment to recent social change while mainstreaming gender equality and divorce prevention effort, particularly in explaining some fragile themes on gender injustice. *Third,* the course materials have not been feasible and well contributing to the divorce prevention particularly because the use of old references which are textually based understanding and not following current legal requirements as well as recent social changes. However, the lecturers balance this by using proper delivery method of learning to introduce students with moderate persepective on *fiqh munākaḥah.*

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al-Ihkam: Jurnal Hukum dan Pranata Sosial, 15 (2), 2020: 301-326
ISSN: 1907-591X, E-ISSN: 2442-3084
DOI: http://doi.org/10.19105/al-lhkam.v15i2.3660

Ḍamānu Muntijāh al-Ḥalāl li Ḥimāyah Ḥuqūq al-Mustahlikīn

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Article history: Received: 28 July 2020, Accepted: 10 December 2020, Published: 28 December 2020

Abstract:

Patent has a prominent place in people's lives, as it constitutes a basic engine of progress, and becomes measure of the progress and richness of nations. Countries that possess a huge percentage of patents occupy high positions among other countries and have political influence against other countries. Therefore, the countries of the world have agreed to conduct agreements to protect it, on top of which is the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). When the State of Indonesia agreed to sign this agreement, it had to provide legal cover in the field of patent through Law number 13 of 2016. After careful study of this law and Islamic jurisprudence, including its principles, and its purposes, the research sees that the Indonesian Law and Islamic Jurisprudence agree that patent is considered as wealth and property. So, they agree on the necessity of patent protection, and punishing the aggressor. They also agree on the patent exploitation, whether it is personal exploitation or through a license contract. However, Islamic jurisprudence has established controls for the exploitation of innocence, the most important of which is that exploitation does not harm others.

Keywords:
Exploitation; Patent; Indonesian Law; Islamic Jurisprudence

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ملخص البحث

التشريع القانوني وضمان المنتجات الحلال للمستهلكين المسلمين من أهم أمر أساسي. وذلك أن من واجبات المسلم أن لا يقتصرالاهتمام باستهلاك المنتجات الخالية من المخاطر الكيميائية والمواد الضارة بالصحة، بالإضافة إلى ذلك فلابد أيضا أن يهتم بحلال المنتجات من ناحية ماهيتها ومعالجتها وفقا للتشريع الإسلامي. وكذلك يجب أن تكون منتجات الملابس مطهرة وليست مصنوعة من أشياء نجسة، لأنها تفسد العبادة والصحة النفسية. دستور الدولة والقوانين واللوائح التي نتص على ضمان منتجات الحلال هي دليل على التزام الحكومة بالتواجد في توفير الحماية للمسلمين هم أعظم المستهلكين في إندونيسيا. أصبح القانون رقم ٣٣ سنة ٢٠١٤ بشأن ضمان المنتج الحلال والذي دخل حيز التنفيذ في ١٧ أكتوبر ٢٠١٩، هو نقطة البداية أن الدولة توفر ضمانات وحمايات لمواطنيها للحصول على الغذاء والأدوية والمواد المستهلكة وفقًا لإرشادات الإيمان. ومع ذلك، فإن تنفيذ القانون وتطبيقه لا يزال يحتوي على استثنائية السلطة التقديرية (حرية التصرف) بشأن رسومات الكلفة حيث أصبحت عملية تفتيش الحلال تحت رعاية سلطة منظمة تحليل الغذاء والأدوية مستحضرات التجميل عضو مجلس العلماء الإندونيسي حتى صدور قرار وزير المالية بشأن رسومات كلفة خدمة شهادة الحلال. ولا تزال هذه استثنائية السلطة التقديرية (حرية التصرف) تؤثر بشكل أو بآخر على برنامج إلزام شهادة الحلال لكل منتجات يتم تسويقها في إندونيسيا من خلال إلصاق علامة/ختم الحلال.

الكلمات المفتاحية:

منتجات الحلال؛ حقوق المستهلكين؛ مجلس العلماء الإندونيسي

مقدمة

الجوهر الأساسي من التعاليم الإسلامية هوقضية الحلال والحرام تطبيقا وانبعاثا من الإيمان. بل يجب على المسلمين تجنب الشبهات حتى ورود الأدلة على إثبات أحكامها. الاحتياط في الأفعال والاستهلاك والاستخدام هو للتأكد من أنهم مسلمون صالحون ولتأكيد قبول جميع أعمالهم عند الله سبحانه وتعالى.

ولكن الناس من العوام الذين لهم حدود فهم تعاليم الإسلام، يفهمون أن معنى الحلال يقتصر على الطعام والشراب فحسب في شريعة الإسلام. في حين أن الحلال في المفهوم الأساسي عند الإسلام يشمل معنى أوسع من السلوك والأفعال والكلام والموقف والملابس ومستحضرات التجميل والعقاقير والاستخدامات غير ذلك.

معنى الحلال والحرام عند الفقهاء يستمد مما بيّنه الله ورسوله. فبهذا المعنى نستخرج فهما أن الحق في قضية إثبات الحلال والحرام هو من الله ومن خلال رسوله[١] صلى الله عليه وسلم. قضية الحلال والحرام من الأحكام التكليفية وأثبتها الإسلام من واجبات المسلم.

إنما من حق الله ورسوله إثبات الحلال أو الحرام. وأضاف الشيخ يوسف القرضاوي، من حق الله أن يثبت حلالا أم حراما على عباده، فمن تجرّأ على وضع حلال وحرام دون أحكام الله فقد اعتدى على حقوق الله وانتهكها.

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[١] عبد الرحمن بن ناصر بن آلسعدي، *تيسير الكريم الرحمن في تفسيركلام المنان*، (المؤسسة الرسالة، ٢٠٠٠م/١٤٢٠هـ)، ص ٢٧٧.

ذهب بعض العلماء: الحلال لغة مشتقة كلمة الإباحة، وهو ما أباحه الشريعة[٢]. قال الجرجاني: أن كلمة حلال من كلمة الفتح إذا "فتح" الشيئ. واصطلاحا: الحلال هو كل شيء لا يعاقب عليه باستعماله أو ما أطلق الشرع فعله.[٣] واصطلاحا: الحلال هو كل شيء لا يعاقب عليه باستعماله أو ما أطلق الشرع فعله.[٤] عرّف السمعاني: الحرام أن يذنب فاعله، والحلال أن يثاب فاعله. أما الجائز فهو ألا يعاقب ولايثاب فاعله.[٥]

وهكذا، فإن تعريف الحلال المستند من القرآن والحديث أمربسيط وواضح، وهو كل الأشياء المفيدة الجيّدة للجسد والعقل والروح. وبالعكس، أن كل شيء يجلب الضرر والمضرة في صحة الجسد والعقل والروح فهو حرام.[٦] في كتاب دليل الإرشادات الفنية لنظام إنتاج الحلال الذي نشرته وزارة الشؤون الدينية جمهورية إندونيسيا، ينص على أن الطعام عبارة عن السلع التي تهدف للأكل أوللشرب لدى

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[٢] محمد رواس قلعجي ومحمد سادق قنيبي، *معجم لغة الفقهاء*، (بيروت: دار الفكر، ١٤٠٥ هـ/١٩٨٥م، ط ١)، ص ١٨٤.

[٣] علي بن محمد بن علي الجرجاني، *التعريفات*، تحقيق أبراهيم الأبيري، (دار الكتاب العربي، ١٤٠٥ هـ، ط ١)، ص ١٢٤.

[٤] علي بن محمد بن علي الجرجاني، *التعريفات*، تحقيق أبراهيم الأبيري، (دار الكتاب العربي، ١٤٠٥ هـ، ط ١)، ص ١٢٤، حيث قال: لكل شيء يعاقب عليه استعماله وما أطلق الشرع فعله مأخوذ من ا لحلال وهو الفتح.

[٥]أبو المظفر منصور بن محمد بن عبد الجبار السمعاني، قواطع الأدلة في الأصول، جزء ١، (بيروت: دار الكتب العلمية)، ص ١٠

[٦] أبو الفداءة إسماعيل بن عمر بن كثير، *تفسير القرآن العظيم*، جزء ١، (دار الطيبة ١٤٢٠ هـ/١٩٩٩م)، ٤٧٨.

الناس، بالإضافة إلى المكونات المستخدمة في إنتاج الأغذية والمشروبات. في حين أن الحلال شيء أباح به الإسلام.[٧]

فالخلاصة، الحلال شيء يسمح به الشريعة الإسلامية لـ (١) الفعل، (٢) الاستخدام، أو (٣) التجارة، لوجود كسر الحواجز التي تمنعه أو العناصر التي تعرضه للخطر من خلال الفعل به بشكل الخير والتراضي، وليس من المعاملات الممنوعات.

مفهوم الحلال والطيب

عند المسلمين، إن أساس كل عمل يجب بنية العبادة، يعني التعبّد لله وحده سبحانه وتعالى. (الذاريات: ٥٦). لذلك، يعتبرالمسلمون أن الأكل والشرب نوع من عبادة الله وفقًا لتعاليم وأرشادات الشرع. ينص القرآن على أنه في استهلاك الطعام لا يكفي أن تكون حلالا، ولكن يجب أن يكون طيبًا أيضًا.

ويمكن أن نلاحظ أن كلمة الحلال في العديد من آيات القرآن تتابعها دائمًا بكلمات طيب. كما جاء في سورة البقرة [٢]: ١٦٨، والأنفال [٨]: ٦٩، والنحل [١٦]: ١١٤، والمائدة [٥]: ٨٨. وفي هذه الآيات كلمة "الحلال" هو الأساس لأوامر الأكل والشرب من حيث الحلال والطيب معا. لأنه ليس كل الأطعمة الحلال طيبا.

فسر السعدي عن سورة البقرة [٢]: ١٦٨، أن خطاب هذه الآية موجهة إلى كل البشر سواء كان مؤمنا أوكافرا.[٨] وكذلك الشيخ محمد علي الصابوني حين فسرالآية

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[٧] مشروع المرافق والبنية التحتية لمنتجات الحلال، الإدارة العامة لإرشاد المجتمع المسلمين وتنفيذ الحج، *الإرشادات الفنية لنظام إنتاج الحلال*، (جكرتا: الوزارة للشؤون الدينية، ٢٠٠٣ م)، ص ٣.

[٨] عبد الرحمن بن ناصر بن آلسعدي، *تيسير الكريم الرحمن في تفسيركلام المنان*، ص ٨٠.

بنفس المعنى بأن خطاب الآية عامة أي أن يأكل ويشرب البشر جميعا مما أحل الله لهم.[٩]

وذهب الإمام مالك، إن كلمة طيب تعني "حلال" ويقوي معنى كلمة "حلال". من رأي الإمام مالك هذا، يتضح أن الحلال والطيب يجتمعان بمعنى واحد كتعزيز وتأكيد. ورأى الشيخ أبو بكر ابن العربي أن كلمة "طيب" هو عكس "الخبيث" بمعني السيء أو القبيح.

ثم أضاف أن معنى "طيب" عاد إلى معنيين. أولا، هو شيء مناسب للجسم أو الجسد ويذاق لذيذا. ثانياً، شيء أحل به الله.[١٠]

وبين الحافظ ابن كثير أن كلمة طيب في هذه الآية بمعنى ذوق اللذيذة للإنسان ولا يعرض الجسم والعقل للخطر. يمكن أن يُفسر كلمة طيب أيضًا بالطعام والشراب الجيد، حيث يحتوي على مغذيات مفيدة للصحة إذا تم استهلاكها أو لا تسبب آثارًا جانبية ضارة أو خاطرة على الجسم.

الأصل أن جميع الأطعمة والمشروبات المستخرجة من النباتات والخضروات والفواكه والحيوانات حلال باستثناء السامة التي تضر حياة الإنسان. المبادئ العامة أن كل شيء لا يحظر أو لا يضر تناوله فهو حلال لأن الأصل في الأشياء حلال أو مباح.

بين القرآن الكريم عددًا مما يحرم أكله حيث إنما يدورعلى أربعة أنواع الطعام الممنوع أكلها كما في سورة البقرة الآية ١٧٣. وهي الميتة، والدم، ولحم الخنزير، وما

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[٩] محمد علي الصابوني، *صفوة التفاسير*، (بيروت: دار الفكر، المجلد ١)، ص ١١٣.

[١٠] أبو بكر محمد بن عبد الله بن العربي، *أحكام القرآن*، (بيروت: دار الفكر، المجلد ٢)، ص ٣٢.

أهل لغيرالله به، والمخنقة، والموقوذة، والمتردية، والنطيحة، وما أكل السبع إلا ما ذكيتم، وما ذبح على النصب. أما المشروبات المحرمات هي جميع المشروبات المسكرة سواء كانت من الأطعمة الحلال أوالحرام.[١١]

هناك طعام حلال في ذاته، ولكن قد يحرم بسبب عوامل العملية الخارجية. المقصود بالطعام الحلال في ذاته هو طعام حلال في أصل مادته ومكوناته. كذلك، فإن الطعام الحرام في ذاته هو كل طعام مادته ومكوناته حرام أصلا. أما الحلال قد يكون من ناحية كيفية الحصول عليه وتمليكه: يعني بغير طريقة نجسة وباطلة. لأن الطعام يكون حلالًا في ذاته ولكن بسبب كيفية الحصول عليه عن طريق الحرام مثل: الربا، أوالسرقة، أوالغش، أوالمقامرة، أو الفساد وغيرها من الأفعال المحرمات، تصبح الممتلكات (الطعام) حرامًا بسبب عوامل خارجية.

ضمان المنتج الحلال

نصت المبادئ التوجيهية لحماية المستهلك لعام ١٩٨٥ التي أصادرتها الأمم المتحدة، "المستهلكون من أي مكان في جميع أنحاء البلاد، لديهم حقوق اجتماعية أساسية." والمقصود بهذه الحقوق الأساسية هو الحق في الحصول على معلومات واضحة وصادقة ونزيهة، والحق في الحصول على تعويض، والحق في الحصول على الاحتياجات الإنسانية الأساسية.[١٢] لذلك، من ضمن الحق الأساسي للمجتمع العالمي في معرفة والحصول على الطعام والشراب والسلع المستعملة وفقًا

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[١١] أبو مالك كمال بن سيد سالم، *فقه السنة للنساء*، ص ٤٩٣.

[١٢] أ.ز ناسوتيون، *أحكام ضمان المستهلكين: مقدمة*، (يوغياكرتا: ديايت ميديا، ٢٠٠١)، ص viii.

لمعتقداتهم وتسهلها الدولة. فرض الدستورالأساسي لجمهورية إندونيسيا عام ١٩٤٥: أن الدولة تضمن استقلالية كل مواطن في اعتناق دياناتهم والعبادة وفقًا لدينهم ومعتقداتهم. لذلك، فإن ضمان المنتجات الحلال للمواطنين الإندونيسيين المسلمين هو جزء من الحقوق الأساسية للشعب التي يجب أن تسهّلها الدولة. وسبب ذلك، فإن استهلاك واستخدام المنتجات الحلال للمسلمين هو جزء من العبادة وهي من حقوق الإنسان.

ضمان المنتج الحلال أمر مهم نظرا إلى تقدم العلم والتكنولوجيا في مجالات الغذاء والدواء ومستحضرات التجميل حيث ينمو ويتطور بسرعة فائقة. وهذا يؤثر بشكل كبير على التحول في معالجة واستخدام المواد الخام التي كانت في بادئ الأمر بسيطًا وطبيعيًا والآن أصبحت معالجة واستخدام المواد الخام ناتجة من الهندسة العلمية

وتجدر بالإشارة، كانت تصورات الناس حول تحريم المنتج لا تزال بسيطة جدا قبل أن تتطور تكنولوجيا معالجة الطعام بسرعة كما هي الآن، فقضية الحلال والحرام في الطعام والشراب تنحصر بوجود أو عدم وجود المنتجات التي تحتوي على لحم الخنزير أو تحتوي على الكحول (الخمر). فتعتبر الأطعمة والمشروبات الخالية من هذين المكونين حلالًا تلقائيًا. ولكن الآن، غيرت تكنولوجيا معالجة الأغذية هذا التصور حيث إنتاج الغذاء للسلع الاستهلاكية لم يعد يعتمد فقط على المكونات الرئيسية، ولكنه يتطلب أيضًا مكونات إضافية

تسمح معالجة المنتجات من خلال الاستفادة من التقدم في العلوم والتكنولوجيا بمزيج من الحلال والحرام سواء عمدتها الشركة أم لم تعمدها. لذلك، لمعرفة حلال وحرام المنتج فبحاجة إلى دراسة خاصة تتطلب معرفة متعددة

التخصصات، مثل المعرفة في مجالات الغذاء والكيمياء والكيمياء الحيوية والهندسة الصناعية وعلم الأحياء وعلم الصيدلة علم الشريعة.

وبجانب ذلك، أكد رياز وخودري أنه عند إنتاج منتجات يضمن حلالها، يجب تطبيق مفهوم ثلاثة صفر، وهو صفر الحد، وصفرالخلل، وصفر الخطر. وهذا يعني أنه يجب عدم احتواء المواد الحرام في المواد الخام (صفر الحد) والمواد المضافة والمنتجات في جميع سلاسل الإنتاج، بما في ذلك المواد النجسة التي يمكن أن تلوث المواد اللازمة لإنتاج منتجات الحلال. وبالتالي، يجب ألا يكون هناك أي منتجات الحرام تم إنتاجها (صفر الخلل) نظرًا للمخاطر الكبيرة التي تتحملها الشركة إذا كانت هناك دعاوى حكمية على منتجات الحرام وتبين أنها حدثت صحيحة. إذا تم تطبيق هذين الأمرين، فلا يوجد أي خطر سيء (صفر خطر) تتحمله الشركة.[١٣]

ضمان المنتج الحلال أمر مهم لتحقيق حقوق المستهلك والوفاء بالتزامات المنتجين. ويجب على المنتجين التأكد من أن تطبيق عملية الإنتاج يوافق الإنتاج الحلال والطيب، مما يعني أنها صحيحة وجيدة من بدء توريد المواد الخام إلى تجهزة السلع المستهلكة في أيدي المستهلكين. لضمان ذلك، يجب أن تكون المواد الخام آمنة من الملوثات البيولوجية والكيميائية والفيزيائية والمواد الحرام. كذلك يجب أن تستخدم عملية الإنتاج أدوات وأماكن نظيفة وصحية وتجنب النجس.

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[١٣] رياز ن.م. خودري م.م، إنتاج الطعام الحلال، فلوريدا الولايات المتحدة: ج.ر.ج بريس ل.ل.ج، ٢٠٠٤، اقتبسها سوليستيو برابووو وعزماواني عبد الرحمن، *شهادة الحلال في قطاع صناعة المنتجات الزراعية*، منتدى البحوث الاقتصادية الزراعية، إصدار ٣٤ رقم ١، يوليو ٢٠٠٦، ص ٦٣.

ومثل ذلك أيضا يجب أن يكون استخدام الموادالمضافة والمواد المساعدة في الإنتاج وفقًا للشروط التي تسمح بذلك.

فلحماية الأمة من الاستهلاك والسلع المحرمة من الناحية المكونات (الذاتية) وليس من ناحية الحصول عليها، لذلك فإن مجلس العلماء الإندونيسي كان رائدة في إصدار الشهادات الحلال. بدأ مجلس العلماء الإندونيسي ريادة نظام ضمان الحلال من خلال الاعتماد عندما أثار نتائج دراسة الباحث تيري سوسانتو (Tri Susanto) أثارة ضجة، التي وجدت مادة مشتقَّة من منتج الخنازير في بعض منتجات الأطعمة والمشروبات. ونشرت نتائج هذا البحث في نشرة كانوبي في يناير ١٩٨٨ وأصبحت شائعة عندما نقلتها وسائل الإعلام. ففي هذه الحالة، انخفضت مبيعات المنتجات الغذائية والمشروبات بنسبة ٨٠٪ لقمع النمو الاقتصادي الوطني وتسببت في غضب المسلمين في إندونيسيا. فلاسترضاء المجتمع على هذه القضية حيث اعترفت الحكومة شهادة الحلال من مجلس العلماء الإندونيسي.[١٤]

إنما يهتم مجلس العلماء الإندونيسي هل تحتوي المنتجات في عناصرها الأساسية على الأشياء المحرمة (حرام لذاته) دون العوامل الخارجية المحرمة (حرام لغيره) والتي لا تتوافق طريقة الحصول عليها مع الشريعة الإسلامية. أي إنما تفحص مجلس العلماء الإندونيسي العناصر الجوهري المحرم في الطعام والشراب والأدوية المنتجات الأخرى، ولا يتفحص في طريقة الحصول عليها.

معيار مجلس العلماء الإندونيسي في المنتجات الحلال هي المنتجات التي توافق متطلبات الحلال موافقة شرعية إسلامية، وهي (١) لا تحتوي على لحم الخنزير

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[١٤] غيريندا أ، وكالة فحص الغذاء والدواء والأغذية – عضو مجلس العلماء الإندونيسي، *من شهادة الحلال إلى إلصاقها*، (جاكرتا: بوستاكا جورنال حلال)، ٢٠٠٨.

ومكونات أخري مشتقة من الخنازير؛ (٢) لا تحتوي على مواد محرمة مثل المواد المشتقة من الأعضاء البشرية والدم والشوائب غيرذلك؛ (٣) جميع المواد التي تكون من الحيوانات الحلال يتم ذبحها وفق أحكام الشريعة الإسلامية (٤) جميع المواد التي تكون من حيوانات حلال ومذبوحة بموجب أحكام الشريعة الإسلامية، يتم استخدام المخازن والمعالجة النقل لا تختلط بالخنازير، وإذا تم استخدام هذه الوسائل للخنازير أو اختلاطها بالسلع المحرمة، يجب أولاً تطهيرها بالطريقة الموافقة للشريعة الإسلامية؛ (٥) جميع الأطعمة والمشروبات لا تحتوي على الخمر.[١٥]

من أجل ضمان حلال المنتجات، أصدر مجلس العلماء الإندونيسي الفتوى. وإصدار فتوى لأجل إخراج شهادة الحلال بعد إجراء المراجعة التدقيق، أي أن المدققين يقومون بالبحث والفحص والتدقيق للمصانع (الشركات) التي تطلب شهادة الحلال. وتشمل الفحوصات التي تم إجراؤها ما يلي: أ) فحص دقيق لمكونات المنتج، سواء كان في المواد الخام أو المواد الإضافية. ب) فحص إثبات فواتير شراء مكونات المنتج. ثم يتم فحص المواد في المختبر، وخاصة المواد المشتبهة في كونها محظورة أو تحتوي على أشياء نجسة، للتأكد من وجودها أو عدمها. ثم أصدرت منظمة تحليل الغذاء والأدوية مستحضرات التجميل عضو مجلس العلماء الإندونيسي تقريرا رسميا عن نتائج الفحص والتدقيق، ومن ثم يقدّم هذا التقرير الرسمي إلى هيئة الفتوى التابعة لمجلس العلماء لإصدار الفتوى عنها.[١٦]

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[١٥] الوزارة للشؤون الدينية، *إرشادات شهادة الحلال*، (جاكرتا: الوزارة للشؤون الدينية)، ٢٠٠٣، ص ٢.

[١٦] مجلس العلماء الإندونيسي، *نظام وإجراءات إصدار فتوى المنتجات الحلال*، ص ١٨.

لضمان استمرار حلال المنتج الذي حصل على شهادة الحلال، ينص مجلس العلماء الإندونيسي في فتواه أنه إذا اتضح فيما بعد أن المنتج يحتوي على العناصر المحرمة والنجسة، فإن للمجلس الحق في إلغاء شهادة الحلال للمنتج المذكور. لضمان حلال المنتج، يحاول المجلس الجمع بين مفهومي "الحلال الطيب" في شكل النظرية والحقائق الميدانية. النظام لتحديد حلال السلع، من أدوية أو مستحضرات التجميل أو أغذية ومشروبات هوعن طريق تكليف المدققين الخبراء لإجراء عمليات التفتيش في مصنع المنتجات التي تشمل من تفتيش المواد الخام إلى تفتيش العمليات وتفتيش الإجراءات، حتى يعرفوا عن العناصر المحتويات في المنتجات من بادئ العملية الخام حتى إخراج المنتجات، ومن عملية الشراء إلى إخراج السلع التامة

في إندونيسيا، دخلت جهود إصدار شهادات الحلال أكثر من ربع قرن. ومع ذلك، لم تتطور ولا تنمو أكثر في تلك الفترة الطويلة مقارنة بم جدث في ماليزيا وتايلاند.

تحتل إندونيسيا المرتبة الخامسة في تطوير الصناعة الزراعية الحلال من مجموعة دول جنوب شرق آسيا، وهو أعلى قليلا بمرتب واحد من الفلبين. إنما تتفوق إندونيسيا من حيث الثروة السوقية، وأنظمة إصدارشهادات الحلال وهيئات إصدار الشهادات وتوافر المواد الخام، بينما تنخفق مرتبة إندونيسيا من الدول الأخرى بالنسبة للبنية التحتية اللوجستية، والالتزام والسياسات الحكومية، بالإضافة إلى قدرات المناصرة الدولية والمحلي.

لوائح ضمان المنتج الحلال في إندونيسيا

سن القانون رقم ٣٣ عام ٢٠١٤ بشأن ضمان المنتجات الحلال هو جزء من استقبال الشريعة الإسلامية لتصبح قانونًا وطنيًا. ويعد هذا القانون أساسًا قانونيًا لتوفير الحماية للمستهلكين المسلمين من الريبة بشأن استهلاك الأطعمة المتنوعة، والمشروبات واستخدام المنتجات من سلع وخدمات وفقًا للالتزامات الشريعة الإسلامية.[١٧]

على الرغم من تطبيق عمل القانون رقم ٣٣ لسنة ٢٠١٤ بشأن ضمان المنتج الحلال، لكن فعالية تنفيذ السياسة لا تزال منخفضة نسبيًا بل لم يتم تنفيذها بأقصى الحد. لأن تشكيل الإدارة العامة لضمان المنتجات الحلال لم يكن على وجه مثالي حتى الموعد النهائي كما ينصه القانون بل حتى الآن أن اللائحة الحكومية التي تحدد القانون تفصيليا لم تنته مباحثتها. وكذلك، لم يتم بشكل جيد تطبيق سياسة التعامل بالغذاء الحلال لدى الجمهور، وبالخصوص لدى صناعة المواد الغذائية باعتبارها الفاعل الرئيسي كالمنتج.

بموجب المادة ٦٦ من القانون رقم ٣٣ سنة ٢٠١٤ بشأن ضمانات المنتج الحلال، ينص أن القانون الذي يعمل به قبل دخول هذا القانون يظل حيز التنفيذ وساري المعمول طالما أنه لا يتعارض مع قانون ضمان المنتج الحلال المذكور. استنادًا إلى القوانين واللوائح المتعلقة بالأغذية والمشروبات ومنتجات الحلال، منها القانون رقم ٨ لعام ١٩٩٩ بشأن حماية المستهلك، وقانون جمهورية إندونيسيا رقم ٤١ عام ٢٠١٤ بشأن تربية الحيوانات وصحة الحيوان. في المادة ٩٧ الفقرة (٢) من قانون

[17] Luqman Hakim, *Dissecting the contents of law of Indonesia on Halal Product Assurance, Indonesia Law Review* (January-April 2015)

جمهورية إندونيسيا رقم ١٨ لعام ٢٠١٢ بشأن الغذاء، وبالخصوص الحرف e يتطلب أن كل سلعة لابد فيها من الملصق ما يتعلق بحل المنتج.

اللوائح الأخرى التي أرشدت ختم الحلال للمنتجات هي اللوائح التنفيذية مثل اللائحة الحكومية جمهورية إندونيسيا رقم ٦٩ لعام ١٩٩٩ بشأن الملصقات والإعلانات الغذائية، وقراروزير الصحة جمهورية إندونيسيا رقم: ٩٢٤ Menkes / SK / VIII / 1996 / بشأن تعديلات على قرار وزير الصحة جمهورية إندونيسيا رقم : ٨٢ / Menkes / SK / I / 1996 بشأن إدراج كتابة الحلال على ملصقات الطعام، وقرار وزير الشؤون الدينية جمهورية إندونيسيا رقم ٥١٨ سنة ٢٠٠١ تاريخ ٣٠ نوفمبر ٢٠٠١ بشأن مبادئ توجيهية وإجراءات لفحص تقرير حلال الأطعمة، ولائحة الحكومة جمهورية إندونيسيا رقم ٩٥ لسنة ٢٠١٢ بشأن الصحة العامة البيطرية ورعاية الحيوان، وقرار وزير الزراعة رقم ٧٤٥ / KPTS / TN.240 / 12/1992 بشأن متطلبات واستيراد اللحوم من الخارج، وقرار وزارة الطاقة والموارد المعدنية رقم ٥١٨ لعام ٢٠٠١ بشأن التفتيش على الغذاء وتحديد وتصاريح من الوكالة الوطنية لمراقبة الأدوية والغذاء، وقرار وزير الشؤون الدينية رقم ٥١٩ لعام ٢٠٠١، والقانون رقم ٣٣ عام ٢٠١٤ بشأن ضمان المنتج الحلال.

نصت المادة ٤ حرف أ من القانون رقم ٨ سنة ١٩٩٩ بأن للمستهلك الحق في الراحة والأمن والسلامة في استهلاك السلع والخدمات. قرار وزير الشؤون الدينية رقم ٥١٩ عام ٢٠٠١ تنص المادة ١ على أن مجلس العلماء الإندونيسي هو الوكالة

المنفذة لتفتيش الأغذية حيث أفتى وأقر بحلال المنتجات التي يتم تعبئتها وتداولها في إندونيسيا.[١٨]

قرار وزير الزراعة رقم KPTS/TN.240 /12/1992/٧٤٥ بشأن متطلبات ومراقبة استيراد اللحوم من الخارج المنصوص عليها في القانون رقم ١٨ لعام ٢٠١٢، وتنص المادة ٩٧ على أنه يجب على كل شخص ينتج الغذاء في البلاد للتجارة أن يضع في العبوة متضمنًا ملصق الحلال أو علامة الحلال. ويجب أن يكون استيراد اللحوم للاستهلاك العام أن يتم ذبح المواشي وفقا للشريعة الإسلامية ومذكورة في شهادة الحلال.

تستند عملية منح شهادات الحلال إلى القانون رقم ٣٣ عام ٢٠١٤ بشأن ضمان المنتج الحلال، حيث تنص المادة ٢٩، أن يتم طلب الحصول على شهادات الحلال من قبل رجال الأعمال بتقديم كتابةً الطلب إلى الإدارة العامة لضمان المنتجات الحلال، ويجب أن تكون طلبات الحصول على شهادات الحلال مصحوبة بمستندات من بيانات العمل وأسماء وأنواع المنتجات وقائمة بالمنتجات والمواد المستخدمة ومعالجة المنتجات.[١٩]

يتم إجراء تفتيش الحلال من قبل الإدارة العامة لضمان المنتج الحلال. أنشأت الإدارة العامة مؤسسة فحص الحلال (المؤسسة) لعملية إجراء فحص الحلال فالمؤسسة مسؤولة عن إجراء عمليات التفتيش الحلال واختبار المنتج الحلال (المادة ٣٠ الفقرة ١). وتنص المادة ٣١ أن فحوصات واختبارات الحلال للمنتجات

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[١٨] قرار وزير الشؤون الدينية رقم ٥١٩ عام ٢٠٠١ تاريخ ٣٠ من نوفمبر عام ٢٠٠١ بشأن *الوكالة المنفذة لحكومة الأغذية الحلال*.

[١٩] القانون رقم ٣٣ سنة ٢٠١٤ بشأن ضمان المنتج الحلال.

يتولّها مدقّقوا الحلال في موقع المصنع أثناء عملية الإنتاج، إذا كانت هناك مواد مشكوك فيها يمكن اختبارها في المختبر. عند فحص مدقق الحلال، يجب على رجل الأعمال بتقديم معلومات حول الأمور المطلوبة لمدقق الحلال. بعد انتهاء مؤسسة فحص الحلال من القيام بواجباتها في إجراء الفحص الحلال، تقدم المؤسسة النتائج إلى الإدارة العامة لضمان المنتج الحلال ثم تقوم الإدارة العامة بإرسالها إلى مجلس العلماء الإندونيسي للحصول على الفتوى (التقرير الشرعي) للمنتج (المادة ٣٢).

لمعرفة حلال أوحرام المنتجات، تجري مجلس العلماء الإندونيسي جلسة إفتاء الحلال (المادة ٣٣). وحضر هذه جلسة فتوى مجلس العلماء الإندونيسي من الخبراء والعناصر من الوزار والمؤسسات والوكالات ذوات الصلة. فقررت جلسة الفتوى على الحلال للمنتج في موعد لا يتجاوز ٣٠ (ثلاثين) يومًا بعد استلام مجلس العلماء الإندونيسي لنتائج الفحص أو التقديم من الإدارة العامة. ثم بعد توقيع الفتوى (القرار الشرعي) على الحلال من قبل المجلس، ثم يقدم إلى الإدارة العامة لاستخراج شهادات الحلال.

وعندما أفتى المجلس على حلال المنتجات، تصدر الإدارة العامة شهادة الحلال في غضون ٧ (سبعة) أيام كحد أقصى بعد إفتاء الحلال من المجلس. على العكس من ذلك، إذا أقر المجلس في جلسة الفتوى على أن المنتج ليس حلالًا، تقوم الإدارة العامة بإعادة طلب شهادة الحلال إلى رجل الأعمال (التاجر) مصحوبًا بسبب إعادة طلبه. علاوة على ذلك، من واجبات الإدارة العامة، نشر إصدار شهادات الحلال (المادة ٣٤).

على رجال الأعمال الذين حصلوا على شهادات الحلال من الإدارة العامة، وضع ملصقات الحلال على عبوات المنتجات، أو أجزاء معينة أو أماكن معينة على المنتجات التي يمكن رؤيتها وقراءتها بسهولة، ولا يمكن إزالتها أوإنفصالها أوإتلافها بسهولة (المادتان ٣٨ و٣٩). ويعاقب رجال الأعمال الذين لا يضعون ملصقات الحلال وفقًا للقانون (المادتين ٣٨ و٣٩) من عقوبات إدارية في شكل تخذير لفظي وتحذيرات مكتوبة وإلغاء شهادات الحلال.

مدة صلاحية شهادة الحلال ٤ (أربع) سنوات من تاريخ إصدارها عن الإدارة العامة ما لم يكن هناك تغيير في محتويات المنتجات أو عملية إنتاجها. ويجب على رجال الأعمال تمديد شهادة الحلال في موعد لا يتجاوز٣ (ثلاثة) أشهر قبل انتهاء مدة صلاحية شهادة الحلال. ويتحمل رجال الأعمال على تكلفة شهادات الحلال، أما للشركات الصغيرة ومتناهية الصغر، فيمكن دفع تكلفة شهادة الحلال من قبل أطراف أخرى (المادة ٤٢). استنادًا إلى المادة ٦٦ من القانون عن ضمان المنتجات الحلال بعد إصدار وعمل القانون، اللوائح الأخرى غير هذا القانون التي تنظم عن المنتجات الحلال لاتزال سارية العمل طالما أنها لا تتعارض مع قانون عن ضمان المنتجات الحلال. وتصبح التزامات شهادات الحلال للمنتجات المتداولة في أراضي إندونيسيا سارية المفعول بعد ٥ (خمس) سنوات من إصدار هذا القانون (المادة ٦٧). وهذا يعني أنه في عام ٢٠١٩ يجب أن تكون جميع المنتجات المتداولة في المجتمع معتمدة بشهادة الحلال. ومع ذلك، في الحقيقة أنه لا يمكن تطبيقه على النحو الأمثل لأن الإدارة العامة لم يكن لها نفوذ فعال لعمل القانون حيث ترجع عملية المراجعة وفحص المنتجات إلى مجلس العلماء الإندونيسي.

الموعد النهائي لبدء إلزام إصدار شهادات الحلال هو ١٧ أكتوبر ٢٠١٩، ولكن اللوائح الحكومية التي تنظم عن مقدارالتكاليف والتعريفات التقنية الأخرى لم يتم إصدارها حتى الآن، فلأجل فعالية تنفيذ القانون رقم ٣٣ عام ٢٠١٤ بشأن ضمان المنتجات الحلال فيتم إصدارقرار وزير الشؤون الدينية رقم ٩٨٢ عام ٢٠١٩ بشأن خدمات شهادة الحلال.[٢٠] هذا قرار وزير الشؤون الدينية يحل محل القانون ما لم يمكن تنفيذ القانون وفقا لولايته حيث أن تنظم مادة القرار مقدارالتكاليف والتعريفات التقنية في خدمة شهادة الحلال، وهذا في انتظار إصدار لائحة وزير المالية. أوضحت قرار وزير الشؤون الدينية أن ولاية خدمة إصدار الشهادات الحلال هي الإدارة العامة لضمان المنتجات الحلال ومجلس العلماء الإندونيسي ووكالة فحص الغذاء والدواء والأغذية. ومع ذلك، في الواقع تكون وكالة فحص الغذاء والدواء والأغذية — عضو مجلس العلماء الإندونيسي جزءًا وعضوا من مؤسسات الفحص الحلال مثل منظمات المجتمع الإسلامي أو الجامعات أو المؤسسات الأخرى المعترف بها من قبل الإدارة العامة لضمان المنتجات الحلال كمدقق ومراقب الحلال.

قال الأستاذ الدكتور سوكوسو، رئيس الإدارة العامة لضمان المنتجات الحلال أن قرار وزير الشؤون الدينية رقم ٩٨٢ عام ٢٠١٩ مطبّق بصفة اتثنائية مؤقتة حتى إصدار اللوائح عن إثبات رسومات خدمة شهادة الحلال. هذه اللائحة مرجع قانوني رسمي لجميع مؤسسات الفحص الحلال، حيث لا تنحصرعلى وكالة فحص الغذاء والدواء والأغذية — عضو مجلس العلماء الإندونيسي فحسب، وذلك يجري على

[٢٠] قرار وزير الدين رقم ٩٨٢ عام ٢٠١٩ بشأن خدمات شهادات الحلال.

السواء في تنفيذ وظيفة فحص المنتجات واختبار الحلال.[٢١] قامت وزارة الشؤون الدينية بترقية ٢٢٦ مفحصا حلالا حتى ديسمبر ٢٠١٩.

يبين قرار وزير الدين رقم ٩٨٢ عام ٢٠١٩ بشأن خدمات شهادات الحلال مفصلا أن تقديم وإصدار شهادات الحلال من وظيفة الإدارة العامة لضمان المنتجات الحلال باعتبارها السلطة المخولة بموجب القانون. بينما يتم إجراء فحص الحلال واختبار الحلال للمنتجات من وظيفة على وكالة فحص الغذاء والدواء والأغذية — عضو مجلس العلماء الإندونيسي. ويكون إجراء المراجعة العلمية لنتائج فحص واختبار المنتجات الحلال وتنفيذ جلسة الفتوى لاعتماد علمية حلال المنتجات من وظيفة مجلس العلماء الإندونيسي.

يتم فرض رسومات خدمات شهادة الحلال على الشركات المتقدمة لحصول شهادات الحلال. وتحدد وزارة المالية مقدار رسومات خدمات شهادة الحلال من لائحة خلال إصدار وزير المالية جمهورية إندونيسيا. ومع ذلك، أن القانون لم يتم إصداره بعد، فلائحة مجلس العلماء الإندونيسي تثبت مقدارسومات خدمات شهادة الحلال ولائحة وكالة فحص الغذاء والدواء والأغذية التي توفر خدمات شهادة الحلال، حتى يتم إصدار وتطبيق القوانين واللوائح المتعلقة بتحديد رسومات خدمات شهادة الحلال. فيكون إلزام شهادة الحلال للمنتجات ساريًا منذ ١٧ أكتوبر ٢٠١٩ وفقًا لتفويض القانون رقم ٣٣ عام ٢٠١٤ بشأن ضمان المنتج الحلال. لكن تنفيذ فحص واختبار الحلال لا يزال غير مثالي، حيث تقتصر ولاية فحص الحلال حسب قرار وزير الدين رقم ٩٨٢ عام ٢٠١٩ بشأن خدمات المنتجات

21 https://www.moeslimchoice.com/read/2019/12/06/29978/kemenag-terbitkan-kma-982-tentang-layanan-sertifikasi-halal

الحلال على وكالة فحص الغذاء والدواء والأغذية – عضو مجلس العلماء الإندونيسي دون غيرها.

الضمان القانوني وحماية المستهلك

أغلب سكان إندونيسيا مسلمون. ذكرت بيانات وكالة الإحصاء المركزية أن عدد سكان إندونيسيا يبلغ ٢٧١ مليون نسمة[٢٢] و٨٦,٣٩ في المائة منهم مسلمون.[٢٣] لذلك، لابد من ضمان الأمن الغذائي والحلال للشعب الإندونيسي من أجل الوفاء بالتوجيهات الدينية التي يكفلها الدستور والقوانين واللوائح. وبالنسبة للمستهلكين المسلمين، فإن الغذاء الآمن لا يخلو من المخاطر الفيزيائية أو الكيميائية أو الميكروبيولوجية فحسب، ولكن هناك أيضًا أهم عنصر أساسي، وهو آمن من خطر البضائع المحرمة. وهذا من حق المستهلكين المسلمين أن يحصلوا على حماية قانونية من الدولة.

توفردولة إندونيسيا الضمانات وحماية المستهلكين المسلمين بإصدار الدستور والتشريعات. حيث يوفر دستور جمهورية إندونيسيا عام ١٩٤٥ أسسًا قانونيا لجميع المواطنين الإندونيسيين ليعيشوا حياتهم الدنيوية والأخروية على حد سواء. تؤكد الفقرة (١) من المادة ٢٨ (د) ما يلي: لكل شخص الحق أمام القانون من اعتراف مكانته وضمانه وحمايته والعدالة القانونية، والتكافؤ التقانوني. وفي الفقرة (٢) من

22 https://bisnis.tempo.co/read/1060737/2020-penduduk-ri-tembus-271-juta-orang-bps-sensus-kian-berat/full&view=ok

23 https://databoks.katadata.co.id/datapublish/2019/09/24/berapa-jumlah-penduduk-muslim-indonesia

المادة ٢٩ تقرر ما يلي: تضمن الدولة استقلالية كل شعب في اعتناق دياناته والعبادة حسب دينه ومعتقداته.

نص القانون جمهورية إندونيسيا رقم ٨ عام ١٩٩٩ بشأن حماية المستهلك، في المادة ١ رقم ١ في تعريف حماية المستهلك هو "جميع الجهود التي تضمن يقينا قانونيا لتوفير الحماية للمستهلكين". إن صياغة تعريف حماية المستهلك الواردة في هذه المادة كافية لتوفير الحماية للمستهلكين، كما قال أحمدي ميرو وسوترمان يودو، أن الجملة التي تنص "جميع الجهود التي تضمن اليقين القانوني"، نرغب أن تكون حصنا لرفض الإجراءات التعسفية التي تضر رجال الأعمال من أجل حماية المستهلك، بالإضافة لضمان الحماية القانونية للمستهلكين.

إن قيمة مكانة المستهلكين مهمة للغاية في الأنشطة الاقتصادية. حيث إن المستهلكين أهم العوامل الرئيسية لحسن سيرعالم الأعمال ولرجال الأعمال. يستهلك المستهلكون السلع والخدمات التي ينتجها الشركات دون تداولها مرة أخرى، مما سيفيد رجال الأعمال أوالشركات لاستمرارية تجارتهم.[٢٤]

نص القانون رقم ٨ سنة ١٩٩٩ بشأن حماية المستهلك أنه يقتضي اتباع متطلبات الإنتاج الحلال، هو مبدأ الحماية القانونية للمستهلكين المسلمين. ومع ذلك، هذا خاص للشركات التي تضع ملصقات الحلال على منتجاتها.

هذا يعني، أنه إذا قام رجل العمل بتثبيت ملصق الحلال على منتجاته يجب أن يتبع لوائح الإنتاج الحلال وأن يثبت أنه قد أنتج إنتاجا حلالا بوجود شهادة الحلال على المنتجات من وكالة فحص الغذاء والدواء والأغذية – عضو مجلس

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[٢٤] حمادي ميرو وسوترمان يودو، *أحكام ضمان المستهلك*، (جاكرتا: شركة راجا غرافيندو برسادا، ٢٠٠٨)، ص ١.

العلماء الإندونيسي. من ناحية أخرى، لا تنطبق هذه لوائح الإنتاج الحلال على رجال الأعمال أوالشركات الذين لا يريدون أو لا يرغبون في إدراج ملصقات الحلال على المنتجات التي يتم تسويقها.

يوفر تقدم العلوم والتكنولوجيا جميع الحاجات المطلوبات، ففي هذه الحالة تتطلب إضافة المواد المتنوعة في معالجة الأغذية، حيث يمكن صنع هذه الإضافات كيميائيًا أو بالتكنولوجيا الحيوية ويمكن أيضًا استخراجها من النباتات أو الحيوانات. هذه هي الحالة التي يمكن فيها تغيير الغذاء من الحلال إلى المحرم، إذا كانت المضافات تأتي من استخراج الحيوانات المحرمات.

ثم أكد القانون رقم ٣٣ عام ٢٠١٤ بشأن ضمان المنتج الحلال على حزم وجوب إلصاق علامة الحلال والالتزام بطلب شهادة المنتجات الحلال في إندونيسيا. في حين أن جميع المنتجات المتداولة في المجتمع يجب أن تلصق شهادة الحلال[٢٥] على عبواتها، وبالعكس إذا كان المنتجات تتكون من مواد محرمة وفقًا للمادة ٢٩ الفقرة (٢) تلتزم الشركات بإلصاق عبوة المنتجات علامة غير الحلال، على سبيل المثال بإلصاق صورة الخنزير.

وهذا يعني أن الشركات صادقة، لأنه في قانون حماية المستهلك، تلتزم الشركات بتقديم معلومات حول مكوّنات منتجات الأغذية والمشروبات.

يجب على رجل العمل في إندونيسيا الذين يتاجرون المنتجات الغذائية والمشروبات بتقديم معلومات واضحة وصادقة حول محتويات المنتجات الغذائية

[٢٥] شهادة الحلال هي الفتوى الرسمي من قبل مجلس العلماء الإندونيسين عن حلال المنتجات حسب الحكم الشرعي.

والمشروبات التي يتم تداولها لحماية حقوق المستهلكين المسلمين ضد المنتجات المحرمة.

يجب على رجال الأعمال الذين حصلوا على شهادات الحلال من الإدارة العامة، وضع ملصقات الحلال على عبوات المنتجات، أو أجزاء معينة أو أماكن معينة على المنتجات التي يمكن رؤيتها وقراءتها بسهولة ولا يمكن إزالتها أو مسحها أوإتلافها بسهولة (المادتان ٣٨ و٣٩). يخضع رجال الأعمال الذين لا يضعون ملصقات الحلال وفقًا لأحكام المادتين ٣٨ و٣٩ لعقوبات إدارية في شكل توبيخ لفظي، وتحذيرات مكتوبة، وإلغاء شهادات الحلال. اللوائح القانونية المذكورة لها دور مهم كمظلة قانونية في توفير الحماية القانونية للمستهلكين المسلمين لعمل الشريعة الإسلامية، خاصة في استهلاك الأطعمة والمشروبات الحلال.

الغرض من إلصاق شعار الحلال على المنتجات الغذائية والمشروبات هو حماية حقوق المستهلكين المسلمين من المنتجات المحرمة، ولتوفير اليقين القانوني للمستهلكين المسلمين بأن المنتجات الغذائية والمشروبات حلال حقا كما تقتضي الشريعة الإسلامية.

في الشريعة الإسلامية أن الحلال لاتنحصرعلى مادية المنتجات فحسب، بل يجب أيضًا أن تكون عملية الإنتاج من الأول إلى الآخر (من المنبع إلى المصب) خالية من المواد المحرمة في شريعة الإسلام، وعدم امتزاج تخزين المنتجات الحلال مع المنتجات المحرمة أوالنجسة. وهذا يعني أن تخزين المنتجات الحلال يجب أن يكون منفصلاً عن المنتجات المحرمة. وبالمثل، لا ينبغي استخدام الأدوات المستخدمة في عملية معالجة المنتجات الحلال مع المنتجات المحرمة.

لذلك، إذا كان ملصق الحلال مدرجا في عبوة المنتجات الغذائية فمن الضروري للمستهلكين المسلمين أن يحصلوا على حماية أن ذلك الملصق الحلال يتوافق مع الحقيقة، مثل حق المستهلك المنصوص في المادة ٤ حرف (ج) من قانون حماية المستهلك رقم ٨ سنوات ١٩٩٩، أن من الحق للحصول على معلومات صحيحة وواضحة وصادقة عن أحوال وضمانات السلع والخدمات

شهادة الحلال على المنتجات الغذائية والأدوية والسلع المستخدمة التي يستهلكها الناس، هي واحدة من جهود الحكومة لحماية ٨٦٪ من المستهلكين المسلمين. ولكن بغض النظرعن وجهة نظرمعتقدات الناس، تدل شهادة المنتجات الغذائية والأدوية المنتشرة في المجتمع على أن هذه الأطعمة والأدوية صالحة للاستهلاك من قبل المسلمين وغير المسلمين.

خاتمة

تنفيذ التعاليم الإسلامية هو تطبيق الحلال والابتعاد عن الحرام. الحلال شيء جائز والحرام ما حرّم الله سبحانه وتعالى. لذلك، من حسن أعمال الدين والتقوى هو اتباع الأوامر التي أمرها الله سبحانه وتعالى والابتعاد عن جميع المحظورات المحرمات.

يحتوي الطعام والشراب والسلعات في الإسلام على عناصر العبادة حيث ترتبط ارتباطا وثيقا بقضية الحلال والحرام. على الرغم من أن القرآن يبين بعض المحرمات بشكل أساسي ويحظر استهلاك موادها، إلا أنه في الواقعة العملية سواء في إندونيسيا أوبعض البلدان الأخرى أن يستخدم مصطلح شهادة الحلال، وذلك لأنه

يقوم على مبدأ الاحتياطي. يعني توقع عدد السلع المنتجات التي تستخدم المواد الغذائية الأساسية أو خليط من السلع المحرمة أو النجسة.

الدستور الأساسي عام ١٩٤٥ والتشريعات مثل القانون رقم ٣٣ عام ٢٠١٤ بشأن ضمان المنتج الحلال الذي يمنح شهادة الحلال لمجلس العلماء الإندونيسي، هو جهد من وجود الدولة لضمان تحقيق اليقين القانوني وحماية الأمة المستهلكين في الحصول على الطعام والشراب والسلع الحلال.

يضع مجلس العلماء الإندونيسي معايير الحلال كما شرعه في التعاليم الإسلامية وتقبلها اللوائح القانونية. ثم يتم فحص وتقييم المنتجات للحصول على شهادة الحلال بناءً على إصدار فتوى حيث تصدربه شهادة الحلال.

في الواقع، لم يتم تطبيق شهادة الحلال في إندونيسيا على الوجه الأكمل، سواء من الناحية القانونية أو من الأعمال التجارية، لأن السياسات لم تندمج في تنسيق واحد حيث لم تجرسياسات برنامج صناعة الحلال. ولم تكف المرافق والبنية التحتية تسسب تنفيذ القانون حيز التنفيذ في ١٧ أكتوبر ٢٠١٩ بشكل غير صحيح وعلى النحوغير الأمثل.

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al-Ihkam: Jurnal Hukum dan Pranata Sosial, 15 (2), 2020: 326-350
ISSN: 1907-591X, E-ISSN: 2442-3084
DOI: http://doi.org/10.19105/al-lhkam.v15i2.4018

Ighlāq al-Masājid Man'an lī intishār Fayrūs Corona
Dirāsah Taḥlīlīyah fī Ḍaw' Maqāṣid al-Sharī`ah

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Article history: Received: 05 September 2020, Accepted: 10 December 2020, Published: 28 December 2020

ملخص:

أمرت كثير من الدول الإسلامية بإغلاق المساجد باعتبار أن التجمع فيها يمثل سببا محتملا لوقوع العدوى. تهدف الورقة إلى مناقشة آراء العلماء المعاصرين وأدلتهم تجاه هذه القضية وتحليلها في ضوء مقاصد الشريعة. استخدمت الورقة المنهج التحليلي في بيان آراء العلماء المعاصرين والموازنة بين المقاصد. أظهرت نتائج الورقة أن العلماء المعاصرين منقسمون إلى قسمين: فطائفة ترى جواز إغلاق المساجد؛ لأنه يحقق مقصود الشارع في حفظ النفوس من الهلاك، وطائفة أخرى ترى أن هذا الإغلاق تعطيل لشعيرة صلاة الجماعة التي هي شعيرة من شعائر الإسلام الظاهرة. كما أوضحت النتائج أن مصلحة حفظ النفس تمثل مقصدا ضروريا وفوات الأنفس ضرر لا يمكن جبره؛ وهو أقوى في مرتبته من مقصد الصلاة جماعة من حيث إنه في مرتبته مكمل لضروري حفظ

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الدين. وأن تعطيل الجماعة في الصلاة يمثل رخصة مؤقتة ولضرورة تقدر بقدرها، ولأنها شعار المسلمين، فهو مصلحة مكملة لضروري حفظ الدين، وعليه فالتعارض واقع بين مقصدين متفاوتين في المرتبة، وعليه، فالقول بفتوى غلق المساجد أرجح باعتبار تحقيق المناط؛ ولأنه يحقق مقاصد الشريعة العليا المتمثلة في حفظ الأنفس المعصومة من الهلاك في الجملة. وتوصي الورقة المؤسسات الدينية بالقيام بتوعية الناس بأهمية اتخاذ التدابير الاحترازية لمنع تفشي هذه الجائحة العالمية "كوفيد-١٩".

الكلمات المفتاحية:

مقاصد الشريعة؛ كوفيد-١٩؛ إغلاق المسجد

Abstract:

Many Muslim countries prohibit mosques opening because social gathering is regarded as a high probable factor for Corona Virus infection. This paper discusses different opinions of some contemporary scholars on this issue from the *Maqāṣidī* perspective. It adopts an analytical method to explain the opinions. Findings show that contemporary scholars are of two group: The first group permits the mosques' closure for realizing the divine objective concerning to life protection out of danger. The second thinks that the mosques's closure amounts to suspension of congregational prayer as one of Islamic essential exterior rites. The findings illustrate that the life protection constitutes a necessary benefit because putting life in danger is a very serious harm. The life protection is more important than congregational prayer's objective which complements the necessary objective of religious protection. Moreover, it shares the spirit with the principle saying that any means to achieving what is compulsory also becomes compulsory accordingly. Above all, prohibition of congregational prayer is just a momentary legal permit due to a necessity on its merit the research recommends that religious institution should make people aware to take all measures in stopping the spread of Covid-19 pandemic.

Keyword:
The Closure of Mosques; Covid-19; *Maqāṣid al-Sharī`ah*

مقدمة:

فيروس كورونا المسمى ب "كوفيد-١٩" جائحة عالمية، تضررت من جرّائها معظم الدول الإسلامية وغير الإسلامية، حيث تفشى هذا الوباء في كثير من أرجاء المعمورة. وصنفت منظمة الصحة العالمية هذا الوباء جائحة عالمية "Pandemic" بعد أن كان الفيروس محدودا بدولة الصين وذلك في ١١ مارس ٢٠٢٠م. وعرّف مجمع الفقه الإسلامي هذا الفيروس بأنه: " التهاب في الجهاز التنفسي بسبب فيروس تاجي جديد"[١]. على أن هذا الالتهاب معد بسرعة فائقة.

ورغم أن سبب انتشار الفيروس لم يتم اكتشافه بعد، إلا أن بعض الباحثين يرون أن هذا الوباء حيواني المنشأ، وإن لم يكتشف على وجه التحديد الحيوان المسبب لهذا الوباء في حين يرى بعض الأطباء أن الحيوان المسبب لهذا الوباء هو الخفاش وآكل النمل.[٢]

والمسلم يؤمن بالقدر خيره وشره، كما يؤمن بمبدأ الابتلاء والامتحان، وهذا الوباء من قبيل الابتلاءات الربانية، وهو داخل في السنن الكونية في ابتلاء الله لعباده. ومع إيمانه بالقدر خيره وشره هو مأمور بالأخذ بالأسباب الجالبة لمصالحه أو الدافعة للضرر عنه، ومن هنا كان الحذر من الأوبئة والأمراض ومسبباتها والبعد عنها أمرا

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[١] توصيات الندوة الفقهية الطبية الثانية بعنوان: " فيروس كورونا المستجد (كوفيد-١٩) وما يتعلق به من معالجات طبية وأحكام شرعية" ص ٣

[٢] مجمع الفقه الإسلامي الدولي، توصيات الندوة الفقهية الطبية الثانية بعنوان: " فيروس كورونا المستجد (كوفيد-١٩) وما يتعلق به من معالجات طبية وأحكام شرعية" ص ٣.

مطلوبا شرعا، لا سيما الأمراض المعدية، وقد جاء في صحيح مسلم أنه كان في وفد ثقيف رجل مجذوم، فأرسل إليه النبي صلى الله عليه وسلم «إنا قد بايعناك فارجع».[٣]

وأخذا بالأسباب، ودرءا للمفاسد التي قد يترتب على تجمع الناس في المساجد لأداء الصلوات الخمس والجمعة، أصدرت الحكومات في الدول الإسلامية وغير الإسلامية أوامر بإغلاق المساجد إلى حين زوال الوباء، وهذه الأوامر أدت إلى اختلاف وجهات نظر العلماء المعاصرين؛ فطائفة من أهل العلم أيّدت تلك القرارات ورأت أن هذا الإغلاق يحقق مقصود الشارع في حفظ النفوس، في حين رأت طائفة أخرى أن هذا الإغلاق تعطيل لشعيرة صلاة الجماعة التي هي شعيرة من شعائر الإسلام الظاهرة، وفي هذا السياق أصدرت السلطات المعنية في فبراير ٢٠٢٠م بالمملكة العربية السسعودة قرارا بمنع العمرة وتأجيها إلى أجل غير مسمى.

هل يجوز إغلاق المساجد كوسيلة لمنع انتشار الوباء؟

اختلف العلماء المعاصرون في مدى جواز الأمر بإغلاق المساجد كوسيلة لمنع انتشار الجائحة العالمية كوفيد-١٩، وهذا الاختلاف ناشئ عن تحليل النصوص الشرعية المتعلقة بالأمر بأداء الصلوات جماعة من ناحية، والنظر إلى المقاصد الشرعية المتعلقة بحفظ النفوس وحفظ الدين من ناحية أخرى. وتزاحم المصالح والمفاسد في هذه النازلة بما يوجب الموازنة بينها والترجيح وذلك حتى يرفع اللّبس على المكلفين من العوام على وجه الخصوص وتستقر أمامهم الفتوى في الأمر

[٣]مسلم بن الحجاج القشيري النيسابوري، **صحيح مسلم**، (القاهرة: دار إحياء الكتب العربية عيسى البابي الحلبي وشركاه، ط١، ١٤١٢هـ/ ١٩٩١م)، ج٤/ ص ١٧٥٢.

ويدفع حرج الاضطراب في الموقف. ولئن كثر اختلاف العلماء وتشعبت مذاهبهم في تناول هذه النازلة إلا أن وجهات نظرهم يمكن تقسيمها إلى مذهبين أساسيين:

المذهب الأول: القول بجواز إغلاق المساجد ومنع صلاة الجماعة في المساجد كوسيلة لمنع انتشار الوباء: وقد ذهب إلى هذا القول جملة من العلماء المعاصرين، وذلك نظرا لتفشي الوباء، ولأن الاجتماع في مكان واحد من أسباب تفشي هذا المرض، وممن صرّح بذلك قرار مجمع الفقه الإسلامي الدولي المنعقد في ١٦ أبريل ٢٠٢٠م.[٤]

المذهب الثاني: القول بعدم جواز إغلاق المساجد ومنع الجماعات في المساجد؛ وذلك أنه لم يرد نص شرعي بتعطيل صلاة الجماعة بسبب الطاعون. وممن أفتى بذلك عدد من المعاصرين والهيئات الشرعية منها: لجنة الفتوى بمجمع فقهاء أمريكا الشمالية[٥]، الشيخ محمد الحسن الددو، والشيخ سالم الشيخي، وخلصت إلى ذلك أيضا هيئة كبار العلماء بالسعودية في رأيها الأول.[٦]

أدلة القولين ومناقشتها:

أدلة المجيزين:

استدل العلماء المجيزون لإغلاق المساجد بسبب الجائحة العالمية "فيروس كورونا" بجملة من الأدلة، يمكن تلخيصها في النقاط الآتية:

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[٤] توصيات الندوة الفقهية الطبية الثانية بعنوان: " **فيروس كورونا المستجد (كوفيد-١٩) وما يتعلق به من معالجات طبية وأحكام شرعية**" ص ٦.

[٥] AMJA Declaration Regarding Coronavirus Disease انظر: **الفتوى بشأن فيروس كورونا**، https://www.amjaonline.org/amja-declaration-regarding-coronavirus-disease/#ar تاريخ ٣ مارس ٢٠٢٠م.

[٦] مسعود صبري، **فتاوى العلماء حول فيروس كورونا**، (القاهرة: دار البشير، ط١، ٢٠٢٠م) ص ٩.

أولا: القواعد الكلية في الشريعة الإسلامية: من الأدلة التي استند إليها العلماء الذين يجيزون إغلاق المساجد منعا لانتشار الجائحة العالمية القواعد الكلية في الشريعة الإسلامية، منها: قاعدة رفع الحرج، والضرر يزال، والمشقة تجلب التيسير واعتبار المآل من الفعل وغيرها من القواعد التي تؤكد الأخذ بالتيسير في رفع الحرج والضرر المحتمل ما دامت الشريعة تبيح ذلك، وبما أن التجمع في المساجد من الأسباب المؤدية إلى انتشار هذا الفيروس وتفشيه، فإن الشريعة ترفع هذا الحرج عن المسلمين وتبيح لهم الصلاة في البيوت.

ولا يشك أحد أن هذا الوباء المعدي يمثل ضررا كبيرا على الناس، فالشريعة الإسلامية تأمر الناس بدرء الضرر قبل وقوعه وباتخاذ الوسائل والتدابير اللازمة في ذللك، وبالتقليل منه وإزالته إذا وقع. ومن القواعد الكلية الكبرى المقررة في الشريعة قاعدة "الضرر يزال" سواء ما وقع أو ما يتوقع وقوعه عادة. وقد انبنى على هذه القاعدة جملة من الفروع الفقهية. ومن تطبيقاتها تجويز النبي ﷺ لمن له رائحة كريهة تؤذي الناس أن يصلي في المسجد؛ كما في حديث جابر رضي الله عنه أن الرسول ﷺ قال: «من أكل ثوما أو بصلا، فليعتزلنا – أو قال: فليعتزل مسجدنا – وليقعد في بيته»،[٧] فإذا كان أكل الثوم يشكل عذرا شرعيا يبيح للإنسان عدم إتيان المسجد فمن باب قياس الأولى التعذر بالفيروس المعدى الذي قد يؤدي إلى هلاك النفس البشرية.

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[٧]حديث صحيح. رواه البخاري، محمد بن إسماعيل أبو عبدالله، **الجامع المسند الصحيح**، (دار طوق النجاة، ط١، ١٤٢٢هـ)، ج٧، ص ٨١. حديث رقم ٥٤٥٢؛ ومسلم، مسلم بن الحجاج أبو الحسن، **صحيح مسلم**. تحقيق: محمد فؤاد عبد الباقي. (بيروت: دار إحياء التراث العربي، دط، دت)، ج١، ص ٣٩٤. حديث رقم ٥٦٤.

ويلاحظ على هذا الاستدلال أن النبي ﷺ لم يأمر بتعطيل المسجد بسبب رائحة كريهة، فغاية ما في هذه الأحاديث هو الترخيص بترك الجمعة والجماعة لأهل الأعذار خاصة وهي تمثل مصلحة خاصة بآكلي الثوم، وليس تعطيل المساجد من عمارها ومنعهم من عمارتها وهي مصلحة عامة المصلين وهي راجحة على الخاصة؛ فالرخص المبيحة لترك الجمعة والجماعات لأهل الأعذار وليس فيها النهي عن إقامة الجمع والجماعات لأجل تلك الأعذار بخلاف محل النقاش وهو تعطيل المساجد ومنع الناس من أداء الصلوات فيها. وهذا الأمر يقدح في استدلال المجيزين لإغلاق المسجد، ويضاف إلى ذلك أن هذا الأمر من النبي صلى الله عليه وسلم يأخذ الطابع الشخصي المتعلق بمن قام به العذر المبيح للرخصة، وعليه فلا يمكن التسليم بمطلقه كحجة لإغلاق المساجد في وقت الجائحة العالمية "فيروس كورونا".

ثانيا: مقصد حفظ النفس من الهلاك: لا شك أن مراعاة المقاصد والاهتمام بها في تنزيل الأحكام الشرعية في الواقع أمر ضروري للمجتهد. ولأهمية المقاصد في صحة الاجتهاد التنزيلي عدّها الإمام الشاطبي من شروط المجتهد بالإضافة إلى معرفة لسان العرب، حيث نص على أنه: "إنما تحصل درجة الاجتهاد لمن اتصف بوصفين، أحدهما: فهم مقاصد الشريعة على كمالها"[٨]

فمن مقاصد الشريعة الإسلامية حفظ النفس البشرية من الهلاك، كليا أو جزئيا، وقد جاءت النصوص الشرعية معبرة عن أهمية هذه المنظومة المقاصدية الكلية "حفظ النفس" منها قوله تعالى :" **وَأَنْفِقُوا فِي سَبِيلِ اللَّهِ وَلَا تُلْقُوا بِأَيْدِيكُمْ إِلَى التَّهْلُكَةِ وَأَحْسِنُوا إِنَّ اللَّهَ يُحِبُّ الْمُحْسِنِينَ**" (البقرة ٢: ١٩٥)، ومنها "**وَلَا تَقْتُلُوا أَنْفُسَكُمْ**

[٨]الشاطبي، إبراهيم بن موسى بن محمد، تحقيق: أبو عبيدة مشهور بن حسن آل سلمان. **الموافقات** (القاهرة: دار ابن عفان، ط١، ١٩٩٧م) ج٥، ص ٤١.

إِنَّ اللَّهَ كَانَ بِكُمْ رَحِيمًا" (النساء ٤: ٢٩) وغيرها من الآيات الدالة على حفظ النفس، وعدم إلقاءها إلى الهلاك. وتفعيلا لهذا المقصد جاءت النصوص بطلب التداوي والأخذ بالأسباب الموجبة للشفاء في حالة المرض وأيضا وردت نصوص في سد الذرايع والمنع من الوسائل التي تهلك النفوص ومنها ما ورد في البخاري من نهيه صلى الله عليه وسلم عن بيع السلاح وقت الفتنة وذلك سدا لذريعة الاقتتال به[٩] . ومن تأمل سرعة انتشار هذا الوباء في أرجاء المعمورة يلاحظ أن هذا الوباء يؤدي – من حيث الجملة – وباعتبار المآل إلى هلاك النفوس المعصومة، وهذا ما يعني وجود ضرر محقق جرّاء فتح المساجد للصلوات الخمس جماعة.

ويناقش هذا الاستدلال بأن مقاصد الشريعة على مراتب فإذا تعارضت قدمت مصلحة الدين على باقي المصالح الضرورية، ثم النفس فالعقل فالنسب فالمال كما هو مقرر في موضعه من كتب الأصول[١٠]، وفي تجويز تعطيل المساجد من الجمع والجماعات من أجل التوقي من المرض ترجيح لمصلحة حفظ النفس على مصلحة حفظ الدين.

ثالثا: يجوز تصرف الإمام بما في مصلحة الرعية: يجوز للإمام إغلاق المساجد مؤقتا منعا لتفشي الوباء العالمي، وهذا الإلزام من السلطات المعنية إنما هي لمصلحة عامة راجعة إلى حفظ مقاصد الشرع أصالة، إما على الصعيد الفردي أو الجماعي، وبيان ذلك: أن الإصابة بهذا الفيروس قد يحول دونه ودون القيام بكثير من الواجبات المنوطة بالرعية، ويضاف إلى ذلك أن إصابة الرعية بالفيروس قد يكلّف الدولة بنفقات كثيرة، علما أن بعض الدول ليست لها أجهزة كافية للفحص، وهذا

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[٩] روى البخاري في **صحيحه**.

[١٠] ابن أمير حاج، **التقرير والتحبير**، (بيروت : دار الكتب العلمية، ط٢، ١٩٨٣م)

بدوره يؤدي إلى انتشار الوباء إلى أهل وأقارب المصاب. وقد تقرر عند العلماء أن "تصرف الإمام على الرعية منوط بالمصلحة".[١١] وعليه فعلى الإمام أو ولي أمر المسلمين أن يختار للمسلمين ما هو الأصلح لهم في دينهم ودنياهم، كما يجب على الرعية الالتزام بما جاء في تعليمات ولي الأمر، لأن "مَنْزِلَةَ الْإِمَامِ مِنْ الرَّعِيَّةِ مَنْزِلَة الْوَلِيِّ مِنْ الْيَتِيمِ"[١٢] وقد نص القرافي على ذلك حيث قال:"لَا يَتَصَرَّفُ مَنْ وَلِيَ وِلَايَةَ الْخِلَافَةِ فَمَا دُونَهَا إلَى الْوَصِيَّةِ إلَّا بِجَلْبِ مَصْلَحَةٍ أَوْ دَرْءِ مَفْسَدَةٍ لِقَوْلِهِ تَعَالَى: {وَلا تَقْرَبُوا مَالَ الْيَتِيمِ إِلا بِالَّتِي هِيَ أَحْسَنُ}"[١٣]

ويعترض على هذا الاستدلال أن تنفيذ ما أمر به الإمام مرتبط بوجود المصلحة الحقيقية الراجحة، فهنا لا مصلحة راجحة في تعطيل شعائر الله وإغلاق المساجد في وجه المصلين، والإصابة بالمرض تبقى احتمالية ولا ترقى لرجحانها.

رابعا: الأحاديث الدالة على جواز ذلك: استدل المجيزون بجملة من الأحاديث التي تدلّ على عدم الاختلاط بالمصاب بالمرض، كما أنه لا يجوز لمن أصيب بمرض معدي الاختلاط بالمصح والمعافى من هذا المرض. ويوضح ذلك كما في الصحيح من حديث أبي هريرة رضي الله أن النبي صلى الله عليه وسلم قال: " لاَ يُورِدَنَّ مُمْرِضٌ عَلَى مُصِحٍّ"[١٤] ووجه الاستدلال هنا أن المريض بالفيروس كورونا إذا جاء إلى المسجد فإنه بذلك يورد على المصحّ، وجدير بالملاحظة أن مرض

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[١١] آل بورنو، محمد صدقي بن أحمد بن محمد، **الموسوعة القواعد الفقهية**، (بيروت: مؤسسة الرسالة، ط١، ٢٠٠٣م) ج٢، ص ٣٠٧.

[١٢]السيوطي، جلال الدين، **الأشباه والنظائر**، (بيروت: دار الكتب العلمية، ط١، ١٩٩٠م)، ص ١٢١.

[١٣] محمد بن يوسف بن أبي القاسم بن يوسف العبدري الغرناطي، **التاج والإكليل لمختصر خليل**، (بيروت: دار الكتب العلمية، ط١، ١٩٩٤م)، ج٦، ص ٤٠١.

[١٤]رواه البخاري، **صحيح البخاري**، ج٧، ص ١٣٨، حديث رقم ٥٧٧٠.

الفيروس كورنا من الأمراض التي لا يعرف المصاب أنه مصاب فضلا عن أن يعرف أنه مسبب للعدوى، لأن الأعراض قد لا تكون واضحة لدى المصاب، كما أن الفيروس سريع الانتشار. ومن هنا، فإن منع الناس من إتيان المساجد في هذه الظروف يحقق مقاصد الشرع من عدم تفشي الأمراض.

ومن الأدلة الصحيحة الدالة أن النبي صلى الله عليه وسلّم رخّص في بعض الظروف في عدم إتيان المساجد، كما في حالة المطر وغيره، وذلك «أن عبد الله بن عباس قال لمؤذنه في يوم مطير: إذا قلت: أشهد أن محمدا رسول الله، فلا تقل حي على الصلاة، قل: صلوا في بيوتكم، فكأن الناس استنكروا، قال: فعله من هو خير مني، إن الجمعة عزمة، وإني كرهت أن أحرجكم، فتمشون في الطين والدحض»[١٥]. وفي الحديث على أن هناك أعذارا يباح بسببها التخلف عن الجمعة، وقد ذكر ابن بطال أنه يرخص ترك الجمعة لأعذار أخرى غير المطر، ومنها: جنازة أخ من إخوانه لينظر فى أمره، وكذلك إذا كان للإنسان مريض يخشى عليه الموت، وحكى أنه مذهب بعض السلف.[١٦]ويرخص أيضا في جواز ترك الجمعة والجماعة لمن خشي على أدنى شيء من ماله ١٧ .ويمكن مناقشة الاستدلال بالأحاديث في جواز غلق المساجد من حيث أنها أحاديث تثبت الرخص لتخلف ذوي الأعذار لمصالحهم الخاصة دون أثرها على تعطيل المصلحة العامة في الإبقاء على الصلوات في المساجد.

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[١٥]صحيح أخرجه البخاري، محمد بن إسماعيل أبو عبدالله، **الجامع المسند الصحيح**، **تحقيق: محمد زهير بن ناصر الناصر**، (بيروت: دار طوق النجاة، ط١، ١٤٢٢هـ)، ج٢، ص ٦، حديث رقم ٩٠١.

[١٦] ابن بطال، أبو الحسن علي بن خلف بن عبد الملك، **شرح صحيح البخارى لابن بطال**، تحقيق: أبو تميم ياسر بن إبراهيم، (الرياض: مكتبة الرشد، ط٢، ٢٠٠٣م)، ج٢، ص ٤٩٣.

[١٧]انظر: الآمدي، **الإحكام في أصول الأحكام**،(بيروت: المكتب الإسلامي، ط٢، ١٤٠٢هـ)، ج ٤، ص.٢٧٥

القول الثاني: عدم جواز إغلاق المساجد

استدل بعض العلماء المعاصرين على عدم جواز إغلاق المساجد بسبب الجائحة العالمية كورونا بجملة من الأدلة منها:

أولا: أن الطاعون حدث من قبل ولم يؤمر بإغلاق المساجد

وقد ثبت أن الطاعون وقع في عصر النبي صلى الله عليه وسلم ولم يأمر بإغلاق المساجد وتعطيل الجمع والجماعات، بل أمر بالاحتراز والوقاية منه، وهناك أحاديث تدل على نفي العدوى، كما جاء في البخاري، لما قال ابن عمر حين اشترى إبلا مريضة يخشى منها العدوى "رضينا بقضاء رسول الله ﷺ: لا عدوى"[١٨]. وحديث لا عدوى كما ذكر ابن حجر في الفتح أنه ثبت من غير طريق أبي هريرة، فصح عن عائشة، وابن عمر، وسعد بن أبي وقاص، وجابر، وغيرهم[١٩].

وعليه فإن الأمر بإغلاق المساجد ومنع الناس من صلاة الجماعة فيها مخالفة لهدي النبي صلى الله عليه وسلم في نفي العدوى.

وثبت أيضا أن الطاعون عم الشام في عصر عمر رضي الله عنه ولم ينقل من طرق صحيحة أن عمر أمر بتعطيل المساجد أو إغلاقها، بل إنهم صلوا صلاة الجنازة وهي فرض كفاية فكيف بالفرض العيني وهي صلاة الجماعة، فثبت عند ابن أبي شيبة عن

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[١٨] انظر: صحيح البخاري، حديث رقم ٢٠٩٩؛ أبو يعلى أحمد بن علي بن المثُنى بن يحيى بن عيسى بن هلال التميمي، تحقيق: حسين سليم أسد، **مسند أبي يعلى**، (دمشق: دار المأمون للتراث، ط١، ١٩٨٤م)، ج١٠، ص٥، حديث رقم: ٥٦٣١.

[١٩] أحمد بن علي بن حجر أبو الفضل العسقلاني، ترقيم وتبويب وتعليق: محمد فؤاد عبد الباقي و محب الدين الخطيب، و عبد العزيز بن عبد الله بن باز. **فتح الباري شرح صحيح البخاري**، (بيروت: دار المعرفة، ط١، ١٣٧٩هـ)، ج١٠، ص ١٦٠.

عمرو بن مهاجر، قال: " صليت مع واثلة بن الأسقع رضي الله عنه على ستين جنازة من الطاعون، رجال ونساء، فكبر أربع تكبيرات، وسلم تسليمة".

ويرى بعض الباحثين أن الطاعون أشد خطرا على الناس من فيروس كورونا، "فالموت منه متحقق، بخلاف كورونا الذي لا تتجاوز نسبة الوفاة به ٢% مما ينفي عنه وصف المرض الخطير"[٢٠].

أن الوباء ليس وليد عهد، وإنما هو من السنن الكونية التي مرت بالأمم التي قبلنا، ولم يرو في التاريخ الإسلامي أنه تم إغلاق المساجد كليا بسبب الطاعون ومن ذلك طاعون عمواس، وقد مات عدد كبير في هذا الطاعون ما يبلغ ٢٥ إلى ٣٠ ألفا ولم يأمر الحاكم في ذلك الوقت بتعطيل الجماعات.

ويمكن أن يجاب عنه بأن غاية ما في هذا الاحتجاج عدم العلم بذلك، وعدم العلم ليس علما بالعدم، ولو سلمنا أنهم لم يتركوا الجمع والجماعات في المساجد فلعل ذلك لفشو المرض وشيوعه في الناس بحيث لا يفيد الاحتراز منه شيئا كما يظهر من أعداد شهداء الطاعون.

ثانيا: أن الاجتماع للصلاة والذكر من الأسباب المؤجبة للشفاء:

فالأصل في مثل هذه الظروف هو الرجوع إلى الله والتضرّع إليه بشتى أنواع الطاعات، ومن أفضل الطاعات الصلاة في المسجد مع المسلمين، فالفزع إلى الصلاة في خضم المصائب من علامات التقوى، وليس إغلاق المساجد.

وكان يقول: "أرحنا بها يا بلال"[٢١] وقال: (وجعلت قرة عيني في الصلاة) [٢٢] وثبت أيضا أن الأذان يرفع البلاء ويعصم الدماء.

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[٢٠] المرجع السابق، **فتاوى العلماء حول فيروس كورونا**، ص ١٦٣.

وفي المقابل يلاحظ بعد الأمر بإغلاق المساجد أن كثيرا من أماكن التجمعات الأخرى لم يتم إغلاقها، وهذا دليل على أن الأمر فيه مؤامرة على الدين، إذ لو كانت التجمعات تسبب تفشي المرض لأُمر بإغلاق كافة ميادين التجمع بما في ذلك الأسواق، والشركات وغيرها.

ثالثا: قاعدة "إذا ضاق الأمر اتسع" وذلك بإبقاء الجماعة في المسجد لكن بضوابط

إذا كان الأمر بإتيان جميع الناس إلى المساجد متعذراً فيمكن أن تكون الجماعة بعدد يسير، ولو لشخصين، وقد نص الشيخ الددو على ذلك حيث ذكر أنه بدلا من تعطيل المساجد "يمكن أن تنتقص جماعتها خوفا من الضرر عند الانتشار السريع والفادح للوباء"[٢٣]، فبهذا يمكن الجمع بين اتخاذ الحذر والحيطة اللازمين في عدم تفشي فيروس كورونا وبين إقامة الصلوات في جماعة وعدم تعطيل المساجد، وهذا استنادا إلى قوله ﷺ قال: " وَمَا أَمَرْتُكُمْ بِهِ فَأْتُوا مِنْهُ مَا اسْتَطَعْتُمْ "[٢٤].

وشدد بعض المعاصرين في الرد على من أفتى بجواز إغلاق المساجد حيث ذكر حاكم المطيري أنه: "من عرف حقيقة الإسلام والإيمان والتوحيد لم يخف المساجد ومنع الصلوات خشية المرض"[٢٥]

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[٢١] سليمان بن أحمد بن أيوب بن مطير اللخمي الشامي، أبو القاسم الطبراني، تحقيق: حمدي بن عبد المجيد السلفي، **المعجم الكبير**، (القاهرة: مكتبة ابن تيمية، ط٢، ١٩٩٤م)، ج٧، ص ٢٧٧، حديث رقم ٦٢١٥.

[٢٢] حديث صحيح، أبو يعلى، **مسند أبي يعلى**، ج٦. ص ٢٣٧، حديث رقم ٣٥٣٠.

[٢٣] **فتاوى العلماء حول فيروس كورونا**، ص ١٥٠.

[٢٤] حديث صحيح: محمد بن حبان بن أحمد بن حبان بن معاذ بن مَعْبدَ، التميمي، أبو حاتم، تحقيق: شعيب الأرنؤوط، ترتيب: الأمير علاء الدين علي بن بلبان الفارسي، **الإحسان في تقريب صحيح ابن حبان**، (بيروت: مؤسسة الرسالة، ط١، ١٩٨٨م)، ج١، ص ١٩٨.

[٢٥] المرجع السابق، **فتاوى العلماء حول فيروس كورونا**، ص ١٥٩

المناقشات

المقاصد الشرعية المتمثلة في الاجتهاد المقاصدي التنزيلي تتطلب إيجاد حل مناسب لقضايا العصر ونوازله، وهذا في حد ذاته ينم عن مرونة الشريعة الإسلامية وصلاحيتها لكل زمان ومكان، فإذا نظرنا إلى الصلاة لا شك أنها فريضة من فرائض الإسلام، وركن من أركانه، وجاءت أدلة متظافرة على وجوبها وجوبا عينيا.

وغير خاف على المهتمين أن مقاصد الشريعة منها ما هي مقاصد ضرورية، وحاجية وتحسينية، فالمقاصد الكلية الضرورية هي تلك المقاصد الدنيوية والأخروية التي راعتها الشريعة الإسلامية للحفاظ على بقاء كيان العالم وتوازنه بحيث إذا لم تراع هذه المقاصد تختل الحياة البشرية، بخلاف المقاصد الحاجية التي ترفع الحرج والمشقة على المكلفين في القيام بالضروريات.

وجدير بالذكر أن هذه المقاصد الخمسة يكمل بعضها بعضها. ووجه ذلك أنه "لو عدم الدين عدم ترتب الجزاء المرتجى، ولو عدم المكلف لعدم من يتدين، ولو عدم العقل لارتفع التدين، ولو عدم النسل لم يكن في العادة بقاء، ولو عدم المال لم يبق عيش"[٢٦]

ولا يخفى أن الآذان، وكذا الصلاة في الجماعة وصلاة العيدين من شعائر الإسلام الظاهرة.[٢٧]

والمتأمل يدرك أن الصلاة في الجماعات في المنظور المقاصدي مصلحة مكملة لمصلحة إقامة الصلاة الفرض التي هي ركن من أركان الإسلام، وإقامتها إقامة

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[٢٦] الشاطبي، **الموافقات**، تحقيق: أبو عبيدة مشهور بن حسن آل سلمان.(الرياض: دار ابن عفان، ط١، ١٩٩٧م) ج٢، ص٣٢.

[٢٧] وقد ذكر ذلك الإمام الشاطبي في مواضع كثيرة انظر: الشاطبي، **الموافقات**، ج٢، ص ٢١١.

لضروري من ضروريات الدين، وهكذا كل شعيرة قصد بها إظهار شعار الدين، هي مصلحة مكملة لمصلحة إقامة الدين الضرورية، يقول الإمام الشاطبي: "كل مرتبة من هذه المراتب يعني الضروريات والحاجيات والتحسينيات- ينضم إليها ما هو كالتتمة والتكملة، فأما الأولى- أي المقصد الضروري، فنحو التماثل في القصاص، فإنه لا تدعو إليه ضرورة، ولا تظهر فيه شدة حاجة، ولكنه تكميلي، وكذلك نفقة المثل، وأجرة المثل، وقراض المثل، والمنع من النظر إلى الأجنبية، وشرب قليل المسكر، ومنع الربا، والورع اللاحق في المتشابهات، **وإظهار شعائر الدين، كصلاة الجماعة في الفرائض والسنن، وصلاة الجمعة**".[٢٨] وذلك أن بعض الواجبات عند الشاطبي "منه ما يكون مقصودا، وهو أعظمها، ومنه ما يكون وسيلة وخادما للمقصود؛ كطهارة الحدث، وستر العورة، واستقبال القبلة، والآذان للتعريف بالأوقات وإظهار شعائر الإسلام مع الصلاة"[٢٩] فالجماعة في أداء الصلاة في المنظومة المقاصدية هي مكملة [٣٠] للمقصد من صلاة الفرض وهو في مرتبة المقاصد الضرورية "حفظ الدين" وخادمة ومقوية له من حيث أن الجماعة تسد ذرائع ما يمكن أن يدخل من مفاسد أو تقصير على المقصد الأصلي (الصلاة) المكمّل فيحصل له الإخلال، فالذي يحافظ على الجماعة في أداء الفرائض يكون في ذلك محافظا على أدائها في وقتها وبأتم الأجر والثواب؛ إذ أن الذي لا يحافظ على الجماعة قد يتهاون في

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[٢٨] الشاطبي، **الموافقات**، ج٢، ص ٢٤.

[٢٩] الشاطبي، **الموافقات**، ج١، ص ٢٤٠.

[٣٠] ويراد بالمقاصد المكملات تلك المقاصد التي لاتستقل عن مقاصدها الأصلية الخمسة، بل هي تنظم إليها وتكملها و تقوي تحققها كان تدفع عنها الفساد والضرر والمشقة ..، وتكون دون مقاصدها الأصلية في المرتبة.انظر: انظر: الفتوحي، **شرح الكوكب المنير، تحقيق محمد الزحيلي ونزيه حماد ، (دمشق: دار الفكر، دط، ١٤٠٢)** ، ج٤، ص١٦٣. **والموافقات**،ج٢، ص ١٣-١٤.

وقتها ويضيع منه أجر الجماعة؛ ومع ذلك فصلاة الفرض لا تتعطّل بتعذر أدائها في جماعة، فصلاة الفرد تجزيء في الأداء مع نقصان الزيادة في الأجر، وهذا ما تقرره القاعد: "المصلحة الأصلية أولى من التكميلية "[٣١].وعليه؛ فمنع المشرع مفتيا أو حاكما من التجمع والجماعة للصلاة في المساجد باعتباره يؤول غالبا إلى إصابة المصلين بالعدوى فحكم منع الجماعة في المسجد يصبح راجحا (مؤقتا) باعتباره مقصدا في مرتبة المكملات على حفظ النفس من الهلاك باعتباره مقصدا ينزل مرتبة الضروريات ضروري وهو حفظ النفس من الهلاك؛ لأن هذا الإجراء يدرء عن النفس مفسدة الهلاك في الجملة، وهذا يرجح كفة من ذهب إلى جواز إغلاق المساجد – رغم أنه مفسدة في ذاته– منعا من تفشي الوباء العالمي كورونا كونه مفسدة أيضا لكن أعظم من مفسدة غلق المساجد، وهذا الرأي له من القواعد الشرعيةما يسنده: "جواز رفع أعظم المفسدتين –هلاك الأنفس–بارتكاب أخفهما (تفويت الجماعة بغلق المساجد)".[٣٢]

ويضاف إلى ذلك أن الأخذ بالاحتياط له ما يؤصله[٣٣] في "اعتبار المآلات" وما يتفرع منه من قواعد "سد الذرائع" و" الوسائل" أي المنع من الذرائع أي الوسائل المشروعة إذا آلت وأدت إلى وقوع المفاسد والمضار وهي عند الإمام الشاطبي من

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[٣١] الشاطبي، **الموافقات**، تحقيق: عبد الله دراز، (القاهرة: المكتبة التجارية ، دط، دت)،ج٤ ، ص٣٠١.

[٣٢] الشنقيطي، **نشر البنود مع مراقي السعود** ،(المغرب، مطبعة فضالة المحمدية، دط، دت)، ٢ج ، ص ٢٦٦.

[٣٣] انظر ما تعلق بذلك من القواعد: ابن عبد السلام ، العز، **قواعد الأحكام في مصالح الأنام** (بيروت دار الكتب العلمية ، دط، دت) ج١، ص ٤٦.و الشاطبي، الموافقات (القاهرة: المكتبة التجارية ، دط، دت) ، ج٤، ص ٢٠٠–٢٠١ و ج ٣، ص٦١ ٢٥٧ . وانظر: قواعد المقري، تحقيق:أحمد بن الحميد (مكة: شركة مكة للطباعة، دط، دت) ج٢، ص٤٤٣.

الأصول القطعية؛ ولها قواعد فرعية كثيرة في باب "الوسائل" يمكن استثمارها في التأصيل لرجحان القول في جواز غلق المساجد باعتباره وسيلة يحترز بها من ضرر الإصابة بالمرض، وتأخذ الوسيلة حكم مقصدها؛ إذ: " كل تصرف جرّ فسادا أو دفع صلاحا فهو منهي عنه"و "ما أدى من الوسائل إلى الواجب فهو واجب"، فحفظ الأنفس مقصد واجب الحفظ فيتطلب وجوب وسيلة غلق المساجد ومنع الجماعة فيه .

والشريعة تتشوف إلى دفع المفاسد والتقليل من وقوعها. وتقوم في تنزيل أحكامها على قاعدة: دفع المفاسد (المرض) أولى من جلب المصالح (ثواب شعيرة الجماعة)، ومفسدة انتشار الوباء العالمي كورونا مما يتطلب الاحتراز منه، والعمل على إقامة الوسائل و الإجراءات اللازمة التي من شأنها الحد من انتشاره حفاظا على سلامة الأنفس وباعتباره مقصدا واجب الحفظ فطرة وشرعا وقانونا.

وأما رفع الآذان فهو من شعائر الدين الذي أمر الشارع بإظهارها، فهو مصلحة مكملة لضروري حفظ الدين. والملاحظ أن كثيرا من الدول التي أمرت بإغلاق المساجد لا تمنع من رفع الأذان في المساجد مما يدل على أن جزءا من الشعائر الدينية متبقية، بالإضافة إلى أن المؤذن لا يمنع من الصلاة في المسجد بعد الأذان، وقد ثبت عند المالكية أن" الْإِمَام الرَّاتِب وَحده كالجماعة".[٣٤]

نموذج في تحقيق مناط حكم المسألة في ضوء الإحصائيات الواردة عن الجائحة العالمية في دول الخليج:

على الرغم من أن دول الخليج فرضت حظر التجول جزئيا أو كليا، بالإضافة إلى الأمر بمنع الصلاة في المساجد جماعة إلا أن الإحصائيات تشير إلى أن عددا كثيرا

[٣٤]محمد بن أحمد بن محمد بن عبد الله، المعروف ب" ابن جزي، **القوانين الفقهية**، ص ٤٩.

من المواطنين والمقيمين في هذه الدول الإسلامية قد أصيبت بالفيروس كورونا. وتوضيح ذلك في الجدول الآتي:

الجدول" ١"[٣٥]

م	البلد	الحالات	الوفيات	التعافي	المتبقى	ملحوظة
١	السعودية	322,237 +781	4,137 +30	298,246	19,854	هذه الإحصائية مأخوذة في تاريخ ٠٨-٠٩-٢٠٢٠م
٢	البحرين	56,076	202 +2	51,240	4,634	
٣	الكويت	91,244 +857	٥٠5	81,654	9,042	
٤	عمان	87,590 +262	742 +8	82,973	3,875	
٥	قطر	120,348	205	117,241	2,902	
٦	الإمارات	٧٤,٤٥٤ ٤٧٠+	٣٩٢	٦٦,٩٧١	٧,٥٣١	للهيئة الوطنية لإدارة الطوارئ والأزمات والكوارث، بدولة الإمارات العربية المتحدة http://covid19.ncema.gov.ae
	المجموع الكلي	٧٥٤,٣١ ٩	٦٢٦٨	٦٩٨,٣٢ ٥	٤٧,٨٣ ٨	

يشير الجدول أعلاه إلى أن المملكة العربية السعودية هي أكثر دول الخليج تعرضا لفيروس كورونا، حيث سجلت الدولة إصابة ٣٢٣,٠١٨ شخصا وتليها قطر حيث

[35] https://www.marj3.com/en/blog/covid-19-in-arab-world-live-statistics تم العثور عليه ٢٠٢٠-٠٩-٠٨

سجلت ١٢٠,٣٤٨ شخصا من المصابين بفيروس كورونا. كما يشير الجدول إلى أن عدد الوفيات جراء الكورورنا في هذه الدول تبلغ ٦٢٦٨ شخصا. موزعة على المملكة العربية السعودية ٤١٦٧ شخصا، وتليها عمان حيث سجلت ٧٥٠، في حين سجلت دولة الكويت ٥٥٠ شخصا، وتليها الإمارات العربية حيث سجلت عدد الوفيات ٣٩٢ شخصا، وتليها قطر حيث سجلت ٢٠٥ وأقل دول الخليج تسجيل عدد الوفيات البحرين حيث سجلت ٢٠٤ شخصا.

وبناء على ما سبق، نلاحظ أنه على الرغم من أن هذه الدول أمرت بإعلاق المساجد تفاديا لانتشار المرض إلا أن عدد الوفيات فيها كثيرا، وهذا يشير إلى أنه إذا لم تتخذ الإجراءات الاحترازية يتوقع أن تكون حالات الإصابة تفوق الحالات المسجلة في هذه الدول.

التأصيل للمسألة في ضوء الاجتهاد في الترتيب بين حفظ الدين والنفس:

المقاصد الشرعية من الآليات التي تراعى في تنزيل الأحكام والاجتهاد في النوازل، وأكثر ما يستثمر فيها هو النظر في أحكام المسائل الخلافية في ضوء مراعاة ترتيب المقاصد من حيث كونها ضروية أو حاجية أو تحسينية، ومن حيث كونها عامة أو خاصة.

فالشريعة الإسلامية جاءت لحماية مصالح الناس في دينهم وأنفسهم وعقولهم ونسلهم وأموالهم، لأن مصالح العبادة في كل التكاليف داخلة في هذه الأمور الخمسة [٣٦]، والمتقرر – عند تعذر الجمع في حفظها– عند أكثر الأصوليين تقديم مصلحة حفظ الدين على سائر الضروريات، ثم حفظ النفس ثم العقل ثم النسب ثم المال، ولا يخفى على المتأمل أن مفصل هذه المسألة هو الموازنة بين مصلحة

[٣٦] الغزالي، **المستصفى**، ص١٧٤.

حفظ النفس وبين مصلحة حفظ الدين، إلا أننا نرى أن مصلحة حفظ النفس هنا مصلحة ضرورية وليست مكملا لضروري "حفظ النفس" كما قد يتوهّم بعض المعاصرين، في حين نلاحظ أن مصلحة الصلاة جماعة لا ترقى إلى المصلحة الضرورية؛ وبيان ذلك أن تعطيل الجماعة لا يوجب تعطيل الشعيرة بإطلاق، وإن أوجب عدم إظهارها، وإظهارها كما هو معلوم معين لقيامها وظهورها في الناس لأنها شعار لأهل الإسلام يمتازون به عن غيرهم ويستعين المسلمون بإظهار هذا الشعار على إقامتها والتأسي ببعضهم في ذلك، فهو مصلحة مكملة لضروري حفظ الدين، وعليه فالتعارض هنا بين مرتبتين من المصالح باعتبار مقاصدها :مرتبة الضروري "حفظ النفس" و مرتبة دونها " مكمل لضروري" تتعلق بمقصد آخر "حفظ الدين" ، وهذا يبقى الترجيح لحكم وجوب حفظ النفس لأن مقصد حفظ النفس ضروري و يعتبر "أصلا" لما دونه من المراتب المكملات، وهو بذلك أقوى من مقصد حفظ الجماعة في الصلاة في المسجد لأن مقصده أقل مرتبة وقوة، وهذا الترجيح استنادا إلى القاعدة " المصلحة الأصلية أولى من التكميلية" [٣٧] وعليه من الخطأ ما توهمه بعض المانعين في أن حفظ الدين مقدم على حفظ النفس كما هو مقرر في محله– أعلاه–وعليه يجوز المنع من الجماعة في إقامة الصلاة باعتباره في مرتبة المكملات ترجيحا لحفظ الأصل الضروري "حفظ النفس" باعتباره في مرتبة الضروريات وهي أصول المقاصد لما دونها من مرات المقاصد المكملات كما سبق بيانه.

والواقع أن الحاصل من هذه التجمعات ليس ضررا متوقعا بل هو ضرر واقع لأنه مظنون ظنا غالبا بحسب كلام أهل الاختصاص[٣٨]، وهو ضرر يؤدي بالجملة وباعتبار

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[٣٧] الشاطبي، ج٢، ص ١٤.

[٣٨] انظر موقع منظمة الصحة العالمية، وعدد الوفيات عالميا بسبب هذا الوباء كثير جدا: https://covid19.who.int/table تم العثور عليه، ٠٤-٠٨-٢٠٢٠م.

المآل إلى زهوق أرواح معصومة، أو لحوق الضرر العام بها الذي لا تقتصر مفسدته على حامل المرض ومن خالطه فقط بل تتجاوزه إلى غيرهم؛ نظرا لطبيعة المرض وسرعة انتشاره في الناس كما يقرره أهل الاختصاص وكما هو مشاهد للناس جميعا، وهذه المفسدة تتعلق بضروري حفظ النفس من حيث درء المفسدة في هلاك النفس، ودفعها مصلحة أرجح من مصلحة إظهار الشعيرة بإقامة الجماعة، والقاعدة المتقررة في التأصيل لهذا الترجيح :" درء المفاسد مقدم على جلب المصالح"[٣٩] فما نزل في مرتبة الضروري مقدم على غيره من المراتب حتى وإن اختلفت في نوع المقصد. والأمر في منع التجمعات عام وليس تعطيلا للمساجد فقط؛ يل هو تعطيل عام في شتى مناحي الحياة؛ من أجل الحفاظ على أرواح الناس من سطوة هذا الوباء، ودليل ذلك أن المساجد لا زالت تصدح بالآذان إعلاما بدخول الوقت فلم تتعطل تعطلا تاما وإن لم تقم فيها للجماعة للمانع الذي تقرر آنفا.

فالحاصل أن الموازنة هنا فيما يظهر هي بين مفسدة واقعة في الجملة متعلقة بهلاك ضروري "حفظ النفس" وبين مفسدة تعطيل إظهار شعيرة الصلاة بإقامتها جماعة في المساجد وهي مصلحة مكملة لضروري حفظ الدين.

و بناء على ماسبق ؛ يمكن الترجيح –استنادا على ماسبق ذكره من القواعد–من وجهين:

١ .كون رتبة الضروري (حفظ الأنفس) هي الأصل والأعلى من رتبة المكمل فتترجح عليه.

٢ .كون المفسدة الأشد (هلاك الأنفس) مقدمة في الاعتبار فتدفع بالمفسدة الأخف (المنع من الجماعة بغلق المسجد) فتترجح عليه.

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[٣٩] انظر: **قواعد المقري**، مصدر سابق، نفس الصفحة.

ولو سلمنا جدلا بأنهما على درجة واحدة وأن المفسدة هنا هي مفسدة مطلق المرض وأن هذا المرض ليس مرضا متلفا للنفوس فيكون التوقي من هذا المرض مكملا لضروري حفظ النفس فإن درجتهما حينئذ واحدة وبناء عليه تقدم درء مفسدة المرض على جلب مصلحة إظهار شعار الصلاة بإقامتها جماعة في المساجد لأن "درء المفسدة مقدّم على جلب المصلحة".[٤٠] وقد نص على هذه القاعدة جمع كبير من العلماء ومن ذلك ما نص عليه الأمير الصنعاني "دفع المفاسد أهم من جلب المصالح عند المساواة"[٤١] ومثله ما ذكر السعدي في رسالته اللطيفة "عند التكافؤ فدرء المفاسد أولى من جلب المصالح".

و يمثل إغلاق المساجد وسيلة للمنع من الجماعة حتى تسد ذريعة انتشار الوباء الذي يؤدي إلى هلاك الأنفس المعصومة من حيث الجملة وهو أرجح من المصلحة المرجوة من فتح المساجد لأداء الصلوات جماعة إظهارا لشعائر الدين.

ويبدو أن وقوع التساوي بين المفاسد والمصالح بحيث لا يمكن ترجيح أحدهما على الآخر لا يمكن تصوره، وقد ذكر الإمام الشاطبي أنه :"إن تساوتا (يعني المصلحة والمفسدة) فلا حكم من جهة المكلف بأحد الطرفين دون الآخر إذا ظهر التساوي بمقتضى الأدلة، ولعلّ هذا غير واقع في الشريعة، وإن فرض وقوعه فلا ترجيح إلا بالتشهي من غير دليل، وذلك في الشرعيات باطل باتفاق"[٤٢]

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[٤٠]انظر: احمد الربابعة. (٢٠٢٠). الموازنة بين المصالح والمفاسد، وتطبيقاتهما في الواقع المعاصر دراسة في: علم أصول الفقه، مجلة البحوث العلمية والدراسات الإسلامية . العدد ١، المجلد ١٤ ص ٧٦- ١٠٦.

[٤١]محمد بن إسماعيل بن صلاح بن محمد الحسني، تحقيق: القاضي حسين بن أحمد السياغي والدكتور حسن محمد مقبولي الأهدل، **أصول الفقه المسمى إجابة السائل شرح بغية الآمل**، (بيروت: مؤسسة الرسالة، ط١، ١٩٨٦م)، ص ١٩٨.

[٤٢] الشاطبي: **الموافقات في أصول الشريعة**، ج ٢، ص ٣٤٤.

ولعل ابن تيمية من أكثر الناس دقة في هذه المسألة حيث ذكر أنه: "فإذا كان الفعل فيه صلاح وفساد رجحوا الراجح منهما، فإذا كان صلاحه أكثر من فساده رجحوا فعله ، وإن كان فساده أكثر من صلاحه رجحوا تركه. فإنّ الله تعالى بعث رسوله – صلى الله وسلم– بتحصيل المصالح وتكميلها ، وتعطيل المفاسد وتقليلها، وأنها ترجّح خير الخيرين وشرّ الشّرين، وتحصيل أعظم المصلحتين، بتفويت أدناهما، وتدفع أعظم المفسدتين باحتمال أدناهما".[٤٣]

وبناء على ما سبق، يرى الباحثون أنه لا مانع شرعا من الأمر بإغلاق المساجد، ومنع الناس من الصلاة جماعة فيها سدا لذريعة انتشار الجائحة العالمية كورونا، وذلك أن مقصد حفظ النفس في هذه الحال مقدم على مقصد حفظ الدين، وذلك أن الأول في مرتبة الضروري بخلاف الأخير فإنه مكمل لضروري حفظ الدين، ويضاف إلى ذلك أن الأول من باب درء المفسدة والأخير من باب جلب المصلحة ولا شك أن درء المفسدة مقدم على جلب المصلحة عند التعارض.

الخاتمة: بناء على ما سبق يخلص البحث إلى ما يلي من النتائج

١- أن الصلاة جماعة والآذان وغيرهما من شعائر الدين التي أمر الشارع بإظهارها. وإظهار هذه الشعائر مكلمة للمقصد الضروري "حفظ الدين "ومقوية لتمام وقوعه.وطلب المكملات مشروط " ألا يعود على أصله بالإبطال"وعليه يترجح عدم القول باستصحاب حكم الأصل في اتخاذ الجماعة لإقامة الصلاة في المساجد قد يؤول إلى فوات الأنفس بسبب

[٤٣] ابن تيميّة، تقي الدين أحمد بن عبد الحليم: **مجموع الفتاوى**، تحقيق عامر الجزار وأنور الباز (مصر: دار الوفاء، والرياض: مكتبة العبيكان، ١٣١٩هـ/١٩٩٨)، ج ١٩، ص ٣٠.

عدوى المرض و إذا هلكت الأنفس يهلك الدين تباعا، لاعتبار أن النفس مكلفة بإقامة الدين.

٢- أن الأمر بإغلاق المساجد لا يعني تعطيلا مطلقا للشعائر الدينية (تعطل في التنزيل موقتا بقدر الضرورة) أو تفويتا لمقصد" حفظ الدين" و إنما تعطيله انصرف لحفظ مقصد آخر وهو " حفظ النفس" من الهلاك، وجواز هذا يستند إلى القاعدة " يجوز تخلف الجزئي عن كليه إذا حفظ كليا آخر".

٣- أن مقصد إغلاق المساجد ينزل منزلة الوسيلة لحفظ المقصد الضروري "حفظ النفس" وهي واجبة الاعتبار بمقتضى القاعدة " الوسائل تأخذ حكم مقاصدها " فكل ما أدى إلى الواجب فهو واجب.

٤- أن ضرر إزهاق الأرواح المعصومة بالجملة مقدم على جلب المصلحة المتمثلة بإظهار شعائر الدين كالصلاة جماعة.وهذا عملا بالقاعدة المقاصدية"المصلحة الأصلية أولى من التكميلية" و " الضرر الأشد يدفع بالأخف، فيرجح اعتبار حفظ مقصد النفس لأن ضرر فواته أشد من ضرر فوات غلق المساجد كوسيلة لمنع شعيرة الجماعة في الصلوات.

ويوصي الباحثون بمراعاة المقاصد الشرعية في تنزيل الأحكام على الواقع ولا سيما إذا كانت الواقعة من النوازل، والاستفادة من آراء المختصين بحيث تتكامل المنظومة المعرفية بين العلوم الشرعية وغيرها من العلوم كالطب مثلا.

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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.

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INSTITUT AGAMA ISLAM NEGERI (IAIN) MADURA

ISSN 1907-591X

ISSN 2442-3084