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## **KATA PENGANTAR**

Puji dan syukur kita panjatkan kehadiran Allah SWT dengan segala limpahan karunia-Nya sehingga dengan rahmat dan iradahnya, Mawaddah: Jurnal Hukum Keluarga Islam dapat menerbitkan Volume 3 Nomor 1 Mei 2025 dalam edisi online maupun cetak, sebagai bentuk sumbangsih keilmuan dalam bidang Hukum Keluarga Islam dalam mewujudkan tatanan hukum dalam kehidupan berbangsa dan bernegara di Indonesia.

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**Tim Redaksi Jurnal Mawaddah**

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## Legal And Psychological Implications Of Divorce Refusal: A Case Study Of Decision No. 880/Pdt.G/2023/Pa. Tmg Based On Sema No. 1 Of 2022

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### Abstract

*This study analyses divorce denial's legal and psychological implications in case No. 880/Pdt.G/2023/PA.Tmg, based on the Supreme Court Circular (SEMA) No. 1 of 2022. The denial was due to the unmet requirement of a six-month separation period, despite evidence of continuous conflict and the husband's criminal behavior. The research examines whether the court considered the psychological aspects of both parties and how SEMA No. 1 of 2022 was applied. Methods This research uses a qualitative approach with case studies that analyze legal documents and court decisions related to the application of SEMA No. 1 of 2022 in divorce rejection cases; the findings highlight the need for legal flexibility to accommodate emotional and cultural factors in divorce cases, suggesting possible policy revisions to support affected individuals better.*

**Keywords:** Divorce Denial; Legal Implications; Psychological Impact; SEMA No. 1 Of 2022; Case Study.

### Abstrak

Penelitian ini menganalisis implikasi hukum dan psikologis dari penolakan cerai dalam kasus No. 880/Pdt.G/2023/PA.Tmg, berdasarkan Surat Edaran Mahkamah Agung (SEMA) No. 1 Tahun 2022. Penolakan cerai ini terjadi karena tidak terpenuhinya syarat pemisahan selama enam bulan, meskipun terdapat bukti konflik terus menerus dan keterlibatan suami dalam tindak pidana. Tujuan penelitian ini adalah untuk mengkaji apakah pengadilan mempertimbangkan aspek psikologis bagi kedua belah pihak dan bagaimana penerapan SEMA No. 1 Tahun 2022 dalam kasus ini. Metode Penelitian ini menggunakan pendekatan kualitatif dengan studi kasus yang menganalisis dokumen hukum dan putusan pengadilan terkait penerapan SEMA No. 1 Tahun 2022 dalam kasus penolakan cerai. Hasil penelitian menunjukkan perlunya fleksibilitas hukum untuk mengakomodasi faktor emosional dan budaya dalam kasus perceraian, serta menyarankan revisi kebijakan untuk mendukung individu yang terdampak.

**Kata Kunci:** Penolakan Cerai; Implikasi Hukum; Dampak Psikologis; SEMA No. 1 Tahun 2022; Studi Kasus.

## INTRODUCTION

In case No. 880/Pdt.G/2023/PA. The TMG's decision based on the Supreme Court Circular Letter (SEMA) No. 1 of 2022 clearly illustrates how religious courts handle divorce refusal cases. Refusal to divorce in Indonesia's legal system often has complex implications, both legal and psychological.<sup>1</sup> Jurisprudence is essential in Indonesia's legal system, influencing law enforcement and interpretation in cases such as divorce rejection. In addition, inter-agency coordination and a holistic approach to law enforcement are essential to ensure consistency and fairness in Indonesia's legal system.<sup>2</sup>

From the point of view of religious law, the importance of harmonizing laws with applicable laws and regulations is emphasized.<sup>3</sup> In addition, the position of Islamic law in Indonesia's legal system is relevant to how religious courts handle divorce rejection cases.<sup>4</sup>

Several aspects of divorce rejection in Indonesia's legal system must be deeply understood. First, jurisprudence is an essential foundation for understanding divorce rejection, where previous legal decisions can guide the handling of divorce cases. In addition, coordination between institutions is vital in addressing this issue, where synergy between related institutions is needed to achieve adequate resolution.<sup>5</sup>

The influence of the Continental European legal system also plays a role in forming Indonesia's legal system, so a deep understanding of

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<sup>1</sup> Holili Holili, M. Yunus, and Winarto Winarto, "Kedudukan Yurisprudensi Sebagai Sumber Hukum Di Indonesia Sebagai Penganut Sistem Civil Law," *COMSERVA: Jurnal Penelitian Dan Pengabdian Masyarakat* 3, no. 09 (January 23, 2024): 3718–26, <https://doi.org/10.59141/comserva.v3i09.1140>.

<sup>2</sup> Miftahul Murachim Budy Kushadianto and Marsudi Dedi Putra, "Implikasi Hierarki Hukum Dalam Pembentukan Undang-Undang: Pengaruhnya Terhadap Penafsiran Dan Penegakan Hukum," *Syntax Idea* 6, no. 3 (April 5, 2024): 1476–84, <https://doi.org/10.46799/syntax-idea.v6i3.3133>.

<sup>3</sup> Aden Rosadi, "Dinamika Dan Sistem Hukum Penyelenggaraan Peradilan Agama Di Indonesia," *Al-Ahkam* 15, no. 1 (June 30, 2019): 20, <https://doi.org/10.37035/ajh.v15i1.2024>.

<sup>4</sup> Watni Marpaung, "DISKURUS KOMPILASI HUKUM ISLAM (KHI) DALAM SISTEM HUKUM INDONESIA," *Al-Usrah: Jurnal Al Ahwal As Syakhsiyah* 11, no. 1 (June 26, 2023), <https://doi.org/10.30821/al-usrah.v11i1.16472>.

<sup>5</sup> Riesti Triyanti, Khairul Amri, and Husain Latuconsina, "Perspektif Kebijakan Dan Peran Penting Riset Dalam Pengelolaan Sumber Daya Perikanan Laut Berkelanjutan," in *Pengelolaan Sumber Daya Perikanan Laut Berkelanjutan* (Penerbit BRIN, 2023), <https://doi.org/10.55981/brin.908.c819>.



this can provide broader insights into divorce rejection.<sup>6</sup> The principle of *the living law* is also an important factor, where the law must adapt to the development of society and applicable values.<sup>7</sup> Harmonization of rules is also crucial. All existing regulations must be in line and not contradict each other.<sup>8</sup>

Finally, the position of Islamic law in Indonesia's national legal system also plays a vital role in the context of divorce rejection. Islamic law in Indonesia is an integral part of national legal life, and a deep understanding of this can provide a more comprehensive perspective on divorce rejection.<sup>9</sup> The background of this research is the high number of divorce rejection cases in Indonesia, which are often not only rooted in differences of opinion between couples but also related to legal, cultural, and religious aspects of society.<sup>10</sup> This is important because it has a direct impact on the mental well-being of the individuals involved, especially those who file for divorce but are rejected by the court.

In the context of the need for a deeper understanding of the psychological impact of divorce, research on divorce and its impact on individuals, especially children, has become particularly relevant. Studies show that parental divorce can hurt the psychological health of adolescents.<sup>11</sup> Children who have experienced parental divorce are also

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<sup>6</sup> Novi Eka Saputri and Eny Kusdarini, "KONTRIBUSI SISTEM HUKUM EROPA KONTINENTAL TERHADAP PEMBANGUNAN SISTEM HUKUM NASIONAL DI INDONESIA," *Masalah-Masalah Hukum* 50, no. 4 (October 30, 2021): 363–72, <https://doi.org/10.14710/mmh.50.4.2021.363-372>.

<sup>7</sup> Arfa'i Arfa'i, Bahder Johan Nasution, and Febrian Febrian, "Aktualisasi Pancasila Sebagai Sumber Hukum Dalam Pembentukan Undang-Undang," *Undang: Jurnal Hukum* 3, no. 2 (December 1, 2020): 377–407, <https://doi.org/10.22437/ujh.3.2.377-407>.

<sup>8</sup> Indah Sari, "SYARAT-SYARAT PENANAMAN MODAL ASING (PMA) DI INDONESIA MENURUT UNDANG-UNDANG NOMOR 25 TAHUN 2007 TENTANG PENANAMAN MODAL," *Jurnal Ilmiah Hukum Dirgantara* 10, no. 2 (March 1, 2020), <https://doi.org/10.35968/jh.v10i2.462>.

<sup>9</sup> Marpaung, "DISKURUS KOMPILASI HUKUM ISLAM (KHI) DALAM SISTEM HUKUM INDONESIA." *Al-Usrah : Jurnal Al Ahwal As Syakhshiyah* 11, no. 1 (June 26, 2023). <https://doi.org/10.30821/al-usrah.v11i1.16472>

<sup>10</sup> M. H. A. Pakarti, D. Farid, S. M. Utama, O. Syuhada, and H. Hendriana, "Asas Keadilan sebagai Salah Satu Landasan Hakim dalam Memutuskan Putusan Perceraian," *Al-Ahwal Al-Syakhshiyah: Jurnal Hukum Keluarga dan Peradilan Islam* 4, no. 2 (2023): 101–16. <https://doi.org/10.15575/as.v4i2.25998>

<sup>11</sup> Ida Untari, Kanissa Puspa Dhini Putri, and Muhammad Hafiduddin, "Dampak Perceraian Orang Tua Terhadap Kesehatan Psikologis Remaja," *Profesi (Profesional Islam): Media Publikasi Penelitian* 15, no. 2 (April 21, 2018): 106, <https://doi.org/10.26576/profesi.272>.

prone to psychosocial disorders and affected learning achievement.<sup>12</sup> In addition, divorce can also affect the emotional intelligence of adolescents through family communication patterns.<sup>13</sup>

In addition, the study also highlights the psychological impact on early adult individuals who experience parental divorce, which can affect their ability to establish relationships and complete early adult developmental tasks.<sup>14</sup> In addition, research also shows that there is a psychological impact on wives who experience early marriage, which requires a deep understanding of the problems faced by them.<sup>15</sup>

In the context of the rejection of polygamy by career women, the study highlights the impact of such rejection on the personality of the child at home.<sup>16</sup> This suggests that factors such as the decision to reject polygamy can have complex implications for the individuals involved, including psychological impacts on children.

Thus, through a deep understanding of the psychological impact of divorce and other related aspects such as polygamy's rejection, family communication patterns, and adolescent emotional intelligence, this research can provide valuable insights into efforts to understand and overcome the psychological consequences of these situations.

This study will examine whether the court's decision has considered the psychological aspects for both parties and how the provisions of SEMA No. 1 of 2022 are applied in this case. The issue raised is how religious courts consider the reasons for refusing divorce

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<sup>12</sup> Harry Ferdinand Mone, "Dampak Perceraian Orang Tua Terhadap Perkembangan Psikososial Dan Prestasi Belajar," *Harmoni Sosial: Jurnal Pendidikan IPS* 6, no. 2 (September 14, 2019): 155–63, <https://doi.org/10.21831/hsjpi.v6i2.20873>.

<sup>13</sup> Pandu Indriani and Wiwin Hendriani, "Pengaruh Pola Komunikasi Keluarga Terhadap Kecerdasan Emosional Remaja Pada Keluarga Single Parent Akibat Perceraian," *Buletin Riset Psikologi Dan Kesehatan Mental (BRPKM)* 2, no. 1 (May 24, 2022): 512–18, <https://doi.org/10.20473/brpkm.v2i1.34607>.

<sup>14</sup> Habibatul Ainina and Primatia Yogi Wulandari, "Dampak Psikologis Terkait Relasi Individu Dewasa Awal Yang Mengalami Perceraian Orang Tua," *Buletin Riset Psikologi Dan Kesehatan Mental (BRPKM)* 3, no. 1 (September 20, 2023): 25–31, <https://doi.org/10.20473/brpkm.v3i1.46965>.

<sup>15</sup> Noor Azlyn Ririn, Muhammad Arsyad, and Ratna Supiyah, "DAMPAK PSIKOSOSIAL PADA ISTRI AKIBAT PERNIKAHAN DINI (Studi Di Desa Awiu Kecamatan Aere Kabupaten Kolaka Timur)," *Welvaart : Jurnal Ilmu Kesejahteraan Sosial* 4, no. 2 (January 1, 2024), <https://doi.org/10.52423/welvaart.v4i2.43372>.

<sup>16</sup> Nada Izzatun Nisa and Muhammad Nurul Fahmi, "The Influence of Career Women's Rejection of Polygamy on Children's Personality (Case Studi in Batu Aji District, Batam City)," *Jurnal Al-Qadau: Peradilan Dan Hukum Keluarga Islam* 10, no. 1 (June 30, 2023): 97–111, <https://doi.org/10.24252/al-qadau.v10i1.37931>.



and its impact on the individuals involved. Alternative solutions proposed include psychological assistance for the party who is denied divorce and a revision of legal policies related to divorce refusal. This study aims to provide new insights that can be a reference for policymakers and legal practitioners in handling similar cases and provide recommendations that can reduce the negative impact of divorce rejection.

## RESEARCH METHODS

This study uses a qualitative approach with case studies to analyze divorce rejection's legal and psychological implications, especially in Decision No. 880/Pdt.G/2023/PA. TMG based on SEMA No. 1 of 2022. Secondary data in legal documents, court decisions, and SEMA are analyzed to assess the application of the law and related jurisprudence. The analysis of the court decision was carried out concerning SEMA No. 1 of 2022 to understand how the law is applied in the context of divorce rejection. The analysis results are presented as in-depth research reports, providing insights into divorce rejection's legal and psychological impact and recommendations for policymakers and legal practitioners.

## RESULTS AND DISCUSSION

### Case Chronology

On August 4, 2023, the Plaintiff filed a divorce lawsuit at the Temanggung Religious Court with registration number 880/Pdt.G/PA.Tmg. The lawsuit was filed based on disputes and quarrels that continued to occur in the Plaintiff's and Defendant's household. The plaintiff claimed that their relationship was no longer harmonious and that there was no hope of achieving a family that *was sakinah, mawaddah, and warahmah*. In his lawsuit, Plaintiff said that Defendant did not provide adequate maintenance, so Plaintiff had to work to meet the needs of the family. In addition, Defendant is considered to be less attentive and often disagrees with Plaintiff in resolving domestic matters, which triggers more conflicts. The situation was further aggravated by the actions of the Defendant who was involved in the crime of theft.<sup>17</sup>

However, in his decision, the judge rejected the Plaintiff's divorce lawsuit. This decision is based on the Supreme Court Circular Letter (SEMA) No. 1 of 2022, which stipulates that the reasons for continuous disputes and quarrels as the basis for divorce must be supported by evidence that the couple has been separated from residence for at least six months. In this case, the Plaintiff and the Defendant have only been

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<sup>17</sup>“Putusan 880/Pdt.G/2023/PA. Tmg” (2023).

separated for three months, so the lawsuit is considered ineligible. In addition, the judge also did not consider the results of the mediation that had been carried out.

This ruling raises controversy regarding the fairness and suitability of the written law compared to the actual situation faced by the Plaintiff. It raises concerns about adequate legal protection for the parties involved in the divorce case. This encourages the author to examine further the basis of the judge's consideration in rejecting the divorce lawsuit and its implications for the understanding and application of the law in the context of divorce in Indonesia.<sup>18</sup>

The plaintiff filed a divorce lawsuit at the Temanggung Religious Court, revealing the postulation that the Defendant could not provide a living, lacked attention, and always had different views on solving the problem. Currently, the Defendant is undergoing the Prosecutor's detention for being involved in a theft case. The plaintiffs felt that their household could no longer be maintained, considering that her husband did not make a financial contribution and had committed acts that damaged family harmony. This condition made the Plaintiff feel pressured and uncomfortable about continuing the marriage.<sup>19</sup>

However, in Decision Number 880/Pdt.G/2023/PA. Tmg, the court decided to dismiss the divorce lawsuit filed by the Plaintiff. The main reason for this refusal is that the separation conditions for six months have yet to be fulfilled as stipulated in SEMA No. 1 of 2022. The Court held that the Plaintiff and the Defendant, on the grounds of disputes and quarrels, were continuous or had been separated for six months. The Tribunal considered the separation between the Plaintiff and the Defendant, who had only been separated for three months. Therefore, the lawsuit was rejected, and the results of the mediation were not considered.<sup>20</sup>

In the legal considerations taken, the court emphasizes the fulfillment of formal procedures more than considering the emotional and psychological state of the plaintiff as the plaintiff. Although the Plaintiff felt that their marriage was no longer viable and filed for divorce for his good, the court considered that the absence of physical separation for six months was a significant barrier factor in this divorce process.

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<sup>18</sup> Putusan 880/Pdt.G/2023/PA.Tmg.

<sup>19</sup> Putusan 880/Pdt.G/2023/PA.Tmg.

<sup>20</sup> Putusan 880/Pdt.G/2023/PA.Tmg.

This decision has raised controversy, especially in terms of fairness and empathy for the plaintiffs' conditions facing difficult situations. Many have questioned whether such formal provisions should take precedence over individual psychological and well-being considerations, especially in cases where one party is in prison and unable to fulfill their obligations as a husband. This case highlights the importance of policy revisions or more flexible interpretations of the law to handle similar situations in the future.

### **Normative Aspects in Divorce Law Enforcement**

Jurisprudence and normative aspects play essential roles in enforcing divorce law. Although persuasive and non-binding, jurisprudence allows judges to decide based on discretion and justice.<sup>21</sup> Research combining normative and conceptual aspects provides an in-depth analysis of the legal phenomenon being studied.<sup>22</sup> Jurisprudence is considered an essential law source in Indonesia's civil law tradition.<sup>23</sup>

Jurisprudence in the civil law tradition is essential in guiding judges in handling similar cases. Although jurisprudence is not legally binding, its existence helps create consistency in applying the law and guides interpreting it. Jurisprudence in the civil law system tends to be persuasive rather than binding, so judges can choose to follow it.<sup>24</sup>

In Indonesia, law is the primary source of law in the civil law legal system, but jurisprudence still provides strong legal references and

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<sup>21</sup> Holili, Yunus, and Winarto, "Kedudukan Yurisprudensi Sebagai Sumber Hukum Di Indonesia Sebagai Penganut Sistem Civil Law." *COMSERVA: Jurnal Penelitian Dan Pengabdian Masyarakat* 3, no. 09 (January 23, 2024): 3718–26. <https://doi.org/10.59141/comserva.v3i09.1140>.

<sup>22</sup> Briant Rizqullah Irawan Al Machrus and Prasetyowati Endang, "Implikasi Hukum Terkait Tukar Jabatan Antara Sekutu Komanditer Dengan Sekutu Komplementer Dalam Commanditaire Venootschap," *Future Academia: The Journal of Multidisciplinary Research on Scientific and Advanced* 2, no. 3 (June 25, 2024): 183–91, <https://doi.org/10.61579/future.v2i3.134>.

<sup>23</sup> Enrico Simanjuntak, "Peran Yurisprudensi Dalam Sistem Hukum Di Indonesia," *Jurnal Konstitusi* 16, no. 1 (April 1, 2019): 83, <https://doi.org/10.31078/jk1615>.

<sup>24</sup> Holili, Yunus, and Winarto, "Kedudukan Yurisprudensi Sebagai Sumber Hukum Di Indonesia Sebagai Penganut Sistem Civil Law."

arguments.<sup>25</sup> Although Indonesia is not bound by jurisprudence, its use can add value to law enforcement.<sup>26</sup>

Bridging expectations for the ideal law with the reality of existing law enforcement presents challenges. This shows the need for readiness regarding legal regulations, law enforcement, and the community to run a fair legal system.<sup>27</sup> In addition, in situations where written law is insufficient or inconsistent with the problem faced in a case, judges are allowed to seek and find the law from other sources, such as jurisprudence.<sup>28</sup>

By comparing similar cases, judges can identify relevant factors, understand the legal considerations applied, and explain the reasons behind the decision.<sup>29</sup> This shows the importance of references to jurisprudence in assisting judges in deciding a case.

In conclusion, jurisprudence plays an essential role in the civil law legal system, even though it is not legally binding. Using jurisprudence can provide direction, consistency, and strong arguments in law enforcement and assist judges in interpreting laws and deciding similar cases.

The normative aspect of enforcing divorce also includes understanding positive law and applying appropriate legal policies. Normative law research often uses secondary data to study the laws it

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<sup>25</sup> Rizky Maulana Nugraha, Aris Machmud, and Fokky Fuad, "Akibat Hukum Terhadap Aset Milik Pihak Ketiga Yang Dijaminkan Kepada Kreditur Dalam Kepailitan," *Binamulia Hukum* 12, no. 1 (August 30, 2023): 191–99, <https://doi.org/10.37893/jbh.v12i1.504>.

<sup>26</sup> Oly Viana Agustine, "Keberlakuan Yurisprudensi Pada Kewenangan Pengujian Undang-Undang Dalam Putusan Mahkamah Konstitusi," *Jurnal Konstitusi* 15, no. 3 (November 19, 2018): 642, <https://doi.org/10.31078/jk1539>.

<sup>27</sup> Puteri Hikmawati, "Peniadaan Pidana Penjara Bagi Pelaku Lansia Dalam Pembaruan Hukum Pidana, Dapatkah Keadilan Restoratif Tercapai? (Elimination of Imprisonment for Elderly Criminal Offenders in Criminal Law Reform, Can Restorative Justice Be Achieved?)," *Negara Hukum: Membangun Hukum Untuk Keadilan Dan Kesejahteraan* 11, no. 1 (June 23, 2020), <https://doi.org/10.22212/jnh.v11i1.1583>.

<sup>28</sup> Yogi Diansyah, Wahyu Donri Tinambunan, and Kharisma Gemilang, "Penerapan Pidana Penjara Minimal Khusus Terhadap Pelaku Tindak Pidana Peredaran Narkotika," *Jurnal Bedah Hukum* 7, no. 2 (October 31, 2023): 213–27, <https://doi.org/10.36596/jbh.v7i2.1010>.

<sup>29</sup> Frengky Desiroto, "Analisis Pendekatan Perbandingan Dengan Yurisprudensi Dalam Putusan Narkotika (Studi Putusan Pengadilan Negeri Jakarta Pusat Nomor 372/Pid.Sus/2022/Pn. JKT Pst)," *Comserva Jurnal Penelitian Dan Pengabdian Masyarakat*, 2024, <https://doi.org/10.59141/comserva.v3i10.1187>.

raises.<sup>30</sup> In addition, normative law is a relevant type of research in this context, with an approach that analyses legislation, concepts, and documents.<sup>31</sup>

The enforcement of divorce laws is theoretical and must be realized in concrete actions that lead to the maintenance of order and justice.<sup>32</sup> The community also actively optimizes legal functions, including divorce law enforcement.<sup>33</sup> In this case, divorce law enforcement requires clarity of regulations and effective law enforcement.<sup>34</sup>

Several references can make a significant contribution to the analysis of court decisions, the application of SEMA No. 1 of 2022, and relevant jurisprudence. The study can include exploring legal principles, values, and norms and comparing different regulations to find consistency and synchronisation.<sup>35</sup> In addition, in judicial proceedings,

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<sup>30</sup> Fitria Noviaturn Rizki and Zainal Arifin, “PEMERKOSAAN DALAM RUMAH TANGGA (MARITAL RAPE) PERBANDINGAN HUKUM POSITIF INDONESIA, TIMUR TENGAH, DAN FIKIH,” *BIDAYAH: STUDI ILMU-ILMU KEISLAMAN*, December 8, 2023, 239–57, <https://doi.org/10.47498/bidayah.v14i2.2210>.

<sup>31</sup> Miftahul Murachim Budy Kushadianto and Putra, “Implikasi Hierarki Hukum Dalam Pembentukan Undang-Undang: Pengaruhnya Terhadap Penafsiran Dan Penegakan Hukum.” *Syntax Idea* 6, no. 3 (April 5, 2024): 1476–84. <https://doi.org/10.46799/syntax-idea.v6i3.3133>.

<sup>32</sup> Yohanes Alexandro Diliyanto Tanur, Tatok Sudjiarto, and Armunanto Hutahaean, “Penegakan Hukum Lalu Lintas Melalui E-Tilang Dalam Meningkatkan Kesadaran Hukum Berlalu Lintas Studi Kasus Kepolisian Negara Republik Indonesia Resor Badung Bali,” *Syntax Idea* 6, no. 5 (May 27, 2024): 2106–18, <https://doi.org/10.46799/syntax-idea.v6i5.3255>.

<sup>33</sup> Tri Arso, “Persoalan Disfungsi Asas Resiprokalitas Dalam Hubungan Perikatan Di PDAM Tobelo,” *Jurnal Analisis Hukum* 6, no. 1 (April 25, 2023): 48–57, <https://doi.org/10.38043/jah.v6i1.4177>.

<sup>34</sup> Muhammad Ashraf, Agnes Harvelian, and Tantri Kartika, “Regulasi Dan Penegakan Hukum Lingkungan Dalam Menangani Kebakaran Hutan Berdasarkan Undang-Undang Nomor 32 Tahun 2009,” *HUMANIORUM* 1, no. 4 (January 17, 2024): 99–104, <https://doi.org/10.37010/hmr.v1i4.28>.

<sup>35</sup> Achmad Zuhdi and Ari Ade Kamula, “Legitimasi Hukum Asing Sebagai Pertimbangan Putusan Oleh Mahkamah Konstitusi: Perbandingan Antara Indonesia Dan Afrika Selatan,” *Yurispruden: Jurnal Fakultas Hukum Universitas Islam Malang* 7, no. 2 (June 20, 2024): 272–96, <https://doi.org/10.33474/yur.v7i2.21634>.

judges often refer to jurisprudence, a set of previous court decisions, as the basis for making appropriate decisions.<sup>36</sup>

Research that combines normative juridical methods with comparative, legislative, and historical approaches can provide in-depth insights into how law is applied in court decisions.<sup>37</sup> The comparative analysis also confirms that efficiency, transparency, and institutional collaboration are critical to the success of corruption eradication, which is relevant in applying the law in the courts.<sup>38</sup>

In addition, research that analyses court decisions related to the protection of children as victims of sexual violence can also provide an essential perspective in the context of legal analysis.<sup>39</sup> Conceptual and case approaches to research related to legal concepts can also provide a deep understanding of how to resolve a legal problem in court decisions.<sup>40</sup>

Thus, through the synthesis of various relevant references, it can be concluded that the analysis of court decisions, the application of SEMA No. 1 of 2022, and relevant jurisprudence requires a deep understanding of legal principles, comparisons with previous cases, and consistency in the application of law to achieve justice in court decisions.

In SEMA No. 1 of 2022, regarding the 6-month separation as a condition for filing for divorce, jurisprudence can support court decisions by analyzing similar cases to understand relevant legal

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<sup>36</sup> Desiroti, “Analisis Pendekatan Perbandingan Dengan Yurisprudensi Dalam Putusan Narkotika (Studi Putusan Pengadilan Negeri Jakarta Pusat Nomor 372/Pid.Sus/2022/Pn. JKT Pst).”

<sup>37</sup> Oki Giri Pamungkas, Andriana Kusumawati, and Aisha Mutiara Safitri, “Komparasi Hukum Pidana Korupsi: Studi Perbandingan Hukum Pidana Korupsi Di Indonesia Dan Singapura,” *HUMANIORUM* 1, no. 4 (January 18, 2024): 105–9, <https://doi.org/10.37010/hmr.v1i4.30>.

<sup>38</sup> Faizzah Wardatul Ummah and Emy Rosnawati, “Analisis Yuridis Putusan Pengadilan Negeri Padang Pariaman Nomor 18/Pid.Sus-Anak/2018/Pn Pmn Tentang Perlindungan Hukum Terhadap Anak Sebagai Korban Tindak Pidana Kekerasan Seksual,” *Web of Scientist International Scientific Research Journal* 3, no. 1 (October 3, 2023), <https://doi.org/10.47134/webofscientist.v3i1.15>.

<sup>39</sup> Ronny and Dian Adriawan Dg. Tawang, “Kajian Konsep ‘Antargolongan’ Dalam Pasal 28 Ayat (2) Undang-Undang Informasi Dan Transaksi Elektronik,” *Amnesti: Jurnal Hukum* 5, no. 2 (August 3, 2023): 247–57, <https://doi.org/10.37729/amnesti.v5i2.3083>.

<sup>40</sup> Ardlini Eta Pithaloka and Kholis Roisah, “Pembatalan Dan Penghapusan Merek Dagang Karena Ada Persamaan Pada Pokoknya,” *Notarius* 16, no. 2 (August 31, 2023): 907–15, <https://doi.org/10.14710/nts.v16i2.41566>.



considerations.<sup>41</sup> However, it should be noted that there is a potential for inconsistency in applying the law, such as dysfunction of the principle of reciprocity in the relationship of engagement that can affect the balance of rights and obligations.<sup>42</sup> Therefore, paying attention to regulations that reflect welfare and fairness for all parties involved is essential.<sup>43</sup>

### **The Psychological Impact of Divorce Rejection**

The psychological impact of divorce can have significant consequences, especially for the party filing for divorce. Individuals who go through divorce can experience a variety of emotional reactions, ranging from sadness to disappointment. This situation can also have an impact on their mental health, triggering stress, anxiety, and even depression.<sup>44</sup> In addition, divorce can also affect family dynamics in the family context, especially if children are involved. Children involved in divorce situations often experience significant emotional and psychological distress.<sup>45</sup>

In dealing with the psychological impact of divorce, it is essential to pay attention to the mental health aspects of the individuals involved. Psychological support and counseling can help individuals cope with the stress and anxiety that arise as a result of divorce situations.<sup>46</sup> In addition,

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<sup>41</sup> Desiroto, "Analisis Pendekatan Perbandingan Dengan Yurisprudensi Dalam Putusan Narkotika (Studi Putusan Pengadilan Negeri Jakarta Pusat Nomor 372/Pid.Sus/2022/Pn. JKT Pst)."

<sup>42</sup> Arso, "Persoalan Disfungsi Asas Resiprokalitas Dalam Hubungan Perikatan Di PDAM Tobelo." *Jurnal Analisis Hukum* 6, no. 1 (April 25, 2023): 48–57. <https://doi.org/10.38043/jah.v6i1.4177>

<sup>43</sup> Hermansyah Hermansyah, "Interpretasi Asas Mempersulit Perceraian Dalam Perspektif Hukum Islam," *As-Syar'i: Jurnal Bimbingan & Konseling Keluarga* 6, no. 1 (April 4, 2024): 1110–21, <https://doi.org/10.47467/as.v6i1.6307>.

<sup>44</sup> Kharisma Dwi Handayani, "MASALAH KESEHATAN MENTAL DI TENGAH PANDEMI COVID-19: PENINGKATAN MASALAH GANGGUAN KECEMASAN DAN CARA PENANGANANNYA," *Contagion: Scientific Periodical Journal of Public Health and Coastal Health* 4, no. 1 (July 23, 2022): 56, <https://doi.org/10.30829/contagion.v4i1.10844>.

<sup>45</sup> Nila Zaimatus Septiana, "Dampak Penggunaan Media Sosial Terhadap Kesehatan Mental Dan Kesejahteraan Sosial Remaja Dimasa Pandemi Covid-19," *Nusantara of Research : Jurnal Hasil-Hasil Penelitian Universitas Nusantara PGRI Kediri* 8, no. 1 (April 30, 2021): 1–13, <https://doi.org/10.29407/nor.v8i1.15632>.

<sup>46</sup> Handayani, "MASALAH KESEHATAN MENTAL DI TENGAH PANDEMI COVID-19: PENINGKATAN MASALAH GANGGUAN KECEMASAN DAN CARA PENANGANANNYA." *Contagion: Scientific Periodical Journal of Public Health and Coastal Health* 4, no. 1 (July 23, 2022): 56. <https://doi.org/10.30829/contagion.v4i1.10844>

involving families and children in the recovery process is essential in creating a supportive environment for all parties involved.<sup>47</sup>

With a deep understanding of the psychological impact of divorce, efforts can be made to provide appropriate support for the individual experiencing the situation, as well as to maintain the well-being of the family as a whole. Emotional support and family intervention programs designed to improve communication and relationships between family members can also play an essential role in minimizing the negative impact of divorce. Through a holistic and empathy-based approach, it is hoped that the psychological well-being of individuals and family stability can be maintained despite the challenges of divorce.

The rejection of a divorce petition by the court can cause significant psychological repercussions for the individual filing for divorce. When divorce is considered the only solution to the problem at hand, this rejection can lead to deep feelings of frustration, despair, and disappointment. In this context, the individual may experience more severe symptoms of anxiety and depression, which are common responses to situations that are considered irreversible.<sup>48</sup>

Furthermore, the emotional distress faced by individuals who are forced to remain in unwanted relationships can trigger feelings of loss of control and powerlessness. This can worsen overall psychological well-being, with individuals involved in domestic conflicts often having difficulty regulating their emotions.<sup>49</sup> Research shows that problems in the regulation of emotions can lead to the use of maladaptive strategies in responding to negative emotions, which can further worsen the mental state of the individual.<sup>50</sup>

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<sup>47</sup> Septiana, "Dampak Penggunaan Media Sosial Terhadap Kesehatan Mental Dan Kesejahteraan Sosial Remaja Dimasa Pandemi Covid-19." *Nusantara of Research : Jurnal Hasil-Hasil Penelitian Universitas Nusantara PGRI Kediri* 8, no. 1 (April 30, 2021): 1–13. <https://doi.org/10.29407/nor.v8i1.15632>

<sup>48</sup> Gert Martin Hald et al., "Randomized Controlled Trial Study of the Effects of an Online Divorce Platform on Anxiety, Depression, and Somatization.," *Journal of Family Psychology* 34, no. 6 (September 2020): 740–51, <https://doi.org/10.1037/fam0000635>.

<sup>49</sup> Monavar Ghazanfari Shabankare et al., "The Relationship of Mindfulness and Difficulties in Emotion Regulation with Emotional Divorce through Sexual Satisfaction among Married University Students in Ahvaz, Iran," *Journal of Shahrekord University of Medical Sciences* 23, no. 1 (March 30, 2021): 7–13, <https://doi.org/10.34172/jsms.2021.02>.

<sup>50</sup> Chenyu Zhan et al., "Association between Parents' Relationship, Emotion-Regulation Strategies, and Psychotic-like Experiences in Adolescents," *Children* 9, no. 6 (May 31, 2022): 815, <https://doi.org/10.3390/children9060815>.

Although the court's rejection of a divorce is aimed at maintaining the integrity of the family, it can have complex legal and psychological consequences for the parties involved. Exploring alternatives to divorce, such as counseling or mediation, can be a more constructive approach to resolving domestic conflicts while minimizing the negative impact on the psychological well-being of individuals and families.

In the context of the rejection of divorce lawsuits, culture, religious values, Indigenous peoples' roles, and traditional rights significantly influence decision-making. Spiritual values are often the moral basis for individuals to consider divorce, with some religions emphasizing fidelity in marriage and the importance of maintaining family unity. This can influence a person's decision to reject a divorce lawsuit due to vital moral and spiritual considerations.<sup>51</sup>

In addition, indigenous peoples also play an essential role in the context of divorce rejection in Indonesia. Indigenous peoples often have different value systems and norms from the prevailing positive law. Sometimes, they can mediate divorce conflicts and seek to maintain family unity through their customs and traditions.<sup>52</sup> Thus, in the context of rejection of divorce lawsuits, culture, religious values, the role of indigenous peoples, and traditional rights play a significant role in shaping individual views and decisions regarding divorce.

In addition, the role of communities and religious institutions must be addressed. They can serve as a source of support and provide appropriate direction based on prevailing religious or customary teachings. Indigenous peoples, for example, often have conflict resolution mechanisms that can help couples reconcile or reach mutually beneficial agreements. This approach helps address psychological problems and strengthens social and community bonds.

Divorce can have a significant psychological impact on the individuals involved, both in the short and long term. Symptoms such as depression, anxiety, and stress often appear as a consequence of divorce. This impact is felt not only by young couples but also strongly by older couples. For parents, divorce can exacerbate feelings of loss, uncertainty,

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<sup>51</sup> Made Widiadnyana Wardiha, "ANALISIS KOMPARATIF PERAN ADAT DAN KEPERCAYAAN DALAM PENINGKATAN KUALITAS LINGKUNGAN PERMUKIMAN BERKACA PADA ADAT YANG ADA DI PERMUKIMAN TRADISIONAL," *Jurnal Presipitasi : Media Komunikasi Dan Pengembangan Teknik Lingkungan* 15, no. 2 (September 1, 2018): 114, <https://doi.org/10.14710/presipitasi.v15i2.114-121>.

<sup>52</sup> Wardiha.

and loneliness, given that age is more susceptible to significant changes in life. Additionally, for those who have children, additional psychological stress can arise from concerns about the impact of divorce on children and parenthood after divorce.

Studies by Vassi, Veltsista, & Bakoula Rahmandani highlight that stressful situations such as peer rejection or family stress can cause long-term psychological impacts.<sup>53</sup> Apart from that, divorce can also trigger feelings of fear, feelings of helplessness, depression, and even thoughts of suicide, as stated in Nadiya's research..<sup>54</sup>

## CONCLUSION

Decision Number 880/Pdt.G/2023/PA. Tmg rejected the divorce lawsuit because the six-month separation requirements were not met according to SEMA No. 1 of 2022, even though there was evidence of a dispute and the husband was involved in a criminal act. This decision sparked controversy about justice for the Plaintiff, who faced a difficult situation, including the husband's indifference to alimony. The analysis emphasizes the need for legal flexibility considering emotional conditions, cultural values, religion, and customs. Legal evaluation and revision are needed to respond more to individual needs and substantive justice. Further research is recommended to understand the psychological impact of divorce rejection, support the welfare of all parties, and improve legal practices to be more humane in handling divorce cases in Indonesia. This holistic approach can help create a fairer and more inclusive legal system.

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<sup>53</sup> Amalia Rahmandani, "Pemaafan Dan Aspek Kognitif Dari Stres Pada Mahasiswi Jurusan Kebidanan Tingkat Dua," *Jurnal Psikologi Undip* 14, no. 2 (October 1, 2015), <https://doi.org/10.14710/jpu.14.2.118-128>.

<sup>54</sup> Nadya Ridha Rachmatunisa and Amalia Rahmandani, "APAKAH AKU MASIH MEMILIKI HARAPAN? STUDI KUALITATIF FENOMENOLOGI PENGALAMAN IBU KORBAN KDRT HINGGA MEMUTUSKAN BERCERAI," *Jurnal EMPATI* 13, no. 1 (July 26, 2023): 63–69, <https://doi.org/10.14710/empati.2024.27699>.

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## Guardian Navigation in Islamic Family Law: From History to Implementation in Indonesia and Muslim Countries

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### Abstract

*This study examines the role and function of guardians in Islamic family law by emphasizing the historical aspects and their implementation in Indonesia and other Muslim countries. Guardians are responsible for the implementation of marriage, which is a long-standing tradition in Islamic law. This study investigates how the concept of guardians has evolved in various schools of thought and how these interpretations have impacted legal practice in various Muslim countries. In addition, this study discusses how the concept of guardians is used in Indonesian national law, considering how they are used in other Muslim countries. This study shows that, although the basic principles are the same, the implementation and interpretation of laws related to guardians vary greatly due to cultural factors, national laws, and social dynamics. The method used in this study is library research. Data and sources were used from both printed and electronic literature, namely books, journals, and laws, and analyzed comparatively. The results of this study provide us with an understanding of the complexity of the role of guardians in Islamic family law and how this role affects the contemporary system. The main purpose of the guardianship rules remains consistent to maintain welfare and justice in marriage.*

**Keywords:** Rule, Guardian, Muslim Countries.

### Abstrak

Studi ini meneliti peran dan fungsi wali dalam hukum keluarga Islam dengan mengutamakan aspek historis dan pelaksanaannya di Indonesia dan negara-negara Muslim lainnya. Wali bertanggung jawab atas pelaksanaan pernikahan, yang merupakan tradisi lama dalam hukum Islam. Penelitian ini menyelidiki bagaimana konsep wali berkembang dalam berbagai mazhab dan bagaimana interpretasi ini berdampak pada praktik hukum di berbagai negara Muslim. Selain itu, penelitian ini membahas bagaimana konsep wali digunakan dalam hukum nasional Indonesia, dengan mempertimbangkan bagaimana mereka digunakan di negara-negara Muslim lainnya. Studi ini menunjukkan bahwa, meskipun prinsip dasar sama, implementasi dan interpretasi hukum terkait wali sangat berbeda karena faktor budaya, hukum nasional,

dan dinamika sosial. Metode yang digunakan dalam penelitian ini adalah penelitian pustaka. Data dan sumber yang digunakan dari kepustakaan baik cetak maupun elektronik yaitu buku, jurnal, undang-undang dan dianalisis secara komparatif. Hasil penelitian ini memberi kita pemahaman tentang kompleksitas peran wali dalam hukum keluarga Islam dan bagaimana peran ini berpengaruh pada sistem kontemporer. Tujuan utama dari aturan wali tetap konsisten dalam upaya menjaga kesejahteraan dan keadilan dalam pernikahan.

**Kata Kunci:** Aturan, Wali, Negara Muslim.

## INTRODUCTION

According to human nature, marriage is the only legal way to get married and have children. Human life and civilization depend on the continuity of marriage from every generation of mankind.<sup>1</sup> Marriage is done to create a harmonious family that can meet their innate and inner needs and generate happiness and affection between family members.<sup>2</sup>

Social, religious, and legal relationships have a very important role. Therefore, marriage is only considered valid if it meets the conditions and principles set. In the fiqh of *munakahat*, one of the important requirements is to get the blessing of the bride-to-be's parents.<sup>3</sup> This is by Articles 3 and 7 of the Compilation of Islamic Law (KHI),<sup>4</sup> and Law No. 1 of 1974 Article 1 states the formation of a happy family or household, based on the One Godhead,<sup>5</sup> and very important parental consent.<sup>6</sup>

The guardian rule has a long history, ranging from the classical Islamic era to the modern era, where the rule has undergone adaptation and change along with social, political, and cultural changes. Initially, guardianship rules were created to ensure that the marriage was carried out with the full consent and understanding of the woman and to prevent forced or unpleasant marriages. Over time, some Muslim countries have adapted these rules to their local contexts and needs.

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<sup>1</sup> Hasbi Indra, *Potret Wanita Shalehah* (Jakarta: Penamadani, 2004), hlm. 61.

<sup>2</sup> Abd Rahman Ghazaly, *Fiqh Munakahat* (Bogor: Kencana, 2003), hlm. 22.

<sup>3</sup> Ah. Soni Irawan, (2022). "Eksistensi Wali Dalam Akad Pernikahan Perspektif Teori Double Movement Fazlur Rahman," *El-Ahli : Jurnal Hukum Keluarga Islam* 3, (2): 227–43, <https://doi.org/10.56874/el-ahli.v3i2.968>.

<sup>4</sup> Abdurrahman, *Kompilasi Hukum Islam Di Indonesia*, 1st ed. (Jakarta: Akademika Pressindo, 1992), hlm. 114.

<sup>5</sup> Lihat Undang-Undang Nomor 1 Tahun 1974, Pasal 1.

<sup>6</sup> Ahmad Rofiq, *Hukum Islam Di Indonesia*, 6th ed. (Jakarta: Raja Grafindo Persada, 2003), hlm. 74.



One of the requirements for prospective brides in the Indonesian Muslim community is to have a marriage guardian. In other words, a person cannot get married without the presence of his marriage guardian. Article 19 of the Compilation of Islamic Law (KHI) regulates how the bride-to-be must ask the guardian to attend the wedding feast.<sup>7</sup>

The novelty of this study lies in a comprehensive approach that connects historical, normative, and contextual aspects in the analysis of the role of guardians in Islamic family law. Such as research conducted by Qurraatul Ainiyah.<sup>8</sup> Rohmat<sup>9</sup> The position of the guardian in marriage is about whether it is included in the legal marriage or not. This is important to know because it will affect the validity of the marriage contract. Based on the same text, Imam Shafi'i and Imam Hanafi have different thoughts. Imam Shafi'i stated that the wali is one of the pillars of marriage that must exist and the legal requirements are met, while Imam Hanafi stated that the wali is not a harmonious person in marriage, so its absence does not affect the validity of the marriage.

Article written by Jefry Tarantang.<sup>10</sup> The position of the marriage guardian is based on the perspective of placing the guardian as a guardian who can protect the bride-to-be from psychological aspects related to her emotions and psychology, related to public views, to the bride-to-be that can cause sociological losses. The guardian of marriage in the context of hadith is an obligation, this is relevant to the development of modern times today. From the perspective of marriage law in Indonesia, it has reduced the need for guardians, so in the context of the relevance of the hadith about guardians in modern times, it is a form of need as a form of legal protection for dignity (*hifzul 'irdh*). It is very important that the guardian in marriage as a form of sincerity and has sacred value, the bride-to-be and groom must ask permission from their guardian as a form of blessing to undergo marriage.

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<sup>7</sup> Mughni Labib Ilhamuddin Is Ashidique, (2021) "KRITIK ATAS PERATURAN WALI NIKAH DALAM KHI DAN FIKIH PERSPEKTIF GENDER Mughni," *Al-Mazaahib: Jurnal Perbandingan Hukum* 9, (1): 23–44.

<sup>8</sup> Qurrotul Ainiyah, (2020) "Kedudukan Wali Dalam Pernikahan (Perspektif Imam Syafi'i Dan Imam Hanafi)," *Mukammil: Jurnal Kajian Keislaman* 3, (2): 107–22.

<sup>9</sup> Rohmat, (2011) "KEDUDUKAN WALI DALAM PERNIKAHAN : STUDI PEMIKIRAN SYÂFI ' ÎYAH , HANAFIYAH ," *AL- 'ADALAH* 10, (2): 165-178.

<sup>10</sup> Jefry Tarantang, (2022) "Relevansi Hadis Tentang Wali Nikah Di Zaman Modern," *Ahkam: Jurnal Hukum Islam* 10, (1): 1–17, <https://doi.org/https://doi.org/10.21274/ahkam.2022.10.1.1-26>.

In addition, the study offers a comparative perspective that has not been explored much, by analyzing how the concept and practice of guardianship is implemented differently in different Muslim countries. It provides new insights into the factors that influence variations in implementation, such as sectarian differences, local traditions, and state policies. This research also considers the social and legal dynamics that affect the interpretation and implementation of the role of guardians in contemporary times, making them relatable to the challenges and needs of the times.

Studies conducted in Muslim countries, such as Indonesia, Malaysia, Saudi Arabia, Egypt, and Pakistan, show that, despite differences in the way guardianship rules are applied and interpreted, the main purpose remains the same. By establishing guardianship rules to protect women's rights, maintain family stability, and ensure that marriage is carried out with legal consent. But the rules are different in every Muslim country due to the differences in culture, society, and rules.

## **RESEARCH METHODS**

This research is a literature study, also known as a literature review. The study will look at guardianship in a past context and compare guardianship provisions in Indonesia and other Muslim countries. Furthermore, this study will find out the status of guardian provisions in various Muslim countries. The data and sources needed for this research were obtained from literature, both print and electronic, including books, journals, laws, and other library sources that support this research. Once the data is obtained, these sources will be analyzed comparatively.

## **RESULTS AND DISCUSSION**

### **In Review from History**

The political situation of the country was very different at the beginning of the Abbasid Dynasty, especially during the time of Imam Shafi'i. The Arabs played an important role in the government of the Umayyad Dynasty. During the Abbasid Dynasty, the Persians, especially the Khurasan, gained many strategic positions in the country in exchange for their political support, which allowed them to overthrow the previous caliph's government.<sup>11</sup> The influence of the Arabs was hampered by the political power of the Persians in government, as recorded by historians.

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<sup>11</sup> Ahmad Nahrawi Abdus Salam, *Al-Imâm Al-Syâfi'î fî Madhâbihi Al-Qadîm Wa Al-Jadîd*, terj. Usman Sya'roni (Jakarta: Penerbit Hikmah, 2008), hlm. 69.

Women under Abbasid rule were divided into three types: general, special, and slave. Men and women of a certain class tended to enjoy the same freedom at the beginning of the Abbasid Dynasty. Kayzuran, al-Rashid's mother and al-Mahdi's wife was one of the many successful and influential women in the government of the time.<sup>12</sup> Men usually look for women in the market to be slaves, but women from the elite have the power to set the terms of their marriages. They reject marriages that require conditions and responsibilities that bind couples, and they also do not want to have children after they die.<sup>13</sup>

Women were considered a commodity at the time; they were sold in the market to become slaves to the lust of the Caliph, the palace family, and the wealthy man. No modern woman writes to show who they are. Texts about women written by men in a very patriarchal culture and era usually describe women's conditions, roles, and relationships with patriarchal biases. This is because at that time almost all text writers were men. There is a lack of data from books that discuss the roles and responsibilities of women in contemporary society. Leila Ahmed stated that women in the Abbasid era were not involved in significant social issues, as mentioned by Zaenul Mahmudi. Since then, upper-class and bourgeois women have been living in exile. They were required to fulfill the sexual desires of wealthy and royal men and lived in harems, isolated parts of the house for Arab women. Since it was the norm for female slaves to have many concubines, the Muslim elite was able to avoid embarrassment.<sup>14</sup>

Parents are worried about having a daughter because of the condition of women who affirmed in the Abbasid period because the phenomenon of women in their society can occur in their families, especially in lower-class families.<sup>15</sup> In the poet's phrase, death is a better fate than marrying and then becoming a concubine or sexual slave of a wealthy man.

Women were given a noble position and a higher degree after the arrival of Islam. Islam wants women's degrees to be honorable, noble, and better. This means that women are no longer discriminated against, humiliated, and unfairly exploited. Women have responsibilities and

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<sup>12</sup> Philip K Hitti, *History Arabs*, terj. R. Cecep Lukman Yasin dan Dedi Slamet Riyadi (Jakarta: Serambi, 2008), hlm. 414.

<sup>13</sup> Zaenul Mahmudi, *Sosiologi Fikih Perempuan* (Malang: UIN Malang Press, 2009), hlm. 83.

<sup>14</sup> *Ibid.*

<sup>15</sup> Hitti, *History Arabs*, hlm. 414.

rights in the household and society according to the teachings of Islam. One of the Islamic marriage laws requires the daughter to be married to attend the guardian.

### **Purpose of the Wali Rule in Islamic Family Legislation**

People in the world want to be happy. However, obeying the rules of life is not easy to achieve. Marriage, which begins with a sincere desire to build a household, is one of the processes of achieving happiness. Legally, marriage is commanded, allowed, and sometimes required.<sup>16</sup> From the Qur'an and the Sunnah, scholars make more detailed rules about the family.<sup>17</sup> In addition, Islam regulates the rights and obligations necessary for marriage. God will give the couple who are going to get married enough.

According to the fuqaha, as long as it meets certain conditions and harmony, the marriage is carried out in front of two witnesses with the words *ijab* and *qobul*. The bride's guardian usually says *ijab* and the man say *qobul*, which is a statement of acceptance.<sup>18</sup>

The purpose of the guardian rule in Islamic legislation is very important and has many aspects related to justice, protection, and social stability. The guardian rule in marriage, for example, aims to ensure that the marriage takes place with the consent and legal agreement of both parties. The guardian acts as a representative of the family or a party that has the authority to grant permission, ensuring that the bride-to-be is not forced or forced to accept the marriage. It provides legal protection for women and maintains integrity and fairness in the marriage process.<sup>19</sup>

According to the etymology, the wali carries out the marriage contract of a woman he loves and performs a *mitsil* dowry. If a widow wants to get married, she does not need to ask for the permission or consent of her parents, whereas a girl cannot marry without the

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<sup>16</sup> Agung Tri Nugroho, (2019). "Rekonseptualisasi Otoritas Perwalian Nikah Di Indonesia," *Jurnal Mahkamah* 4, (1): 63–82.

<sup>17</sup> Khoiruddin Nasution, *Hukum Perkawinan* (Yogyakarta: Pustaka Pelajar dengan Academia, 2005), hlm. 1.

<sup>18</sup> Abdurrahman Al-Jazairi, *Kitab Al Fiqh Ala Mazahibul Al-Arba'ah*, 4th ed. (Jakarta: Pustaka Al-Kautsar, 2015), hlm. 26.

<sup>19</sup> Nida Chaerunnisa and Mukhtar, (2017) "Studi Komparatif Kedudukan Wali Dalam Pernikahan Menurut Imam Syafi-i Dan Imam Hanafi1 (Comparative Study of Marital Guardian Position According to Imam Syafi-i and Imam Hanafi," *Mizan: Journal of Islamic Law* 1, (2): 209–28, <https://doi.org/https://doi.org/10.32507/mizan.v1i2.12>.

permission or consent of the guardian.<sup>20</sup> In addition, the guardianship law aims to protect the rights of orphans and people who are unable to take care of themselves. In cases where orphans are cared for by guardians, guardians are responsible for safeguarding and managing the orphans' property and interests until they reach the age limit of majority and can take care of themselves. This guarantees that children who have lost a parent are not abandoned and get the support they need to thrive.

Islamic law and Indonesian family law are not in line, according to KHI Article 15 paragraph 2 and Law No. 1 of 1974 Article 6 paragraph 2, a child who has not reached the age of 21 must receive a certificate from his parents before starting his education. In other words, the law does not require adult students to marry without a guardian. According to the fiqh munakahat of Madhhab Shafi'i, such statements are unacceptable on a legal basis. Guardianship is an important principle in marriage. However, the content of the Law mentioned above is still by the Hanafi madhhab.<sup>21</sup>

KHI's material in the field of marriage is highly dependent on Shafi'iyah fiqh, although it is not entirely taken from the fiqh of the Shafi'i madhhab when it was compiled. Some articles, such as paragraph (1) of article 20, stipulate that a man must be the guardian of the marriage. For example, Pasal 14 of the KHI establishes the conditions for marriage: (1) the groom-to-be, (2) the bride-to-be, (3) the guardian, (4) two witnesses, and (5) ijab, qabul. In the same way, madhhab Shafi'i believes that the five requirements mentioned above must exist.<sup>22</sup>

### **The Practice of Guardians in Marriage in Indonesia**

One of God's purposes is to create men and women to establish a happy, everlasting family.<sup>23</sup> Marriage must be carried out according to the conditions and harmony. All of the following requirements must be met:

- a. A man
- b. A woman

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<sup>20</sup> Sirajudin, (2015). "Konstruksi Hukum Keluarga Islam Di Indonesia: Analisis Terhadap Undang-Undang RI No . 1 Tahun 1974 Tentang Perkawinan Dan KHI," *Istinbath, Jurnal Hukum Islam* 14, (2): 169.

<sup>21</sup> Amir Syarifuddin, *Hukum Perkawinan Islam Di Indonesia: Antara Fiqih Munakahat Dan Undang-Undang Perkawinan* (Jakarta: Kencana Prenanda Grup, 2006), hlm. 30.

<sup>22</sup> Abdul Rahman Ghazali, *Fiqh Munakahat* (Jakarta: Kencana Prenanda Media, 2010), hlm. 48.

<sup>23</sup> Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan.

- c. The guardian who marries.
- d. There are 2 witnesses.
- e. Ijab and qabul.<sup>24</sup>

In addition, Chapter IV Article 14 (KHI) discusses the principles and conditions of marriage. The KHI stipulates that the conditions required to perform marriage are:

- a. Husband-to-be
- b. Wife-to-be
- c. Marriage guardian
- d. 2 witnesses,<sup>25</sup> and
- e. Ijab and qabul.

According to beliefs, people can become virtuous people if they follow the lessons and rules of their religion. Condition in this case means the requirements necessary to determine whether a job is legitimate or not, even if it does not fall into that category. Harmony in this case means the requirements needed to determine whether a job is legitimate or not.<sup>26</sup>

According to Article 19 of the Compilation of Islamic Law No. 1 of 1991, the bride-to-be must qualify as the marriage guardian. This is contrary to the opinion of Imam Shafi'i, who argued that the guardianship of a woman is the main condition for a valid marriage. Marriage Law Number 1 of 1974 also regulates guardianship. The prosecutor, his or her spouse, and their families have the right to request the annulment of the marriage in the presence of an unauthorized (P2N), an invalid marriage guardian, or in the absence of two witnesses.

This indicates that the marriage can be annulled or voided if the guardian does not submit it. However, the right to cancel it is lost if the husband and wife continue to live together. Thus, the woman is entitled to dowry. With the law and its explanation, it is clear that a guardian is required for the validity of the marriage. The statement that marriage is valid, if it is performed according to the laws of each religion and belief" shows that in the 1945 law, marriage does not exist.<sup>27</sup> The wali is the heir

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<sup>24</sup> Syarifuddin, *Hukum Perkawinan Islam Di Indonesia: Antara Fiqih Munakahat Dan Undang-Undang Perkawinan*, hlm. 61.

<sup>25</sup> Undang-Undang RI. Nomor 1 Tahun 1974 Tentang Perkawinan dan Kompilasi Hukum Islam.

<sup>26</sup> Tihami, *Kajian Fikih Nikah Lengkap* (Jakarta: PT. Raja Grafindo Persada, 2009), hlm. 12.

<sup>27</sup> Peuno Daly, *Hukum Perkawinan Islam Suatu Studi Perbandingan Dalam Kalangan Ahlus-Sunnah Dan Negara-Negara Islam*, n.d, hlm. 135.

chosen from the priority according to Imam Malik and Imam Shafi'i, which is the closest to the family relationship.<sup>28</sup>

A qarib wali is a wali. The guardianship passes to the guardian *ab'ad* if the guardian does not meet the following conditions: puberty, intellectual, Islamic, independent, good-minded, and fair. However, when the nearest guardian is on Hajj or Umrah, the guardianship does not move to the guardian *ab'ad* but generally moves to the guardian of the haki. If all the guardians are absent, the guardian of the judge is in a state of *adhal*, or the guardian of the judge refuses to marry without a valid reason, the guardian of the judge acts as the guardian of the marriage. If the guardian judge is in another place that is two *marhalah* or about 60 km away, the guardian judge will perform the marriage contract in the same way.<sup>29</sup>

As an amendment to the Regulation of the Minister of Religion of the Republic of Indonesia No. 2 of 1987, a guardian judge is a Muslim head of state who is authorized to marry a person with a guardian of a guardian judge. Regulation of the Minister of Religion of the Republic of Indonesia No. 30 of 2005 establishes this definition.

### **Guardianship Practices in Marriage in Malaysia**

Malaysia is a federal state with 13 states and one federal territory. The respective states have Islamic Family Laws (UUKI), known as the Islamic Family Law Enactment. In these enactments, the term "guardian judge" or "guardian judge" is used. Three of the fourteen enactments of Pahang, Perak, and Sarawak use the formula of guardian judges, while others use the term "guardian king". The guardian in these enactments is a guardian authorized by the Yang di-Pertuan Agong to carry out guardianship for women who do not have a nasab to marry.<sup>30</sup> "or a woman whose guardian is reluctant to marry her without a compelling reason following Sharia Law" is an additional formulation found in the enactment of the Perak UUKI. In this section, the definition of a guardian or judge only powers in the case of a prospective bride who does not

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<sup>28</sup> Tihami, *Kajian Fikih Nikah Lengkap*, hlm. 90.

<sup>29</sup> Amir Syarifuddin, *Garis-Garis Besar Fiqh* (Jakarta: Kencana Prenanda Media Grup, 2010), hlm. 94.

<sup>30</sup> Akhmad Fadly Syahputera and Ferdiyan, (2022) "Konsep Wali Hakim Dalam Pembaharuan Hukum Keluarga Islam Di Malaysia Dan Indonesia," *Jurnal Asy-Syari'ah* 24, (2): 179–92, <https://doi.org/10.15575/as.v24i2.17735>.

have a guardian or whose guardian is reluctant to marry. This arrangement follows the provisions of Islamic law.<sup>31</sup>

Only in the case of marriage can the wali judge also known as the wali raja in Malaysia replace the wali nasab according to the law. Marriage also requires a guardian. According to Malaysian law, every Muslim woman who marries must be protected. In the Islamic Family Law (Negeri Sembilan) Enactment of 2003, the guardian judge is referred to as the guardian of the king. In Negeri Sembilan, Selangor, Kelantan, Federal Territories, Malacca, and Penang, the term wali hakim is also used. Perak, Sarawak, and Pahang also use it. According to Article 7 of the Islamic Family Law (Negeri Sembilan) Enactment of 2003, only the following individuals have the authority to perform marriages.<sup>32</sup>

- 1) Marriages in Negeri Sembilan must be married by Sharia law: and must comply with the provisions of this Enactment.
  - a. The guardian in front of the Registrant or the Registrant Chairman.
  - b. The deputy guardian before the Chief Registrar or Registrant and with their permission; or
  - c. The Chairman of the Registrant or the Registrant as the deputy guardian.
- 2) Sharia law requires the guardian of the King to marry a woman who does not have a guardian from the nasab.

### **Guardianship Practices in Marriage in Saudi Arabia**

The State of Saudi Arabia uses Madzhab Hambali as the State Madhhab, therefore the laws containing sharia are based on the books of the madzhab. Guardianship in the Hambali madhhab is mandatory by law, even marriage is considered invalid without a guardian. A woman cannot marry herself without the permission of her guardian, and similarly cannot marry another woman without the permission of her guardian. Wali is a requirement for marriage guardianship in the Hambali School. If the bride herself has already entered into a marriage

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<sup>31</sup> Kholis Bidayati, Muhammad AM Alwi, and Suci Ramadhan, (2021) "Dinamika Pembaharuan Hukum Keluarga Islam Di Negara Muslim," *ADHUKI: Journal of Islamic Family Law* 3, (1): 51–68.

<sup>32</sup> Zulfaqar Bin Mamat, "Tertib Wali Hakim Dalam Pekahwinan: Kajian Kes Di Negeri Sembilan," *Persatuan Ulama Malaysia*, 2023, [https://www.researchgate.net/publication/334361477\\_TERTIB\\_WALI\\_HAKIM\\_DALAM\\_PERKAHWINAN\\_KAJIAN\\_KES](https://www.researchgate.net/publication/334361477_TERTIB_WALI_HAKIM_DALAM_PERKAHWINAN_KAJIAN_KES).



contract, the marriage must be separated because the law is *fasid*.<sup>33</sup> However, in terms of punishment, observing the marriage has become a debate discourse so that there is no punishment for the perpetrator of the marriage. Meanwhile, for guardians, in order from father, grandfather, and then brothers. The marriage by the distant guardian, while the closer guardian still exists, causes the marriage to be annulled.<sup>34</sup>

In addition to the command from religion, women who want to get married must have a guardian because women are creatures who are given glory by Allah. They also show affection and love for their father and family to their daughter-to-be, who will be responsible for safeguarding her humanity, dignity, and sanctity. Married people are also considered to understand the guardian better, so they always expect their daughter or daughter to be a good guardian.<sup>35</sup>

### **Guardian Practices in Marriage in Sudan**

Islamic law in Sudan has been around for a long time. When Muhammad Ahmad al-Mahdi took over Khartoum in 1885, Islamic law throughout Sudan was changed. Al-Mahdi said that the teachings of Islam will be restored as in the time of the Prophet Muhammad (peace be upon him). The source of al-Mahdi's government law is the Qur'an and the sunnah, under the interpretation of al-Mahdi. This means that al-Mahdi's Islamic law differs from the Sunni Islamic law that has been applied before. As a result, the role of scholars in the time of al-Mahdi was reduced.<sup>36</sup>

Family law in Sudan is left to the law applicable to the religion of the couple. It can be a Muslim married couple, then the applicable law is Islamic law. Thus, if the married couple is a Christian, Jewish, Hindu, or local belief, then the law is applied according to their religion and belief.<sup>37</sup>

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<sup>33</sup> Neng Eri Sofiana and Dian Meiningtias, (2023) "Reaktualisasi Perlindungan Perempuan Dalam Hukum Keluarga Islam Di Arab Saudi Dan Mesir," *Indonesian Journal of Shariah and Justice* 3, (1): 1–25, <https://doi.org/10.46339/ijsj.v3i1.46>.

<sup>34</sup> Sofiana and Meiningtias.

<sup>35</sup> Hamzah, (2022). "KEDUDUKAN WALI NIKAH MENURUT SHAMSI ALI (STUDI KOMPARATIF ANTARA MAZHAB HANAFI DAN MAZHAB SYAFI'I)," *AR-RISALAH* 2, (1): 66–84.

<sup>36</sup> Olaf Kondgen, Shari'ah and National Law in the Sudan, *Sharia Incorporated: A Comparative Overview of the Legal System Of Twelve Muslim Countries in Past and Present* (Leiden: Leiden University Press, 2010), hlm. 185.

<sup>37</sup> Fadly Syahputera and Ferdiyan, "Konsep Wali Hakim Dalam Pembaharuan Hukum Keluarga Islam Di Malaysia Dan Indonesia."

Islamic family law in Sudan is enforced periodically by the great *qadhi* through *manshurat* (*Manshuraat al-Qadhi al-Qudhat*). Around 1916 during the *Anglo-Egyptian condominium rule*, the great *qadhi* had issued 57 *manshurs* relating to family law in the view of the Hanafi *madhhab*. The reform of family law continues to be sustainable with the continuous issuance of *manshurat* on family law, especially in the view of the Hanafi *madhhab*.<sup>38</sup>

An analysis conducted by Khairuddin Nasution states that the Sudanese state needs a guardian for marriage. This is by Article 2 of *Manshur* No. 54 of 1960, which states that "the person appointed as guardian must be a Muslim, mature, and sane. If the person concerned does not meet the requirements, then another guardian will be called to replace him". According to the Maliki School, guardians can be sequential according to their order.<sup>39</sup> *Manshur* No. 54 of 1960 Article 6 regulates the procedure for the approval of the bride-to-be. If an adult woman or a widow agrees to marry, then her consent must be with a firm statement. If a woman is not of legal age, then her consent is silent.<sup>40</sup>

The marriage contract between a man and the female guardian must be officially recorded.<sup>41</sup> The age of the bride and groom, the number of the letter of expenditure, and the amount of cash dowry or debt are all listed in the marriage record. According to Sudanese marriage law, "*urf*" marriages, known in Indonesia as *sirri* marriages or marriages under the hands, are considered valid. However, a wife who is married without registration does not have the same rights as other couples.<sup>42</sup>

### **Guardian Practices in Marriage in Morocco**

Forced marriages are legally prohibited in Morocco, and marriages must be performed with the consent of the guardians and the bride-to-be. However, the right to *ijbar* is still recognized by the state if there is a

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<sup>38</sup> Ahmad Bunyan Wahib, (2014) "Reformasi Hukum Keluarga Di Dunia Muslim," *Ijtihad: Jurnal Wacana Hukum Islam Dan Kemanusiaan* 14, (1): 1–19, <https://doi.org/10.18326/ijtihad.v14i1.1-19>.

<sup>39</sup> Qodir Zaelani, (2012). "PEMBAHARUAN HUKUM KELUARGA: KAJIAN ATAS SUDAN-INDONESIA," *Al-'ADALAH* 10, (42):331-42.

<sup>40</sup> Zaelani.

<sup>41</sup> Ahmad Tholabie Kharlie and dkk, *Kodifikasi Hukum Keluarga Islam Kontemporer: Pembaharuan, Pendekatan Dan Elastisitas Penerapan Hukum* (Jakarta: Kencana, 2020), hlm. 176.

<sup>42</sup> Kondgen, Shari'ah and National Law in the Sudan, *Sharia Incorporated: A Comparative Overview of the Legal System Of Twelve Muslim Countries in Past and Present*, hlm. 206.

concern that marriage will cause suffering to the child.<sup>43</sup> Marriage in Morocco cannot be done without the consent of the guardian; this applies to series marriages, male marriages, and other types of marriages. Moroccan people who adhere to religious beliefs will comply with *the Mudawwanatul Usrah Law*.<sup>44</sup>

The guardian of marriage in the Moroccan Family Law is contained in articles 13, 17, 18, 24, and 25 of *Al Mudawwanah al-Akhwal al-Syakhshiyyah* No. 70.03 of 2004.

#### **Article 13**

"Marriage must meet several requirements, such as the ability of a man and a woman to marry, no opportunity to abort the dowry, the presence of a guardian when determined, the presence of a fair witness, and no obstructions".

#### **Article 17**

"Power of attorney is required for marriage using guardians"

#### **Article 18**

"Guardians are not allowed to marry under their guardianship".

#### **Article 24**

"Guardianship is the right of every woman who is smart or understands her will for her good".

Since guardians are the property of women absolutely, guardians do not have the right to be guardians of women who will marry if she does not give them power. Thus, the guardian cannot force the woman who is going to marry him. However, women must have a positive goal for their marriage, which is to have a positive goal.

#### **Article 25**

A woman who already understands may marry someone else or give herself up to her guardian.

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<sup>43</sup> Khoiruddin Nasution, *Status Wanita Di Asia Tenggara: Studi Terhadap Perundang-Undangan Perkawinan Muslim Kontemporer Di Indonesia Dan Malaysia* (Leiden-Jakarta: INIS, 2002), hlm. 122-123.

<sup>44</sup> Nasiri Nasiri, (2021). "Praktik Perkawinan Di Negara Maroko (Praktik Undang-Undang Mudawwanatul Usroh Di Bumi Para Wali)," *Jurnal Keislaman* 1, (2): 163–85, <https://doi.org/10.54298/jk.v1i2.3362>.

Puberty and *mumayyiz* women can submit their marriage contract to their father or one of their family members. Since the bride has control over the marriage contract, this provision has eliminated the role of guardians in marriage.

### **Guardianship Practices in Marriage in Iraq**

The selection of Islamic family law in modern Muslim countries is based on several considerations, *first*, the deliberate alteration of the material on the enactment of family law in modern Muslim countries. Such as the reform of polygamy, the existence of guardians in marriage, the limits and age difference of marriage, punishments for violating parties, and provisions for the distribution of inheritance. *Second*, geographical location when the country is a representation of countries in North Africa, West Africa, West and East Asia, and Southeast Asia. *Third*, in terms of religious and historical culture, community role models in classical fiqh schools from several countries.<sup>45</sup>

The practice of guardianship in marriage in Iraq reflects the social, cultural, and legal complexities influenced by a long history of conflict and political change. Guardians play an important role in the marriage process, especially in the context of Islamic family law applied in Iraq. The role of guardians is often governed by local religious and customary laws, and in many cases, guardians must give consent for marriage, especially for women.<sup>46</sup>

Most of Iraq's Muslim community adheres to the Hanafi school. However, the law on the family in Iraq comes from a variety of sources, not just from the Hanafi school.<sup>47</sup> In this case this issue of trust, the latest amendment to Iraqi law states that:

- i. No family or anyone can force someone, whether a man or a woman, to marry if the party concerned does not mind. Sexual harassment must occur before the marriage is annulled. Likewise, the family or other people cannot prevent a person

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<sup>45</sup> Miftahul Huda, (2018) "Ragam Bangunan Perundang-Undangan Hukum Keluarga Di Negera-Negara Muslim Modern: Kajian Tipologis," *Al-Manahij: Jurnal Kajian Hukum Islam* 11, (1): 49–60, <https://doi.org/10.24090/mnh.v11i1.1267>.

<sup>46</sup> Asst Prof, Mohammed Shahr, and Mohammed Salh, (2022) "The Guardianship of the Mother in Marriage in the Amended Iraqi Personal Status Law in the Kurdistan Region of Iraq A Jurisprudential Evaluative Study," *Journal of College of Law for Legal and Political Sciences* 11, (39): 459–69.

<sup>47</sup> Moh. Mujibur Rohman, (2021) "Hukum Keluarga Islam Irak; Menakar Historis Dan Socio Cultural Masyarakat Dalam Ber-Fiqh," *ASASI: Journal of Islamic Family Law* 1, (2): 94–112, <https://doi.org/10.36420/asasi.v1i2.6>.

who wants to get married from getting married to the extent that it is by the regulations (Article 9 paragraph 1).

- ii. If a person violates the above provisions, if he is a level 1 family member, he will be subject to a maximum sentence of 3 years in prison or a fine. If the person who commits the violation is another person (not a member of the 1st level family), the maximum penalty is 10 years in prison or a minimum of 3 years in prison (Article 9 paragraph 2).
- iii. Article 9 paragraph 3 states that the Sharia Court or the Personal Status Court stipulates punishment.

However, the implementation of the role of guardian in Iraq varies, especially between Sunni and Shia communities, each of which has different legal traditions. For example, in Sunni communities, guardians usually have greater authority over marriages, while in Shia communities, there is more freedom for individuals to choose a partner. These differences reflect the growing influence of political and social sectarianism in Iraq. Conflict and massive migration over the past few decades have also affected the dynamics of marriage in Iraq, including the role of guardians. In some cases, guardianship practices can become looser or more stringent depending on socio-economic conditions and political pressures in a particular area. This shows that the role of the guardian in marriage in Iraq is not only a religious issue, but also greatly influenced by other factors such as conflict, migration, and changes in social structures.<sup>48</sup>

### **Guardianship Practices in Marriage in Pakistan**

Pakistan is one of the countries that follows the Hanafi madhhab as a reference in legal matters, especially in the legal context related to Islamic family law. Most of Pakistan's population embraces Islam. Pakistan has experienced three constitutional changes, while the new Muslim Family Law was enacted in 1961.<sup>49</sup>

According to Article 2 of the Muslim Family Law of 1961 Number 8, the minimum age for marriage is 18 years old, and the age for women

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<sup>48</sup> Lucine Taminian, "Marriage in Times of War and Political Conflict: The Case of Iraq," The Center For Social Sciences Research & Action, n.d., <https://civilsociety-centre.org/paper/marriage-times-war-and-political-conflict-case-iraq>.

<sup>49</sup> Dina Sakinah Wijaya Pratiwi Uly Romadhoni, (2024) "Pencatatan Pernikahan Dan Batas Usia Pernikahan Di Negara Muslim: Studi Kasus Di Mesir, Maroko, Tunisia, Yordania, Turkiye, Pakistan, Malaysia, Indonesia," *As-Syar'i: Jurnal Bimbingan & Konseling Keluarga: Jurnal Bimbingan & Konseling Keluarga* 4, (1): 321, <https://doi.org/10.47476/assyari.v6i1.375>.

is 16 years old.<sup>50</sup> The parent or guardian of a person under the age of 18 who marries a minor is liable to imprisonment for one month or a fine of one thousand Rupees or both, except for women who commit jihad.<sup>51</sup> In addition, officers who violate the Marriage Registration Regulations will be subject to penalties. Marriage can only be performed on adult women without coercion, even if they are sent for a contract by their guardian in this situation.

In practice, the status of the guardian of the marriage seems to be an attempt to eliminate the concept of madhhab fiqh. In Pakistan, where the majority of people adhere to the Hanafi school, the marriage process is stricter and requires a guardian of the marriage, although the provisions of *siyasah syar'iyah* apply.

However, in recent decades, the legal interpretation of the role of guardians in Pakistan has changed, along with increased advocacy for women's rights and adjustment to modern law. For example, under the applicable law, an adult woman who has reached the age of marriage has the right to marry without the consent of the guardian, known as *khila* or *nikkah without a guardian*. These changes reflect the influence of legal reforms and pressure from human rights groups that promote gender equality.<sup>52</sup>

### **Guardian Practices in Marriage in Tunisia**

Along with the social and legal changes that have occurred, the practice of matrimonial guardianship in Tunisia has undergone a significant transformation. Tunisia is known as one of the most progressive Islamic countries in reforming family law, including changing how guardians marry.

Gradual efforts to establish a comprehensive marriage law continued after independence in 1956. Tunisian marriage laws are still being created and regulated. The material combines legal thought from the Hanafi and Maliki schools. After the *Majallat al-Ahwal al-*

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<sup>50</sup> Tahir Mahmood, *Personal Law in Islamic Countries: History, Text, and Comparative Analysis* (New Delhi: Academy of Law in Religion, 1987), hlm. 242.

<sup>51</sup> Akbar Saputra, *Konsep Perwalian Dan Poligami Dalam Sistem Hukum Perkawinan Indonesia Dan Pakistan* (Jakarta: Fakultas Syariah dan Hukum UIN Syarif Hidayatullah, 2018), hlm. 44-45.

<sup>52</sup> Amna Hassan, (2021) "Women in Pakistan – A Comparative Analysis of Women's Rights on the Basis of Anglo-Saxon and Muslim Legal Traditions," *Vesnik Pravne Istorije* 1, (1): 283–322, [https://doi.org/10.51204/hlh\\_20110a](https://doi.org/10.51204/hlh_20110a).

Shahsiyyah marriage law was enacted in 1956, the effort was successful.<sup>53</sup>

First, the role of the guardian in Tunisia is more symbolic than practical. Tunisia's Personal Status Law, created in 1956, eliminated guardianship obligations for adult women who wanted to marry. This means that Tunisian women over the age of 18 can marry without the need for guardian consent, provided they have the legal power to do so. According to Article 3 of the Tunisian Law, a marriage can only be performed with the consent of both brides, witnessed by two witnesses, and with a dowry paid by the prospective wife. The new guardian is treated as if the bride-to-be is still a minor. This means they have to be present and reach a consensus. Guardians can submit their consent to the court if they refuse.

Second, for women who are still under the age of 18, the existence of a guardian is still necessary. In this case, the guardian serves to ensure that the marriage does not harm the interests of the child and is by the law. However, child marriage requires the consent of a judge, who acts as an additional watchdog to protect the rights of children.

In a historical context, the role of the wali in Tunisia initially follows the Maliki tradition, where the wali has great authority in determining a woman's marriage. However, along with social and political developments, Tunisia adopted a more progressive approach. Today, although the role of guardians is still recognized, adult women have the freedom to choose a partner without the need for guardian intervention, which signals a shift from traditional practices to the fulfillment of individual rights.<sup>54</sup>

The implementation is also motivated by Tunisia's efforts to balance Islamic values with the need for modern social reforms. The move is seen as part of a broader effort to empower women in the realm of family law, where Tunisia has taken a more advanced position than many Muslim-majority countries.<sup>55</sup>

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<sup>53</sup> Suchamdi, (2013). "HETEROGENEOUS PERUNDANG-UNDANGAN HUKUM PERKAWINAN NEGARA-NEGARA MUSLIM MODERN," *Kodifikasi* 7, (1): 31.

<sup>54</sup> Maaïke Voorhoeve, (2018) "Law and Social Change in Tunisia: The Case of Unregistered Marriage," *Oxford Journal of Law and Religion* 7, (3): 479–97, <https://doi.org/https://doi.org/10.1093/ojlr/rwy027>.

<sup>55</sup> Muhammad Sabir Rahman et al., (2022) "Implementation of Marriage Through Wali Hakim (Marriage Guardian) in the Office of Religious Affairs," *International Journal of Multicultural and Multireligious Understanding* 9, no. (4):

## CONCLUSION

The navigation of the role of guardians in Islamic family law is a reflection of the interaction between religious texts, legal interpretations, and socio-cultural dynamics. It is important for every Muslim country, including Indonesia, to continue to review and adjust the implementation of the role of guardian under the times without neglecting the fundamental and progressive values needed to ensure that Islamic family law remains relevant and able to protect the rights and interests of all parties involved in marriage.

These reforms show variations in the implementation of Islamic family law in different countries, depending on the local social, cultural, and political context. While some countries have retained the traditional role of guardians, others have reduced or even eliminated the reliance on guardians in the decision to marry adult women. Thus, the navigation of the role of the guardian in Islamic family law continues to evolve, reflecting the need to strike a balance between preserving tradition and meeting the demands of social change.

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## Resolution Of Household Conflicts Due To Different Choices Of Presidential Candidates Perspective Of Islamic Law

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### **Abstract**

*Islam indeed requires wives to be obedient to their husbands. However, is this obedience absolute, such that all decisions and commands of the husband must be followed by the wife, including in choosing a presidential candidate? Meanwhile, the state guarantees the right to vote and be elected for all citizens, and any form of restriction constitutes a violation of human rights. This study can provide both theoretical and practical benefits, especially in the context of conflict management and preventing domestic violence arising from differences in political views. This is a qualitative study employing a descriptive analysis approach in the context of a case study. The research predominantly uses secondary data sources obtained from published scholarly works relevant to this study. Data analysis was conducted by gathering information from various secondary literature sources such as journals, articles, and other academic works related to the topic discussed. The data was then analyzed by compiling an initial description from the collected data, followed by further analysis to answer the research questions. The findings of this study conclude that the obligation of a wife's obedience to her husband is not absolute. Similarly, in determining a presidential candidate, the wife may vote according to her conscience. A wife will not be classified as disobedient or rebellious to her husband solely because of differing political preferences. If household conflicts arise due to differences in presidential candidate preferences, solutions include open communication, setting privacy boundaries regarding politics, not easily believing hoaxes, and reminding each other that household harmony is more important than politics.*

**Keywords:** *Choice Differences; Conflict Management; Islamic Law; Nusyuz.*

### **Abstrak**

Islam memang mewajibkan para istri untuk patuh kepada suaminya. Namun, apakah kepatuhan ini bersifat mutlak, sehingga semua keputusan dan perintah suami wajib diikuti oleh istri, termasuk dalam hal memilih calon presiden. Sedangkan negara telah menjamin hak untuk memilih dan dipilih bagi semua warga negara, dan setiap bentuk pembatasan merupakan pelanggaran hak asasi manusia. Penelitian ini dapat memberikan manfaat baik secara teoritis maupun praktis, terutama dalam konteks

manajemen konflik dan mencegah kekerasan rumah tangga yang timbul akibat perbedaan pandangan politik. Penelitian ini merupakan jenis penelitian kualitatif dengan menggunakan pendekatan analisis deskriptif dalam konteks studi kasus. Penelitian ini secara dominan menggunakan sumber data sekunder yang diperoleh dari karya ilmiah yang telah dipublikasikan dan memiliki relevansi dengan penelitian ini. Analisis data dilakukan dengan cara mengumpulkan data dari berbagai sumber literatur sekunder seperti jurnal, artikel, dan karya ilmiah lain yang relevan dengan topik yang dibahas. Data kemudian dianalisis dengan menyusun deskripsi awal dari data yang dikumpulkan, kemudian dianalisis untuk menjawab pertanyaan penelitian. Hasil dari penelitian ini mendapatkan kesimpulan bahwa kewajiban kepatuhan istri kepada suami tidaklah mutlak. Demikian pula, dalam menentukan pilihan calon presiden, istri dapat memilih sesuai dengan hati nuraninya. Seorang istri tidak akan diklasifikasikan sebagai tidak patuh atau memberontak kepada suami hanya karena perbedaan pilihan politik. Jika terjadi konflik rumah tangga akibat perbedaan pilihan calon presiden, solusi yang dapat dilakukan adalah dengan komunikasi terbuka, membatasi privasi politik, tidak mudah mempercayai hoaks, dan saling mengingatkan bahwa keharmonisan rumah tangga lebih penting dibandingkan politik.

**Kata Kunci:** Nusyuz; Penyelesaian Konflik; Perbedaan Pilihan; Hukum Islam

## INTRODUCTION

Family is a fundamental element in society, thus playing a significant role. Islam has provided comprehensive guidelines to form a harmonious and quality family.<sup>1</sup> Everyone certainly hopes for a harmonious marriage.<sup>2</sup> Conflict in the household can come at any time, either because of trivial problems to serious problems. Often conflicts between husband and wife are caused by ignoring the rights and obligations that have actually been stipulated by Sharia, as a result of nusyuz behavior that destroys household harmony.<sup>3</sup> There are many factors that can cause conflict in the family, such as economic problems, not fulfilling rights and obligations<sup>4</sup>, to differences in

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<sup>1</sup> Dedisyah Putra and Nuriza Acela, "Human Rights Protection in the Islamic Family Law: A Case Study Concerning Domestic Violences," *El-Usrah: Jurnal Hukum Keluarga* 6, no. 1 (September 26, 2023): 1–16, <https://doi.org/10.22373/ujhk.v6i1.18511>.

<sup>2</sup> Muhammad Khusaini et al., "Creating a Harmonious Family Through Social Media Facebook in West Lampung," *El-Mashlahah* 12, no. 2 (December 31, 2022): 139–52, <https://doi.org/10.23971/el-mashlahah.v12i2.3937>.

<sup>3</sup> Alex Kusmardani et al., "Nushūz In Islamic Family Law: A Critical Study of Hadith Exegesis and Religious Court Verdicts," *Mawaddah: Jurnal Hukum Keluarga Islam* 2, no. 1 (May 1, 2024): 1–31, <https://doi.org/10.52496/mjhki.v1i2.6>.

<sup>4</sup> Moh Subhan, "RETHINKING KONSEP NUSYUZ RELASI MENCIPTAKAN HARMONISASI DALAM KELUARGA," *Al-'Adalah : Jurnal*

viewpoints, principles and choices. Differences of opinion that occur in the household are caused by each partner bringing different needs, desires, and backgrounds.<sup>5</sup> For example, differences in choices in terms of choosing presidential and vice presidential candidates during the election period. General elections (elections) are a milestone of democracy in a nation and play a crucial role in determining the future of a country.<sup>6</sup> Indonesia itself, which is a democratic country, provides equal rights and opportunities for all citizens to choose who is considered appropriate to lead the country.<sup>7</sup> The excitement of the campaign period does not only occur among politicians and academics, but has flowed into a topic that is always discussed at every level of society and has even entered the topic of household chatter. It is not uncommon to find people who experience tension between the political camps they support, which can lead to conflict and division and even lead to violence.

As experienced by a wife with the initials NO in Batu Aji District, Batam, Riau Islands who was persecuted by her husband with the initials AJ, this persecution was caused by differences in the choice of presidential candidates in the 2024 election last February. Reporting from *detiknews.com* AJ, the husband of NO, committed domestic violence against his wife until she was battered, this was confirmed by the Criminal Investigation Unit of Batu Aji Police, Iptu Yudha Firmansyah. According to him, the incident occurred the day after the voting day, on February 15, 2024. The chronology is that before voting the husband had reminded and told his wife to vote for presidential candidate number 1, but after voting was carried out the wife then told

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*Syariah Dan Hukum Islam* 4, no. 2 (December 10, 2019): 194–215, <https://doi.org/10.31538/adlh.v4i2.542>.

<sup>5</sup> Rama Dhini Permasari Johar and Hamda Sulfinadia, “Manajemen Konflik Sebagai Upaya Mempertahankan Keutuhan Rumah Tangga (Studi Kasus Di Desa Lempur Tengah Kecamatan Gunung Raya Kabupaten Kerinci),” *Jurnal Al-Ahkam* 11, no. 1 (2020): 34–48, <https://doi.org/10.15548/alakhkam.v11i1.1476>.

<sup>6</sup> Nesya Desriany Mustapa, Nara Rafi Zulfikar, and Muhammad Alif Athaariq, “Peran Pers Dalam Menanggulangi Hoaks Pemilu,” *Gunung Djati Conference Series* 39 (January 24, 2024): 107–14, <https://www.conferences.uinsgd.ac.id/index.php/gdcs/article/view/2086>.

<sup>7</sup> Zico Junius Fernando, Wiwit Pratiwi, and Putra Perdana Ahmad Saifulloh, “Model Penanaman Nilai-Nilai Pancasila Dalam Menghadapi Ancaman Polarisasi Politik Pemilu 2024 Di Indonesia,” *Prosiding Seminar Nasional Program Doktor Ilmu Hukum*, December 12, 2022, 120–32, <https://proceedings.ums.ac.id/index.php/pdih/article/view/2914>.

her husband honestly that she did not vote for presidential candidate number 1 but presidential candidate number 2. Because he felt that his wife did not obey his orders, AJ immediately slapped his wife from the back of the head. Feeling unsatisfied, he also beat his wife three times until she was injured". Seeing this fact makes us realize that the social effects of elections not only divide community groups but can also threaten the integrity of households.

Conflicts that occur in families due to differences in presidential choices occur because of friction between family members who have different political choices, so that these differences result in domestic conflicts.<sup>8</sup> Even reported by BBC.com shows that during the election period there were many cases of divorce for reasons of different political choices. In 2009, 402 divorce cases were found due to political issues, although it was reduced in 2010 to 334 cases, but in 2011 divorce cases motivated by political issues reached 650 cases. Divorce due to differences in political views is very likely to occur, because each person certainly has a different level of fanaticism.<sup>9</sup> Differences in views, principles and choices are commonplace. But what if the difference in choice occurs between husband and wife, does the wife have to submit and obey the husband's choice in any case, including in her right to political choice? is different choice with the husband included in the category of nusyuz wife? What if the husband imposes his will on the wife to vote for the same presidential candidate as the husband's choice? Hasn't the state guaranteed that everyone has the right and freedom to make their choices, and the right to elect and be elected is a basic right for every citizen. The equal rights to participate in the public sphere and voice opinions are often disregarded by certain groups who misuse religion as a justification for their truth.<sup>10</sup>

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<sup>8</sup> Nandorari Saptenly Buling and Aloysius L. S. Soesilo, "KOMUNIKASI DALAM KELUARGA TRADISIONAL YANG MENGALAMI KONFLIK KARENA PILKADA DI KABUPATEN ALOR," *Jurnal Psikohumanika* 13, no. 1 (June 9, 2021): 1–21, <https://doi.org/10.31001/j.psi.v13i1.1144>.

<sup>9</sup> Lusi Andriyani et al., "Relasi Kuasa Elit Lokal Dan Pemerintah Lokal Dalam Penangan Konflik Sosial Paska Pilkada Dalam Mendukung Ketahanan Sosial," *Jurnal Ketahanan Nasional* 27, no. 1 (June 21, 2021): 39–64, <https://doi.org/10.22146/jkn.61155>.

<sup>10</sup> Angraini binti Ramli and Radwan Jamal Elatrash, "Woman Participation in Politics: Toward an Ideal Model in the Perspective of Siyasa al-Shar'iyya," *Al-Risalah: Forum Kajian Hukum Dan Sosial Kemasyarakatan* 21, no. 1 (June 30, 2021): 1–11, <https://doi.org/10.30631/alrisalah.v21i1.564>.



Therefore, this study aims to analyze how the concept of obedience and obedience of wives to husbands, and whether different choices with the husband's wishes are included in the category of nusyuz for wives. To show that this research is different from previous research, the author includes a study of previous literature to see the novelty of the research being conducted with previous research. First, the writings of Arif Sugitanata and Muannif Ridwan, this research suggests that conflict resolution due to politics is done by understanding each other, good communication, filtering news carefully, tolerance, and maintaining privacy.<sup>11</sup> Although it has similarities with the research that the author did, the author analyzes conflict resolution solutions based on the perspective of Islamic law. Second, Muhil Mubarak's writing, this study reveals that the reasons for divorce due to differences in political choices are because the two spouses both cling to their respective political ideologies, kinship politics, and because the wife has a stronger social role than the husband.<sup>12</sup> Third, written by Moch. Azis Qoharuddin, this research suggests several strategies in dealing with political disagreements in the household, including opening discussions, understanding each other's opinions, focusing on finding common goals, and selecting the sources of information received.<sup>13</sup> Fourth, the writing of Nandorari Saptenty Buling, Aloysius L.S. Soesilo, this research reveals that the consequences of political differences in the elections in Alor have affected communication in a family.<sup>14</sup> Fifth, the writing of Sarip Hidayat, the results of this study reveal that if the household conflict is caused by the wife doing Nusyuz, then the settlement is done through

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<sup>11</sup> Arif Sugitanata and Muannif Ridwan, "Menuju Keluarga Yang Harmonis: Manajemen Konflik Politik Dalam Keluarga Di Tengah Perbedaan Pilihan Politik," *Jurnal Indragiri Penelitian Multidisiplin* 4, no. 1 (January 31, 2024): 67–74, <https://doi.org/10.58707/jipm.v4i1.706>.

<sup>12</sup> Muhil Mubarak, "Perceraian Karena Perbedaan Perspektif Pilihan Politik Teori Konflik Di Kabupaten Tangerang," *Journal of Islamic Law and Family Studies* 4, no. 1 (September 13, 2021): 59–73, <https://doi.org/10.18860/jilfas.v4i1.13336>.

<sup>13</sup> Moch Azis Qoharuddin, "Pemilu Dan Konflik Dalam Keluarga: Menjaga Harmoni Dalam Perbedaan Pendapat," *Indonesian Journal of Humanities and Social Sciences* 3, no. 3 (November 30, 2022): 379–92, <https://doi.org/10.33367/ijhass.v3i3.3818>.

<sup>14</sup> Buling and Soesilo, "KOMUNIKASI DALAM KELUARGA TRADISIONAL YANG MENGALAMI KONFLIK KARENA PILKADA DI KABUPATEN ALOR."

mediation by seeking a win-win solution.<sup>15</sup> Sixth, the writing of Mahyuddin, Emilia Mustary, and Nisar entitled "The Power Of Emak-Emak: Women in the Vortex of the 2019 Presidential Election Political Campaign", this research focuses on analyzing the forms of women's participation in the 2019 presidential election, it was found that the contribution of women in the democratic process in 2019 was increasingly evident, such as engaging in innovative joint campaigns, participating in monitoring the government, and asserting the rights of women in choosing the president.<sup>16</sup>

From the literature study that the author has described above, no similar research has been found that discusses the Nusyuz actions of husbands due to differences in the choice of presidential candidates during the election. So here the author tries to overcome these limitations by presenting a research entitled "Politics In The Family: An Islamic Law Solution For Household Conflict Management In The Election Era." This study aims to analyze how the concept of obedience and obedience of wives to husbands is actually, and whether different choices with the husband's wishes are included in the category of nusyuz for wives.

## **RESEARCH METHODS**

This research is a type of qualitative study with a descriptive analysis approach in the context of a case study. Descriptive analysis involves analyzing data by illustrating and explaining the data obtained using words or sentences, allowing conclusions to be drawn. This approach is used by the author because it can provide a detailed explanation of how differences in political preferences can lead to conflicts within the household from an Islamic law perspective. To achieve the research results, data analysis was conducted by collecting data from various secondary literature sources, such as books on marriage fiqh, journals, articles, and legal regulations such as the Law on Domestic Violence, as well as other relevant academic works

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<sup>15</sup> Sarip Hidayat, "Korelasi Tindak Pidana Kekerasan dalam Rumah Tangga Menurut Undang-Undang Nomor 23 Tahun 2004 dengan Konsep Nusyuz dan Penyelesaian Sengketanya," *Logika : Jurnal Penelitian Universitas Kuningan* 13, no. 02 (December 17, 2022): 181–91, <https://doi.org/10.25134/logika.v13i02.7111>.

<sup>16</sup> Mahyuddin Mahyuddin, Emilia Mustary, and Nisar Nisar, "The Power of Emak-Emak: Perempuan Dalam Pusaran Kampanye Politik Pemilihan Presiden 2019," *AL-MAIYYAH: Media Transformasi Gender Dalam Paradigma Sosial Keagamaan* 12, no. 2 (2019): 1–15, <https://ejurnal.iainpare.ac.id/index.php/almaiyyah/article/view/8578>.

supporting the research. The data collection technique involved tracing various literature, both online and offline, such as accessing articles from scientific journals with research topics similar to this study. The collected data was then analyzed by compiling an initial description, followed by further analysis to answer the research questions. The data was analyzed using a thematic analysis method, where themes relevant to the research topic were identified and further explored. This technique helps in drawing conclusions based on various literature and Islamic legal perspectives on the obligations and limitations of a wife's obedience to her husband in the context of political differences.

## **RESULTS AND DISCUSSION**

### **Domestic Conflict and Its Resolution**

Looking at the case previously described, in Islam, the actions taken by AJ against his wife NO can be classified as an act of nusyuz by a husband against his wife. In language, nusyuz means "land that is lifted up".<sup>17</sup> In terms, nusyuz is an act of disobedience from one party.<sup>18</sup> Nusyuz is a conflict in a household caused by one party not carrying out their obligations as they should, so that the other party, either the wife or the husband, does not get their rights.<sup>19</sup> Nusyuz is an act that leads to syiqaq, meaning that it has not yet led to divorce, because nusyuz means speech or behavior that disobeys obligations, does not feel guilty and feels better than your partner, while syiqaq is a quarrel that leads to divorce or one of the parties has asked for separation.<sup>20</sup> Nusyuz is not only committed by the husband, but there are also actions that are classified as nusyuz by the wife.<sup>21</sup>

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<sup>17</sup> Risma Handayani Lubis and Lailatusy Syifa Sirait, "Istri Nusyuz Dan Suami Dayyus," *Ahlana: Jurnal Hukum Dan Hukum Keluarga Islam* 1, no. 1 (2024): 26–38, <https://jurnal.uinsu.ac.id/index.php/ahlana/article/view/19181>.

<sup>18</sup> Eka Rahmi Yanti and Rita Zahara, "Hak Dan Kewajiban Suami Istri Dan Kaitan Dengan Nusyuz Dan Dayyuz Dalam Nash," *Takammul : Jurnal Studi Gender Dan Islam Serta Perlindungan Anak* 9, no. 1 (February 11, 2022): 1–22, <https://doi.org/10.22373/takamul.v9i1.12562>.

<sup>19</sup> Dewi Cahyati, "Peran Ganda Istri Dan Pengaruhnya Terhadap Nusyuz," *Jurnal Riset Hukum Keluarga Islam*, December 22, 2022, 111–14, <https://doi.org/10.29313/jrhki.vi.1547>.

<sup>20</sup> Ahmad Ahmad and Rozihan Rozihan, "Analisis Metode Mafhum Mubadalah Faqihuddin Abdul Kodir Terhadap Masalah Nusyuz Suami," *BUDAI: MULTIDISCIPLINARY JOURNAL OF ISLAMIC STUDIES* 1, no. 1 (December 29, 2021): 13–23, <https://doi.org/10.30659/budai.1.1.13-23>.

<sup>21</sup> Hidayat, "Korelasi Tindak Pidana Kekerasan dalam Rumah Tangga Menurut Undang-Undang Nomor 23 Tahun 2004 dengan Konsep Nusyuz dan Penyelesaian Sengketa.".

A wife is considered to have acted nusyuz to her husband if she does not want to carry out her obligations as referred to in Article 83 Paragraph 1 KHI (Compilation of Islamic Law) except with valid reasons. The actions of the wife that are categorized as acts of nusyuz include: Wives who refuse to dress up for their husbands, refuse their husbands' invitations to sleep together while this is the husband's right, deny the good that the husband has done, leave the house without the husband's permission, tear the husband's clothes, pull the husband's beard as a form of contempt for him, speak harshly and revile the husband, refuse to establish relations with the husband's family.<sup>22</sup> Meanwhile, the forms of husband's nusyuz can be divided into two, namely: First, Nusyuz of words, namely husbands who silence their wives, speak with harsh and hurtful words, reproach and mention the disgrace of their wives, have prejudice and do not invite their wives to sleep together, and order their wives to commit immoral and unlawful acts. Second, Nusyuz actions, which are the actions of the husband in the form of not having sex with his wife without an excuse and a clear reason, mistreating his wife such as hitting and harming his wife, not providing maintenance, and staying away from his wife because of his illness unless there is an excuse.<sup>23</sup>

When the wife's nusyuz occurs, based on Q.S An-Nisa 34, three stages are explained in its resolution, namely: First, with advice, what is meant by advice in this case is in the form of words from the husband to the wife such as "Fear Allah!, Do not continue what you are doing. Know that you must obey me!". Husbands are required to treat their wives well when their wives behave badly, this is what is meant by Nawawi al-Bantani who refers to the hadith of the prophet SAW, that "The one who is patient with his wife's bad character, then Allah will give him a reward like what He gave to Job who was patient with His test".<sup>24</sup> Second, separate the beds. If the first method still cannot bring the wife back to obey the husband, then Islam recommends separating

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<sup>22</sup> Yanti and Zahara, "HAK DAN KEWAJIBAN SUAMI ISTRI DAN KAITAN DENGAN NUSYUZ DAN DAYYUZ DALAM NASH."

<sup>23</sup> Abdul Munib, "Batasan Hak Suami Dalam Memperlakukan Isteri Pada Saat Nusyuz Dan Kemungkinan Sanksi Pidana," *VOICE JUSTISIA : Jurnal Hukum Dan Keadilan* 3, no. 2 (2019): 26–51.

<sup>24</sup> Ahmad Fadhil, "Tafsir Al-Sayis Dan Al-Zuhayli Terhadap Ayat Nusyuz Dan Syiqaq Serta Dan Penyelesaiannya: Analisa Teologis Normatif, Psikologis, Dan Sosiologis," *Syaksia : Jurnal Hukum Perdata Islam* 22, no. 2 (December 31, 2021): 235–56, <https://doi.org/10.37035/syaksia.v22i2.5536>.

the beds, if the wife sleeps in the room, the husband sleeps on the sofa or other as long as it is not in the same place, as a form of rebuke to the wife.<sup>25</sup> The purpose of separating the beds is to not have sexual intercourse or leave her alone in the room and include not communicating for a maximum of only 3 days.<sup>26</sup> However, there are other interpretations of separation from the bed, which means not having intercourse with the wife or turning her back when sleeping. Separating the bed does not mean not communicating with the wife, because Islam prohibits not exchanging greetings for more than 3 days, meaning that the husband is only not allowed to sleep together, not not communicating with his wife. Scholars agree that the length of separation from bed when dealing with a nusyuz wife is one month.<sup>27</sup> Third, with a blow. Scholars agree that it is permissible to hit with blows that do not hurt and try to be as light as possible. More specifically, the scholars stipulated that the blows should not be carried out in succession in one place, should not hit the face, should not use whips or sticks. However, it should be avoided as much as possible, because avoiding it is better. This is according to the hadeeth narrated by Jabir ibn 'Abdullah and the atsar of 'Atha: "A blow that does not injure with a miswak or something similar." Ibn 'Abbas said this and Qatadah said, "A blow that does not harm."<sup>28</sup>

However, if the one who commits nusyuz is the husband then as explained in Q.S An-Nisa: 128 that if the husband's nusyuz occurs, the way to resolve it is by Islah (peace). This means that when a husband's nusyuz occurs, there are no sanctions or actions that can be taken by the wife other than peace. This shows the advantages that a husband has over his wife.<sup>29</sup> To make peace, a mediator is appointed to mediate or reconcile the two disputing parties. In Q.S An-Nisa: 35, this verse is

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<sup>25</sup> Abd Jalil, "Nusyuz Penyelesaian Konflik Keluarga Dalam Hukum Islam (Teori Dan Praktinya Di Indonesia)," *JURISY: Jurnal Ilmiah Syariah* 1, no. 2 (September 15, 2021): 15–32, <https://doi.org/10.37348/jurisy.v1i2.135>.

<sup>26</sup> Fadhil, "Tafsir Al-Sayis Dan Al-Zuhayli Terhadap Ayat Nusyuz Dan Syiqaq Serta Dan Penyelesaiannya."

<sup>27</sup> Jalil, "Nusyuz Penyelesaian Konflik Keluarga Dalam Hukum Islam (Teori Dan Praktinya Di Indonesia)."

<sup>28</sup> Fadhil, "Tafsir Al-Sayis Dan Al-Zuhayli Terhadap Ayat Nusyuz Dan Syiqaq Serta Dan Penyelesaiannya."

<sup>29</sup> Khairuddin Khairuddin and Abdul Jalil Salam, "Konsep Nusyuz Menurut Al-Qur`An Dan Hadis (Kajian Hak Dan Kewajiban Suami-Istri Dalam Rumah Tangga)," *El-Usrah: Jurnal Hukum Keluarga* 4, no. 1 (June 30, 2021): 182–97, <https://doi.org/10.22373/ujhk.v4i1.10096>.

addressed to al-hukkam or al-qadhi (state or religious court). The hakam referred to in the verse does not necessarily come from the families of both parties, meaning that it is allowed not to be from the family as long as the aim is to reconcile. Then the question arises whether the hakam has the authority to make its own decisions or there must be permission from the party represented, the scholars differ in opinion on this matter, according to Ibn 'Abbas, al-Shafi'bi and Imam Malik argued that the hakam has the right to decide by considering the interests independently without permission from the party he represents, provided that the hakam is a person appointed by the state. Meanwhile, according to al-Hasan and Abu Hanifah and their students, the hakam is not allowed to decide on divorce without the permission of both parties, because the hakam only acts as a representative.

### **The Limit of Wife's Obedience to Husband According to Islam**

Marriage is a strong and sacred bond between a legal husband and wife, therefore to keep this relationship harmonious, each partner has their own rights and obligations that must be fulfilled.<sup>30</sup> The husband is the main figure for a wife, so the husband must be respected and appreciated. Wives have an obligation to obey and serve the needs of their husbands.<sup>31</sup> There is even one of the prophet's hadiths which says that "if I were to order humans to bow down to humans, then I would order the wives to bow down to their husbands". This is because of the great rights of husbands towards their wives.<sup>32</sup> In addition, the husband is also responsible for his wife and is the leader of his wife. However, this does not necessarily make the husband absolute to be obeyed. Because wives also have a central role in realizing family resilience in order to remain harmonious.<sup>33</sup> A wife should not obey her

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<sup>30</sup> A. Kumedi Ja'far and Agus Hermanto, "Reinterpretation of the Rights and Duties of Contemporary Husbands and Wives," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 5, no. 2 (December 26, 2021): 648–67, <https://doi.org/10.22373/sjhk.v5i2.9124>.

<sup>31</sup> Ja'far and Hermanto.

<sup>32</sup> Rizqi Nur Azizah and Muhammad Yassir, "Hak Dan Kewajiban Suami Istri Perspektif Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan Dan Hukum Islam," *Asy-Syari'ah: Jurnal Hukum Islam* 10, no. 1 (February 16, 2024): 48–64, <https://doi.org/10.55210/assyariah.v10i1.1409>.

<sup>33</sup> Tri Wahyu Hidayati, Ulfah Susilawati, and Endang Sriani, "Dynamics of family fiqh: the multiple roles of women in realizing family resilience," *Ijtihad: Jurnal Wacana Hukum Islam dan Kemanusiaan* 22, no. 2 (December 14, 2022): 219–38, <https://doi.org/10.18326/ijtihad.v22i2.219-238>.



husband's orders in matters of sin<sup>34</sup>, things that are harmful and not in accordance with common sense. This means that the husband cannot control and act arbitrarily towards the wife.<sup>35</sup> The scholars agree that the wife's obedience and obedience to her husband is obligatory, except that this obligation is not absolute and unlimited. This means that the obligation to obey and obey the husband is muqayyad or limited. This is as explained below:

اتَّفَقَ الْمُفْهَمَاءُ عَلَى أَنَّ طَاعَةَ الزَّوْجِ وَاجِبَةٌ عَلَى الزَّوْجَةِ، لِقَوْلِهِ تَعَالَى الرَّجَالُ قَوَّامُونَ عَلَى النِّسَاءِ بِمَا فَضَّلَ اللَّهُ بَعْضَهُمْ عَلَى بَعْضٍ وَبِمَا أَنْفَقُوا مِنْ أَمْوَالِهِمْ وَلِقَوْلِهِ تَعَالَى وَلَهُنَّ مِثْلُ الَّذِي عَلَيْهِنَّ بِالْمَعْرُوفِ وَلِلرِّجَالِ عَلَيْهِنَّ دَرَجَةٌ، وَاتَّفَقُوا كَذَلِكَ عَلَى أَنَّ وَجُوبَ طَاعَةِ الزَّوْجَةِ زَوْجَهَا مُقَيَّدَةٌ بِأَنْ لَا تَكُونَ فِي مَعْصِيَةِ اللَّهِ تَعَالَى. لِأَنَّهُ لَا طَاعَةَ لِمَخْلُوقٍ فِي مَعْصِيَةِ الْخَالِقِ لِقَوْلِهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ "لَا طَاعَةَ لِمَخْلُوقٍ فِي مَعْصِيَةِ اللَّهِ عَزَّ وَجَلَّ

Meaning: The scholars agree that the wife's obedience to her husband is obligatory based on the words of Allah SWT, 'men are leaders for women because of some advantages that Allah has given to some others and because of some of the wealth they spend'. and the words of Allah SWT, 'They have rights equal to the obligations they bear well. While the men have an advantage of one level over them (women)'. The scholars also agree that the wife's obedience to her husband is not absolute (absolute, unlimited), but is muqayyad (limited), namely as far as obedience is in the form of disobedience to Allah. The reason is, a rule says that there is no obedience to fellow creatures regarding disobedience to Allah according to the words of the Prophet Muhammad SAW, 'There is no obedience to fellow creatures regarding disobedience to Allah'.<sup>36</sup>

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<sup>34</sup> Juhaepa Juhaepa, Hasbi Indra, and A. Rahmat Rosyadi, "Program Bimbingan Dan Konseling Pada Pasangan Rawan Perceraian Menurut Pemikiran Wahbah Az-Zuhaili," *Tawazun: Jurnal Pendidikan Islam* 14, no. 2 (August 31, 2021): 116–32, <https://doi.org/10.32832/tawazun.v14i2.4517>.

<sup>35</sup> Marhani Malik and Andi Alda Khairul Ummah, "KETAATAN ISTRI TERHADAP SUAMI PERSPEKTIF NABI SAW. (SUATU KAJIAN TAHLILI)," *Jurnal Ushuluddin: Media Dialog Pemikiran Islam* 23, no. 1 (February 22, 2021), <https://doi.org/10.24252/jumdpi.v23i1.19580>.

<sup>36</sup> Syaiful Mudai, "BATASAN KETAATAN ISTRI TERHADAP SUAMI DALAM MENGGAPAI RUMAH TANGGA SAKINAH MAWADDAH WA

The wife's obedience to her husband must also take into account the wife's ability, so that if the husband's order or desire is beyond the wife's ability, she does not need to fulfill it. Because the wife is obliged to obey her husband in matters that she can do. The wife's obedience is obligatory in matters of the husband's rights in marriage and its derivatives. The most important right of the husband is sexual intercourse, and its derivatives, such as looking attractive and beautiful in front of the husband. Then the wife must obey her husband in matters that are in accordance with the wife's nature as a woman, as Allah SWT says in Q.S Al-Isra: 84 "Say: each person does according to his own circumstances. The meaning of the words "each situation" is according to the nature or characteristics of its creation.<sup>37</sup> Women's nature includes feelings, tenderness, affection, a weaker body than men and so on. Therefore, if the husband orders his wife to do work that is contrary to her nature as a wife and as a woman, she does not need to obey the order. For example, if a husband orders his wife to climb onto the roof to fix a leaky roof, or if a husband orders his wife to climb a tall coconut tree and she is able to do so, she does not have to obey him.

Therefore, it is not permissible to impose a will that cannot be implemented by the wife. The verse in Q.S An-Nisa: 34 that says it is permissible for a husband to beat his wife is often used as an excuse and justification for husbands who abuse their wives under the pretext of educating their wives, because husbands are leaders over their wives, especially for those who live in a patriarchal culture. They tend to interpret the word "*daraba*" with the meaning of 'hitting', so that the fiqh understanding that develops allows husbands to beat their wives, especially when the beating is accompanied by emotion and household conditions that are not harmonious.

In verse 34 Q.S An-nisa there is also the phrase "feared of nusyuz" this verse does not mean that this allows the husband to give punishment to the wife because of anxiety by predicting that his wife will behave badly or something that he does not want in the future, while the nusyuz has not yet occurred. So that punishment of the wife

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RAHMAH DALAM PANDANGAN ISLAM," *JAS MERAH: Jurnal Hukum Dan Ahwal al-Syakhsyiah* 1, no. 2 (May 30, 2022): 80–100, <https://ejournal.staidapondokkrempyang.ac.id/index.php/jmjh/article/view/144>.

<sup>37</sup> Sheikh Zain Al Abedeen Ibrahim Ibn Najeem Al Misri, *Bahr Ar Raiq Sharah Kanz Ad Daqaig Vol 1*, 1893, <http://archive.org/details/in.ernet.dli.2015.324087>.



can only be given if it has been proven that she has committed nusyuz and has committed this mistake continuously. If the husband is worried that his wife will be nusyuz, the punishment is in the form of advice, while the other two punishments are applied when nusyuz has actually occurred.

One of the important efforts made to get a correct understanding of Islam and avoid discriminatory understanding is to classify the nash. Nash needs to be divided into two, namely: First, the general text that is applicable and suitable for all times, all places and conditions and becomes the ultimate goal, the main goal. Second, the particular text that is applicable and suitable only for a certain time, a certain place and a certain condition, but not necessarily suitable for other times, other places, and certain other conditions, and becomes an intermediate goal to achieve the ultimate goal.<sup>38</sup>

### **Household Conflict Management Due to Differences in Presidential Choice**

The wife's obedience to her husband is limited, because the relationship between husband and wife is not a superior and subordinate relationship, but a partnership relationship. If in a country there is a president and his deputy, in a university there is a rector and his deputy, in a company there is a director and deputy director, then in a household there is a husband and wife. Differences of opinion and principles between husband and wife are commonplace. The same applies to the issue of different choices of presidential candidates between husband and wife. It is like when a husband and wife come to a restaurant and want to order food, then the husband does not need to dictate to the wife what she should eat or choose the same food as her. It would be nice if the husband let his wife order what she likes and according to her wishes.

For wives who choose a presidential candidate according to their heart's desire is not included in the category of disobeying their husbands. Wives can make their choices in politics according to their conscience without worrying about being considered a disobedient

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<sup>38</sup> Khoiruddin Nasution, "MENGHAPUS KEKERASAN DALAM RUMAH TANGGA DENGAN KAJIAN NORMATIF-YURIDIS: ANALISIS INTERDISIPLINER DENGAN PEMBEDAAN NASH OBJEKTIF DAN TEMPORAL," *JURIS (Jurnal Ilmiah Syariah)* 17, no. 1 (June 30, 2018): 35–46, <https://doi.org/10.31958/juris.v17i1.1000>.

wife.<sup>39</sup> This difference does not exclude the wife from the obedience and obedience ordered by Islam. In other words, a wife who chooses to differ with her husband in political choices does not tarnish her image as a pious wife. A wise and prudent husband can allow his wife to choose a presidential candidate according to the wishes of her conscience. This refers to the Decision of the 1999 NU Congress and the 1997 NU National Conference regarding the position and public role of women, it is advisable for husbands and wives to respect and respect each other's political choices and views. And it is advisable for both of them not to intimidate each other's political choices with religious arguments or on behalf of others.

Differences in political choices between husband and wife should not make it a division in the family. Because the right to choose and be chosen is a human right owned by every citizen and guaranteed by the state.<sup>40</sup> As the Constitutional Court Decision Number 011-017/PUU-I/2003 which states that: "Considering, that the constitutional right of citizens to vote and to be elected (right to vote and right to be candidate) is a right guaranteed by the constitution, laws, and international conventions, the limitation, distortion, elimination, and elimination of the right is a violation of the human rights of citizens." In line with this regulation, Law Number 30 of 1999 concerning Human Rights also explains that: "every citizen has the right to vote and to vote in general elections based on equal rights through direct, general, free, secret, honest and fair voting in accordance with the provisions of laws and regulations".

Regarding the case against NO, it can be categorized as husband's nusyuz in the form of maltreatment or domestic violence and the husband can be punished. The violence committed by AJ cannot be justified as an excuse or justification for committing domestic violence. Violence is behavior that cannot be justified in Islam or in the context of law and human values. Different political choices should not be used as an excuse to violate human rights, including the wife's right to live free from violence. Domestic violence is regulated in Law Number 23 of 2004 concerning the Elimination of Domestic Violence by

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<sup>39</sup> "Asas Berimbang Hak &Kewajiban Suami Istri Serta Penyesuaiannya Dengan Budaya Lokal Menurut Hukum Islam | Al-Manhaj: Journal of Indonesian Islamic Family Law," June 26, 2022, <https://doi.org/10.19105/al-manhaj.v4i1.6263>.

<sup>40</sup> Dwiganura Apu, "Belis Dan Perilaku Memilih Perempuan Di Kabupaten Nagekeo, Flores, Nusa Tenggara Timur," *PERSPEKTIF* 10, no. 1 (January 6, 2021): 1–9, <https://doi.org/10.31289/perspektif.v10i1.3844>.

considering that all forms of domestic violence are a violation of human rights.<sup>41</sup> In addition, the state is obliged to realize the protection and guarantee the rights of women in society, especially within the scope of the family. It needs to be emphasized that no domestic violence can be justified in any way, whether from a religious, cultural, or societal perspective.<sup>42</sup>

Men and women have the freedom to make their own political choices. It is not permissible for anyone to limit, force or even prohibit their spouse to choose a Presidential Candidate according to their choice. Forcing the will and intimidating someone to choose a candidate is a violation of the constitution. If there is tension between husband and wife regarding differences in political views, it is very important for both partners to resolve this problem through good communication so that it does not become a prolonged problem. Using violence as an alternative to solving problems is not in accordance with the face of Islam or humanitarian norms.

Islam teaches the importance of patience, mutual respect and respect for every difference of opinion. If there is a dispute in the family, it is advisable to seek professional help such as a mediator or family counselor who is competent in solving the problem. Because every problem that comes certainly has a way out. It all depends on how both partners respond and solve the problem. When conflicts in the household are faced by prioritizing each other's ego, it is difficult to find a point of resolution, otherwise if faced with a cool head and a calm heart, a peaceful and prosperous family atmosphere will be created.

Husbands and wives must be able to maintain household harmony during the democratic party and prevent household conflicts due to differences in political choices. In this case, there are several conflict management alternatives that can be done, namely:

First, open communication that involves understanding and respecting the other party's opinion, starting an open and empathic dialog is

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<sup>41</sup> Felani Ahmad Cerdas and Hernadi Afandi, "Jaminan Perlindungan Hak Pilih Dan Kewajiban Negara Melindungi Hak Pilih Warga Negara Dalam Konstitusi (Kajian Kritis Pemilu Serentak 2019)," *SASI* 25, no. 1 (August 24, 2019): 72–83, <https://doi.org/10.47268/sasi.v25i1.142>.

<sup>42</sup> Nur Faizah, "The Spiritualization of Domestic Violence in the Digital Era: Examining the Cathartic Role of Religious Institutions in Empowering Victims," *De Jure: Jurnal Hukum Dan Syar'iah* 15, no. 2 (December 29, 2023): 251–67, <https://doi.org/10.18860/j-fsh.v15i2.23297>.

important. It is important to listen carefully to the opinions of others without rushing to respond or defend one's own views. Through this approach, healthy and open communication can be created. Choosing the time to have a discussion is also something that must be considered, for example during tea time in the afternoon when you are in a relaxed atmosphere, and make sure that the person you are going to discuss with is in a good mood. Because discussions when the mood is not good will have a bad impact on the communication process, moreover political issues are sensitive for some people. Second, it is important to set privacy boundaries when talking about politics, especially when at home, such as stopping the conversation if the discussion gets heated. This is the best alternative for both husband and wife to avoid conflict when it is felt that the discussion is no longer conditioned. If possible, slowly divert or change the direction of the discussion that is being discussed from topics that make the atmosphere even murkier, or by making jokes to break the ice. Third, it is important to always check the truth of information before believing it, especially from social media, never easily believe the hoaxes that spread in cyberspace. Besides that it is important to always filter every information that is obtained both offline and online. Fifth, an important step in this regard is to remind both parties that household harmony is more important than presidential election politics. Both the husband and wife should be able to remind each other that it is more important to maintain household harmony than to make fanatic decisions when choosing to support a particular presidential and vice-presidential candidate, so that conflicts within the household can be avoided.

## **CONCLUSION**

Islam does require wives to obey and obey their husbands' orders, but this obedience does not mean that the husband can order anything to his wife, but the obedience is *muqayyad* or limited. This obedience is limited to matters that are not contrary to the provisions in Islamic law. A wife may not obey her husband's orders in matters of disobedience, things that endanger the wife, and something that is contrary to the wife's nature as a woman. According to Islamic law, in determining the choice of presidential candidates, the wife is given the freedom to choose according to her conscience. The wife is given the freedom to choose a presidential candidate according to her heart's desire, this is not included in the category of disobedience to her husband. Wives can make their choices in politics according to their conscience without worrying about being considered a disobedient wife.

This difference does not exclude the wife from the obedience and obedience ordered by Islam. In other words, a wife who chooses to differ with her husband in political choices does not tarnish her image as a pious wife. If there is a household conflict due to differences in the choice of presidential candidates, the solutions that can be done in resolving these problems include open communication, implementing privacy limits regarding politics, and not easily believing in hoaxes. This research is highly relevant to the current socio-political conditions in Indonesia, which is a democratic country. It addresses domestic conflicts arising from political differences within families, a topic that is often overlooked in academic discourse. However, the author acknowledges some limitations in this study. The research primarily relies on secondary literature as the main data source, which, although valid, could be expanded by incorporating field studies or interviews with couples experiencing similar conflicts to obtain primary data. This would enrich perspectives and provide more concrete empirical data. Future research could also explore the factors influencing the dynamics of domestic conflicts and offer more comprehensive solutions in the context of resolving household conflicts.

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## Transformation Of Family Law In Algeria Analysis Of The Pre- And Post Independence Period

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### Abstract

*This study aims to reveal the influence of family law reform in Algeria on the socio-cultural life patterns of its people. As one of the Muslim countries in the African continent, Algeria has gone through various stages of legal reform, especially in the field of family law. These efforts include modernizing regulations, increasing the protection of women's rights, and adapting to changing social and cultural developments. Cultural and social values play an important role in the formation of family law in this country. The findings of the study show that during the Ottoman Turkish rule, Islam was the main foundation in regulating people's lives. However, the arrival of French colonialism had a significant impact on the resilience of the Islamic legal system, as seen from France's efforts to integrate elements of European law into the existing Islamic legal system. On the other hand, French colonization also encouraged the development of family law in Algeria, as reflected in the ratification of the Marriage Law in 1959 known as the Ordinance. After gaining independence, Algeria experienced a major overhaul in its family law with the ratification of the Family Code 1984, which was later amended through Ordinance No. 2 of 2005.*

**Keywords:** Transformation, Family Law, Aljazair, Pre and Post Independence.

### Abstrak

*Penelitian ini bertujuan untuk mengungkap pengaruh reformasi hukum keluarga di Aljazair terhadap pola kehidupan sosio-kultural masyarakatnya. Sebagai salah satu negara Muslim di Benua Afrika, Aljazair telah melalui berbagai tahap reformasi hukum, khususnya dalam bidang hukum keluarga. Upaya ini mencakup modernisasi peraturan, peningkatan perlindungan hak-hak perempuan, serta penyesuaian dengan perkembangan sosial dan budaya yang terus berubah. Nilai-nilai kultural dan sosial berperan penting dalam pembentukan hukum keluarga di negara ini. Temuan penelitian menunjukkan bahwa selama masa pemerintahan Turki Usmani, agama Islam menjadi fondasi utama dalam mengatur kehidupan masyarakat. Namun, kedatangan kolonial Prancis memberikan dampak signifikan terhadap ketahanan sistem hukum Islam, terlihat dari upaya Prancis untuk mengintegrasikan elemen-elemen hukum Eropa ke dalam sistem hukum Islam yang ada. Di sisi lain, kolonialisasi Prancis juga mendorong perkembangan hukum keluarga di Aljazair, yang tercermin dalam pengesahan Undang-Undang Perkawinan pada tahun 1959 yang dikenal sebagai Ordonansi. Setelah meraih kemerdekaan, Aljazair mengalami*

*perombakan besar dalam hukum keluarganya dengan pengesahan Family Code 1984, yang kemudian diamandemen melalui Ordonansi No. 2 tahun 2005.*

**Kata Kunci:** Transformasi, Hukum Keluarga, Aljazair, Pra dan Pasca Kemerdekaan.

## INTRODUCTION

The People's Democratic Republic of Algeria, or al-Jumhuriyah al-Jazairiyah ad-Damuqratiyah ash-Shabiyah, is the official name for the country of Algeria. With an area of 2,381,741 km<sup>2</sup>, Algeria is the second largest country in Africa. Most of its territory is mountainous, with an average altitude of 800 m, and about 84% of the total area consists of the Sahara desert. The capital is Algiers, where Arabic and Berber are recognized as official languages. The system of government is a republic headed by a president, and the majority of the population adheres to the Maliki school of thought. Algeria has undergone significant legal changes, especially in the context of family law.<sup>1</sup> Various factors such as Islamic teachings, colonial influences, the process towards independence, as well as legal reforms have contributed to this dynamic. In recent decades, Islam has played an important role in the social and legal life of the country, especially in the regulation of marriage, divorce, inheritance and family rights. Islamic sharia is the main foundation, providing ethical and legal guidelines that govern family life and society as a whole.<sup>2</sup>

French colonization in Algeria, which lasted from 1830 to 1962, had a major influence on the development of family law in the country. Although Islamic law remains as the main foothold, some elements in family law may have their roots in the colonial laws introduced by the French government. Algeria's quest for independence had a significant impact on the family law system. After gaining independence in 1962, the country sought to create a national identity and legal system that aligned with the values of independence, including Islamic values.<sup>3</sup>

After independence, the Algerian government began efforts to formulate a law on family law, but nothing significant came of it until 1984. On June 9, 1984, the Algerian Family Law Act was finally

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<sup>1</sup> "Legal and Judicial Problems for Divorce According to Algerian Law". 2024. Law and World 10 (31): 8-14. <https://doi.org/10.36475/10.3.1>.

<sup>2</sup> Miftahul Huda, Ragam Bangunan Perundang-Undangan Hukum Keluarga Di NegeraNegara Muslim Modern: *Kajian Tipologis*, Al-Manahij: Jurnal Kajian Hukum Islam 11, no. 1 (2017): 49–60.

<sup>3</sup> Lilis Hidayati Yuli Astutik and Muhammad Ngizzul Muttaqin, *Positifkasi Hukum Keluarga Di Dunia Muslim Melalui Pembaharuan Hukum Keluarga: Hukum Keluarga Islam*, Islamika: Jurnal Ilmu-Ilmu Keislaman 20, no. 01 (2020): 55–65.

passed, consisting of 224 articles and divided into four chapters: Marriage and Dissolution of Marriage, Legal Representation, Inheritance, and Wills. On October 26, 2003, the President established a commission to revise this law, which lasted nine months. From 1984 to the early 2000s, this law was a major concern for women activists demanding changes to improve women's rights. On February 3, 2004, Algeria updated its family law law, and a year later, on February 27, 2005, it was updated again, continuing to include 224 articles in chapters covering Marriage, Legal Proceedings, Inheritance, Wills, Grants, and Waqf.<sup>4</sup>

## **RESEARCH METHOD**

This research is a type of library research, which is conducted by utilizing various literatures, such as books, notes, and reports on previous research results. The author relies on sources that include books, journals, and notes from researchers and practitioners relevant to the topic under study. The data collected includes primary and secondary data, which is then analyzed using documentation techniques. This process involves reading, understanding, studying, and recording literature related to the issues discussed in this paper. Through this method, relevant sources are organized and discussed to reach a clear conclusion.

## **RESULTS AND DISCUSSION**

### **Brief Country Profile of Algeria**

Algeria is one of the countries located in the North Africa region. The country borders the Mediterranean Sea to the north, Tunisia and Libya to the east, Nigeria, Mali and Mauritania to the south and Morocco to the west. Thanks to its geographical location, Algeria has very abundant natural resources compared to other countries in North Africa. Algeria is also known as the Maghrib or Berber. The term Maghrib refers to the countries in the north of the African continent, and the term was introduced by traders. The Maghrib region covers the visible western part of the Arabian Peninsula, including Libya, Tunisia, Algeria, Morocco, Mauritania and Western Sahara.<sup>5</sup> The history of Algeria itself is quite long, starting from 40 BC when this region was under the rule of the Phoenicians, then controlled by the Romans,

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<sup>4</sup> Nur Fadhilah Novianti, *Ketentuan Usia Pernikahan Di Afrika Utara (Mesir, Tunisia, Maroko, Aljazair, Libya)*, Bustanul Fuqaha: Jurnal Bidang Hukum Islam, Vol. 4 No. 3 2023, h. 370.

<sup>5</sup> Samir Amin, *"The Maghreb In The Modern World-Algeria, Tunisia, Morocco"*, (Australia: Pinguins Book 1970), hal. 9-10.

Vandals, and Byzantines (Christians). During the time of Caliph Uthman bin Affan, the process of expanding into North Africa also began.<sup>6</sup>

Languages spoken in Algeria include Arabic, Berber, and French. The Algerian dinar serves as the country's official currency.<sup>7</sup> Algerian society is divided into two main groups: the European group and the Muslim group. These two groups are closely intertwined, mainly due to mixed marriages between Algerians and French citizens during the colonial period. Any individual born in that context automatically acquired French citizenship. On the other hand, Muslims who embraced Islam were recognized as Algerians and continued to speak Arabic.

In the course of its history, Algeria has undergone various changes of power. First of all, in 1236, Algeria was under the rule of the Ziyaid Dynasty. Then, in 1516, power passed to the Ottoman Turks. Finally, in 1830, France took control of Algeria.<sup>8</sup> In the 18th century, Ottoman Turkey declined in power, which made it easier for the French to occupy Algeria. When the French first arrived, Algerian society was still led by Sufi leaders and some tribes. The French occupation brought major changes to the government system in Algeria. They made reforms in various fields, including politics, economics and education. In the education sector, teaching methods shifted to the use of French language and culture, which resulted in many local schools being forced to close. On the government side, the French introduced a law that became the first step in the establishment of family law in Algeria.<sup>9</sup>

### **Family Law In Pre-Independence Algeria**

Historically, Algeria has been ruled by various nations. In 1543 AD, the region was inhabited by Barbarians. Then, in 1152, the al-Muwahhidun Dynasty of Morocco, led by Abdul Mu'min bin Ali born in Tlemcen of the Zahata tribe took control of Algeria. In 1525, power passed to the Ottoman Turks through Khayruddin and Aruj, known as

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<sup>6</sup> Siti Maryam, "*Sejarah Peradaban Islam*", (Yogyakarta: LESFI, 2002), hal, 221.

<sup>7</sup> Trevor Mostyn, "*The Crambridge Encyclopedia of The Middle East And North Africa*", (Camridge University Press, 1988), hal, 302.

<sup>8</sup> Abdurrahman Wahid, *Pergulatan Negara, agama dan kebudayaan*. (Depok: Desentara, 2001)

<sup>9</sup> Silpia Ul'hak, *Dampak Kebijakan Prancis Terhadap Masyarakat Aljazair 1830-1914*, (Uin Syarif Hidaytullah Jakarta, 2016), h, 6.

Barbarossa, two brothers who successfully liberated Algeria from Spanish colonization. This struggle integrated Algeria into Ottoman Turkish rule and made it the center of government.<sup>10</sup>

Algeria was the first region in the Maghrib to fall under Ottoman Turkish rule. In its development, Algeria transformed into one of the Ottoman Turkish provinces and experienced many changes, especially in architecture, especially in the era of Sultan Sulaiman Al-Qanuni, who was famous for his building innovations. These architectural developments went hand in hand with changes in the system of government, which was similar to the changes that occurred in other Ottoman Turkish provinces, such as Egypt, which developed a system of shared government with Palestine and Syria.<sup>11</sup> At this time Islamic law has been embedded in people's lives and made as the main source in regulating every aspect of community life.

In 1830, France began occupying Algeria, and in 1848, the region officially became part of France. Unlike Morocco and Tunisia, French colonization had a much greater impact in Algeria. The French implemented radical changes in the social, cultural and political structures that dated back to the Ottoman Turks. These changes led to the displacement of the Algerian people's cultural and political identity, which had previously been firmly established thanks to the role of Islamic scholars during the Ottoman Turks.<sup>12</sup>

The development of Islamic law in Algeria under French influence shows some similarities to the development of Islamic law in British-influenced India, but the outcomes were very different. In many areas of Algeria, qadhis dealt with matters for which they would normally have been responsible. In addition, the French government extended the application of Islamic law to custom, beyond what had happened under Turkish rule. Changes in positive law in Algeria are rare, and the country's positive law only covers issues related to child

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<sup>10</sup> Syaiful Anam, *Sejarah Perkembangan Islam di Aljazair*, At-Turots, Jurnal Pendidikan Islam, Vol. 1 No. 2 2019, h. 84

<sup>11</sup> Nurdiyanah, *Peranan di Aljazair dan Sekitar Abad Ke 16*, (Uin Syarif Hidayatullah, Jakarta, 2015), h.55.

<sup>12</sup> M Hamdan Basyar, Muhammad Fakhri Ghafar, *Sejarah dan Dinamika Kultural Politik*, Bandung: Pt Dunia Pustaka Jaya, 2016, hlm 43-44.

custody, marriage and divorce. French law has also played a significant role in shaping and influencing the prevailing Islamic law in Algeria.<sup>13</sup>

The French government implemented laws in Algeria gradually. At first, they introduced the principles of civil and criminal law and the system of administration of justice. Later, the French established the Franco-Algerian Agency which combined Islamic and Western law. This body influenced aspects of family and inheritance law in the Maliki and 'Ibadi schools, but its presence led the Algerian judicial system to develop Islamic law in a different way.<sup>14</sup> In 1916, France drafted a legal text for the Muslim community called *Avant Projet de code du droit musulman algérien*, drafted by Marcel Morand. Although this draft was not adopted as official legislation, it had a significant impact on court decisions in family law matters. It later became the foundation for the development of the French family law drafted in 1984.<sup>15</sup>

In 1959, France passed a marriage law known as the Ordinance, but this law did not have a major impact in changing family law in Algeria. The Ordinance only applied to the Maliki school of thought, while followers of the 'Ibadi school were not affected. In addition, the content of the ordinance was similar to the law that the French implemented in Tunisia for the Hanafi school. To address this issue, on September 17, 1959, a Decree was issued that aimed to implement the ordinance by repealing several articles, including article 10 which exempted followers of the 'Ibadi Mazhab and raised the marriage age. As a result, the ordinance then applied to all Muslims, whether they were Maliki or 'Ibadi.

On June 9, 1984, after Algeria gained independence, a new law called the Family Code 1984 was promulgated. This law was based on three main elements: first, the Islamic laws of the various Mazhabs; second, the Muslim Law of 1916 (*Avant Projet de code du droit musulman algérien*); and third, the principle of equivalence with the laws of neighboring countries, especially Morocco, by adopting some

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<sup>13</sup> Engkos Kosasih, *Pemikiran Fikih Maliki Tentang Pernikahan dan Implementasinya dalam UU Perkawinan Aljazair*, Jurnal Bimas Islam Vol.9. No.II 2016, h. 243.

<sup>14</sup> Tahir Mahmood, *Personal Law In Islamic Countries*, New Delhi: Academy of Law and Religion, 1987, hlm 15

<sup>15</sup> Mahmud Widyo Nugroho, *Studi Komparatif Perkawinan Berdasarkan Hubungan Angket Dalam Perundang-Undangan Indonesia dan Aljazair, Sekolah Tinggi Islam Negeri Ponorogo*, Akhwal Syakhshiyah, 2015, hlm, 49



provisions from Moroccan legislation. The Family Code 1984 consists of 224 articles divided into four books: Book I on marriage and its dissolution, Book II on legal representation, Book III on inheritance, and Book IV relating to the division of property. This law was later amended in 2005 through the passing of Ordinance No. 2 on February 27.<sup>16</sup>

### **Family Law in Algeria After Independence**

Algeria is an Islamic republic with two official languages, Arabic and French. In 1959, the compact law was introduced as the beginning of the development of family law in Algeria, regulating aspects of marriage and divorce for Muslims. After much struggle, Algeria gained its independence in 1962 and formed a new government that upheld Islamic sharia as the primary law. Subsequently, in 1959, the government enacted the Marriage Law and repealed several articles related to the age of marriage, followed by the passage of a new law in 1963.

In 1976, a comprehensive family law code was drafted with reference to Islamic law. This law was passed in 1984 and later amended through Ordinance No. 2 of 2005. Overall, Islamic legislation in the country is based on Maliki fiqh, which is the most widely followed school. The following is the Islamic law legislation in force in Algeria:<sup>17</sup>

- a) Marriage Ordinance 1959. This Ordinance regulates family law relating to marriage in accordance with the concept of Islamic marriage law that applies by referring to the majority fiqh school adopted by Muslims in Al-Jazair, namely Maliki fiqh.
- b) Marriage Ordinance (Amendment) Law 1963. This is the first amendment to the existing Marriage Ordinance with various adjustments in accordance with the legal needs that have developed in the midst of society.
- c) Family Code 1984. The Family Code is broader than the Marriage Ordinance and covers inheritance and other family law matters.<sup>18</sup>

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<sup>16</sup> Tahir Mahmood, *Personal Law In Islamic Countries*, New Delhi: Academy of Law and Religion, 1987, hlm 17

<sup>17</sup> Septi Wulan Sari, *Perbandingan Hukum Keluarga di Indonesia dan Aljazair Tentang Nafkah*, Al-Manhaji: Jurnal Hukum dan Pranata Sosial, Vol. 5 No. 1, 2023, h, 9.

<sup>18</sup> Yusrina Nur Dianati Dan Tika Ifrida Takayasa, *The Politics Of Marriage Law In Al Jazair (Between Modernizing Family Law And Maintaining Conservative Values)*, Quru': Journal Of Family Law And Culture Vol. 1, No 3. 2023, h. 268.

a. Proficiency in Marriage

Algeria, The Family Law Code, 1984, article 7, sets the legal age of marriage at 21 years for men and 18 years for women. This age is higher than the age of marriage in other Islamic countries.<sup>19</sup> After the amendment of article 7 of Ordinance No. 2/2005, it is stated that the capacity for legal marriage is 19 years old for both men and women. This represents a decrease in the minimum age for men and an increase in the minimum age for women.<sup>20</sup>

The marriage of an adult woman is attended by her guardian, who can be her father, a relative, or another person of her choosing. Meanwhile, for a person who is not an adult or has not reached the age of 19, the marriage is performed by his or her guardian or relative. If a person does not have a father or close relative, a judge will act as the marriage guardian.<sup>21</sup> Furthermore, a provision was added requiring the submission of a health certificate valid for 3 months, as well as proof of freedom from disease or other factors that could pose a risk. Although the Maliki school of thought is the official school of thought in Algeria, the age of marriage provisions are not drawn entirely from the views of this school.<sup>22</sup>

b. Marriage Registration

Algeria only stipulates that the marriage contract must be legalized by an authorized official. However, there is no regulation or explanation of the status of marriage registration, so this status in Algerian law remains undefined. The provisions regarding marriage registration are set out in the Marriage Ordinance 1959, which is intended to regulate various aspects related to marriage and divorce among Muslims. To provide a more detailed explanation of the

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<sup>19</sup> Yusrina Nur Dianati Dan Tika Ifrida Takayasa, *The Politics Of Marriage Law In Al Jazair (Between Modernizing Family Law And Maintaining Conservative Values)*, Quru': Journal Of Family Law And Culture Vol. 1, No 3. 2023, h. 270.

<sup>20</sup> Basaruddin, Oyo Sunaryo Mukhlis, *Studi Perbandingan Hukum Perkawinan Di Maroko Dan Aljazair*, Al-Fakar: Journal For Islamic Studies, Vol 7 No 1. 2024, h. 638.

<sup>21</sup> Mahmud Widyo Nugroho, *Studi Komparatif Perkawinan Berdasarkan Hubungan Angket Dalam Perundang-Undangan Indonesia dan Aljazair*, Sekolah Tinggi Islam Negeri Ponorogo, Akhwal Syakhsiyah, 2015, hlm, 53

<sup>22</sup> Nur Fadhilah Novianti, *Ketentuan Usia Pernikahan Di Afrika Utara (Mesir, Tunisia, Maroko, Aljazair, Libya)*, Bustanul Fuqaha: Jurnal Bidang Hukum Islam, Vol. 4 No. 3 2023, h. 371.

application of this law, a 1982 Decree was issued.<sup>23</sup> The provisions of the marriage law can be practically applied by the courts under the applicable Decree. Although the Marriage Ordinance 1959 and the Decree set out the procedures for marriage registration in detail, such registration appears to serve only as an administrative requirement and has no bearing on the validity of a marriage.<sup>24</sup>

In July 1963, when Algeria proclaimed its independence, the country amended the 1959 Marriage Law. After several constitutional amendments, the 1984 Marriage Law was finally established as the guideline for family law in Algeria. However, there are no new rules in this law that regulate marriage registration as part of family law. Thus, it can be concluded that despite the changes in the Marriage Law, the provisions regarding marriage registration remain unchanged.<sup>25</sup>

c. Guardian of the Marriage

Prior to the amendment to article 11 of the Family Code 1984, it stated that a woman's marriage had to be performed by her guardian, which could be her father or a close relative. If there was no father or relative, the judge would be the marriage guardian. After the 2005 amendment to the 1984 Family Code, article 11 states that an adult woman can marry in the presence of her guardian, who can be her father, a relative, or a person of her choice. Meanwhile, for a minor individual, the marriage must still be performed by her guardian or relative, with a judge acting as guardian in the absence of a father or close relative.

Prior to the amendment, article 13 of the 1984 Family Code stated that marriage guardians, whether fathers or others, were not allowed to force a person under their guardianship to marry, and they could not marry the person without their consent. After the 2005 amendments to the 1984 Family Code, this statement remains in force, prohibiting guardians, whether fathers or others, from forcing a person

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<sup>23</sup> Jumain Azizi, Muzawir, Reformasi Hukum Perkawinan: “ Pencatatan Perkawinan Berbagai Negara Muslim” Jurnal Darussalam: Pemikiran Hukum Tata Negara dan Perbandingan Hukum, Vol. 3. No.1 2023. h. 109.

<sup>24</sup> Rahamawati, *Perbandingan Hukum Keluarga Islam, Sulawesi Selatan*: IAIN Parepare Nusantara Press, 2020. h. 133.

<sup>25</sup> Dian Mustika, *Pencatatan Perkawinan Dalam Undang-Undang Hukum Keluarga Di Dunia Islam*, Marriage Registration, Family Law, Islamic World, t.t hlm, 58.

under their guardianship to marry, just as they cannot marry the person without his or her consent.<sup>26</sup>

d. Breakup of Marriage

In the Algerian Marriage Law, divorce can occur for certain reasons. First, if the husband does not provide maintenance, unless the wife was aware of the husband's incapacity at the time of marriage. Secondly, there is a weakness in the husband that prevents the purpose of the marriage from being fulfilled. Third, if the husband refuses to live with the wife for more than four months. Fourthly, if the husband is deprived of civil rights for more than one year, for example due to behavior that brings shame to the family and his inability to lead in society and in conjugal relations. Fifth, if the husband is absent for more than one year without providing maintenance. Sixth, due to unacceptable immoral behavior.<sup>27</sup> Under Algerian law, divorce is only possible through a judge's decision in court after peace efforts have been made and failed. The divorce is counted from the time the court records it. If the husband divorces the wife without valid legal reasons, the wife is entitled to compensation. In addition, polygamy can also be a reason for the wife to file for divorce.<sup>28</sup>

e. Polygamy

One is only allowed to be polygamous if there are acceptable conditions, motivations, and intentions to be fair. Husbands who wish to remarry must notify their wives and future wives, and then apply to the chairperson of the competent court for a marriage authorization. A new marriage can only be legalized by the chairperson of the court if the husband has obtained the consent of both wives and proven his reasons and ability to lead a household again. The wife has the right to file for divorce in the event of fraud by the husband. In addition, the marriage is considered void *Qabla dukhul* if the husband does not

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<sup>26</sup> Basaruddin, Oyo Sunaryo Mukhlis, *Studi Perbandingan Hukum Perkawinan Di Maroko Dan Aljazair*, Al-Fakar: Journal For Islamic Studies, Vol 7 No 1. 2024, h. 638.

<sup>27</sup> Didimus Manulang, dkk, *Pembatalan Perkawinan Menurut Hukum Islam dan UU Hukum Keluarga di Negara Muslim: Studi Perbandingan Antara Negara Mesir, Aljazair, Yordan dan Maroko*, Vol 5 No 2, 2014, hlm, 661.

<sup>28</sup> Rahamawati, *Perbandingan Hukum Keluarga Islam, Sulawesi Selatan*: IAIN Parepare Nusantara Press, 2020. h. 181.

obtain permission from the judge, in accordance with the provisions previously explained.<sup>29</sup>

f. Khuluk

A wife can separate from her husband without his consent by paying a sum of money through khulu'. If the husband refuses to pay the ransom, the judge must order a payment that does not exceed the reasonable value of the dowry at the time of receipt.<sup>30</sup>

Prior to the amendment, article 54 of the 1984 Family Code stated that a wife could separate from her husband with the husband's consent. If the husband did not agree, the judge would issue a khulu' judgment in consideration of the ransom to be paid by the wife, which could not exceed the value of the dowry she received. After the amendment of the 1984 Family Code in 2005, article 54 states that the wife can divorce from her husband without the husband's consent by paying a sum of money through khulu'. If the husband refuses to pay the ransom, the judge will order a payment that must not exceed the reasonable value of the dowry at the time of receipt.<sup>31</sup>

g. Interfaith Marriage

Interfaith marriages in Algeria are governed by Civil Code Law No. 11 of 1984 (Civil Code). Article 31 states that "A Muslim woman cannot marry a non-Muslim man." This article confirms the prohibition for Muslim women to marry non-Muslim men. This is in line with the view of the majority of scholars who agree that men are allowed to marry People of the Book, while women are not allowed to marry non-Muslims. The Maliki school, to which most Algerians adhere, is of the opinion that it is makruh to marry a woman of the Book, a view also held by other schools of fiqh such as Hanafi and Shafi'i. This is what distinguishes the legal material on interfaith marriage in Algerian Family Law from the views of the Maliki school.<sup>32</sup>

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<sup>29</sup> Mahmud Widyo Nugroho, *Studi Komparatif Perkawinan Berdasarkan Hubungan Angket Dalam Perundang-Undangan Indonesia dan Aljazair, Sekolah Tinggi Islam Negeri Ponorogo*, Akhwal Syakhshiyah, 2015, hlm, 54

<sup>30</sup> Mahmud Widyo Nugroho, *Studi Komparatif Perkawinan Berdasarkan Hubungan Angket Dalam Perundang-Undangan Indonesia dan Aljazair, Sekolah Tinggi Islam Negeri Ponorogo*, Akhwal Syakhshiyah, 2015, hlm, 55

<sup>31</sup> Basaruddin, Oyo Sunaryo Mukhlis, *Studi Perbandingan Hukum Perkawinan Di Maroko Dan Aljazair*, Al-Fakar: Journal For Islamic Studies, Vol 7 No 1. 2024, h. 640.

<sup>32</sup> Yusrina Nur Dianati Dan Tika Ifrida Takayasa, *The Politics Of Marriage Law In Al Jazair (Between Modernizing Family Law And Maintaining Conservative Values)*, Quru': Journal Of Family Law And Culture Vol. 1, No 3. 2023, h. 274-275.

Algeria's interfaith marriage law includes only one article prohibiting Muslim women from marrying non-Muslim men, indicating that Muslim men are allowed to marry women of the Book. However, this provision does not clarify the status of a woman who has married a non-Muslim man, whether her marriage remains valid or not. This law reflects the debate between following the Qur'anic text (which allows Muslim men to marry women of the Book) and the interpretation that prohibits it. The country chose not to follow the opinions of the Imams of the Maliki, Hanafi, and Shafi'i schools, who consider such marriages *makruh*. Arguments such as *sadd al-dhar'ah* or *al-maslahah* that are usually used to reject these marriages are not taken into consideration, so that the law of interfaith marriage still follows the text of the Qur'an. This trend does not reflect Islamic liberalism in favor of such marriages, but neither does it fully represent conservative or radical views. Thus, interfaith marriage law in Algeria tends to stick to the Qur'anic text without being influenced by radicalism or liberalism.<sup>33</sup>

#### h. Lift Relationship

In addition to the aforementioned, there is an interesting point in Algerian law regarding marriages involving adoptive relationships. Algeria is the only country that prohibits marriages based on adoptive relationships, where the bride and groom have such ties. In the Family Law 1984, article 24 states that there are three impediments to marriage: consanguinity, affinity and fosterage. In another article, the prohibition against marriage in an adoptive relationship is emphasized by stating that adoptive relationships are treated the same as blood relationships. Thus, adoptive relationships are one of the barriers to marriage in Algerian legislation, so marriages based on such relationships are prohibited.<sup>34</sup>

One of the other reasons behind the prohibition of marriage based on adoptive relationships in Algeria is the form of child adoption adopted in the country, which is also in line with Tunisian legislation. Adoptive relationships stem from the process of child adoption, which in Algerian law is known as *kafalah*. Meanwhile, adoption is a form of child raising that is not permitted. Algeria is the only country where this prohibition applies. Once the *kafalah* process is completed, the

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<sup>33</sup> Basaruddin, Oyo Sunaryo Mukhlis, *Studi Perbandingan Hukum Perkawinan Di Maroko Dan Aljazair*, Al-Fakar: Journal For Islamic Studies, Vol 7 No 1. 2024, h. 640.

<sup>34</sup> Miftahul Huda, *Ragam Bangunan Perundang-Undangan Hukum Keluarga di Negera-Negara Muslim Modern*, Al-Manhaji, Vol. XI No. 1, 2017, Hlm 58.

kafil has the right to give his family name to the makful, so that the makful's name will be recorded in the kafil's family documents. However, the makful also gets a separate document confirming his true identity, i.e. that he is not the kafil's biological son, but rather the son of his biological parents. This is different from a prohibited adoption, where the child's lineage transfers to the adoptive parents, making him or her their biological child.

With this explanation, it can be understood that the adopted child becomes the biological child of the adoptive parents because it is recorded in their family documents, even though the child still has documents that show his original lineage. Thus, the child's original lineage remains to his biological parents, not to the adoptive parents. It is clear, therefore, that the adoptive relationship is made one of the prohibitions in marriage, influenced by the manner and form of child adoption which causes the adopted child to be recorded in the family documents of the adoptive parents, even though his original lineage does not transfer to them.<sup>35</sup>

Based on the above, it can be seen that the French colonization left a deep mark on the Algerian legal system. The secular laws introduced by the French replaced many aspects of traditional Islamic law in Algeria. However, most family law continued to be governed by Islamic law. This was due to France's attempt to avoid conflict with the Muslim population by maintaining the existing Islamic law. France also had a strong influence in the process of modernizing and secularizing public and administrative law. After independence, the country sought to balance its Islamic heritage with the demands of modernity in developing family law.

## **CONCLUSION**

Overall, the development of family law in Algeria is the result of strong influences from both Islamic and French law. Historically, Algeria has been under the rule of various dynasties, ranging from the Usmanids to the al-Muwahhidun Dynasty in Morocco, before it was finally controlled by the Ottoman Turks in 1525. During this time, Islam became the main foundation of the judicial system. However, after Algeria fell to the French, efforts to integrate the country into the French empire were evident through the adoption of French civil and criminal law principles and judicial systems. After gaining

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<sup>35</sup> Miftahul Huda, *Ragam Bangunan Perundang-Undangan Hukum Keluarga di Negera-Negara Muslim Modern*, Al-Manhaji, Vol. XI No. 1, 2017, Hlm 58.

independence, Algeria drafted a marriage law known as the Family Code, which was officially enacted in 1984, and later amended through Ordinance No. 2 of 2005. Thus, the journey of family law in Algeria is a reflection of its rich historical heritage, as well as an adaptation to a modern context that respects the traditions and values of its society.

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## Building a Just Law: The Role of Legal Professional Ethics in Indonesia

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### Abstract

*The professionalism of a legal profession is not only due to being capable, intellectual, and successful in their field as law enforcement officers, but the behavioral aspect is also part of the assessment that must be owned in implementing the Code of Ethics or Legal Professional Ethics to uphold law and justice. However, if we look at the reality, there are still many legal practitioners who have not complied with the Legal Professional Code of Ethics. The research method in this journal uses juridical-normative, which uses literature-based secondary data sources. The results of this study are that the Legal Professional Code of Ethics must be obeyed (compelling) even though it is not officially made into regulations. Because Legal Professional Ethics has an important role in law enforcement which is also a manifestation of efforts to realize better law.*

**Keywords:** *Legal Professional Ethics, The Role of Professional Ethics, Indonesia.*

### Abstrak

Profesionalitas seorang profesi hukum bukan hanya karena cakap, intelektual, dan sukses di bidangnya sebagai aparat penegak hukum, melainkan aspek tingkah laku juga bagian dari penilaian yang harus dimiliki dalam mengimplementasikan Kode Etik atau Etika Profesi Hukum untuk menegakkan hukum dan keadilan. Namun jika kita lihat realitas yang ada, para praktisi hukum masih banyak yang belum mematuhi Kode Etik Profesi Hukum. Metode Penelitian dalam Jurnal ini menggunakan yuridis-normatif, yang menggunakan sumber data sekunder berbasis kepustakaan. Hasil penelitian ini yaitu Kode Etik Profesi Hukum harus dipatuhi (bersifat memaksa) sekalipun tidak secara resmi dijadikan sebagai peraturan. Karena Etika Profesi Hukum mempunyai peran penting dalam penegakan hukum yang juga merupakan manifestasi upaya perwujudan hukum yang lebih baik.

**Kata Kunci:** Etika Profesi Hukum, Peran Etika Profesi, Indonesia.

## INTRODUCTION

Law has a very important role in maintaining order and justice in a society. However, the success of law in achieving its objectives does not only depend on existing regulations, but is also greatly influenced by the practices and behaviors of legal practitioners. In this context, the ethics of the legal profession become the moral foundation that shapes the character and actions of legal practitioners.<sup>1</sup>

The ethics of the legal profession are not just a set of moral norms, but are the underlying foundation of how a legal professional should behave and act. Legal ethics includes values such as honesty, integrity, justice, responsibility, and respect for human rights. In a good legal journey, the ethics of the legal profession have a central role in shaping quality legal practices and making a positive contribution to society.<sup>2</sup>

One of the critical aspects of the ethical role of the legal profession is its ability to realize good law. Good law is not only related to the existence of comprehensive regulations, but also to the implementation that is fair and in accordance with moral norms. The ethics of the legal profession are a guideline to ensure that legal practitioners not only focus on the interests of the client or the parties he represents, but also pay attention to the interests of society as a whole.<sup>3</sup>

The importance of the ethical role of the legal profession is increasingly felt in an increasingly complex and diverse global context. Legal practitioners are not only faced with legal challenges, but also with conflicting values, cultural differences, and changing social dynamics. In such a situation, the ethics of the legal profession are a firm grip to ensure that legal decisions are taken with careful moral considerations.<sup>4</sup>

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<sup>1</sup> Tardjono, H. (2021). Urgensi Etika Profesi Hukum Sebagai Upaya Penegakan Hukum Yang Berkeadilan Di Indonesia. *Jurnal Kepastian Hukum Dan Keadilan*, 2(2), 51-64. DOI: <https://doi.org/10.32502/khdk.v2i2.3462>

<sup>2</sup> Sidharta, B. A. (2015). Etika dan Kode Etik Profesi Hukum. *Veritas et Justitia*, 1(1). DOI: <https://doi.org/10.25123/vej.v1i1.1423>

<sup>3</sup> Yustica, Anugrah, Ngadino Ngadino, and Novira Maharani Sukma. "PERAN ETIKA PROFESI NOTARIS SEBAGAI UPAYA PENEGAKAN HUKUM." *Notarius* 13, no. 1 (2020): 60-71. Accessed February 14, 2024. <https://doi.org/10.14710/nts.v13i1.29162>

<sup>4</sup> Ginting, Yuni Priskila, Gwayneowen Justin, Jesselyn Harijanto, Lyviani Sam, Michelle Halim, Rachelina Marceliani, dan Vanessa Valentina. 2023. "ETIKA PROFESI JAKSA SEBAGAI GERBANG KEADILAN SISTEM HUKUM REPUBLIK INDONESIA". *Jurnal Pengabdian West Science* 2 (08):633-45. <https://doi.org/10.58812/jpws.v2i08.492>.

Thus, the purpose of this journal is to explore and analyze the role of legal profession ethics in an effort to realize good law. Through the exploration of legal ethics concepts, it is hoped that this journal can provide in-depth insights into how the ethics of the legal profession can be the main driver towards a legal system that is fair, transparent, and responsive to the needs of the community.

## **RESEARCH METHODS**

The research method used in this study is the juridical-normative method, which is a legal research approach that relies on the analysis of secondary legal materials that are documentary. This approach is commonly used in legal studies because it aims to understand the applicable legal norms, both in the form of laws and regulations and legal doctrines that develop in the academic literature.

In the juridical-normative method, the data used are derived from primary and secondary legal materials. Primary legal materials include laws and regulations, court decisions, and other official documents that have binding legal force. Meanwhile, secondary legal materials include textbooks, scientific journals, opinions of legal experts, and the results of previous research. The analysis is carried out systematically to assess the conformity between the applicable legal norms and the legal phenomena being studied.

This approach is carried out by examining legal theories, legal principles, and relevant concepts in order to gain a deep understanding of the legal issues that are the focus of the research. Juridical-normative research is very appropriate to be used in this study because it allows researchers to formulate logical and systematic legal arguments based on the existing legal framework. Thus, the results of this research are expected to be able to make theoretical and practical contributions to the development of legal science.

## **RESULTS AND DISCUSSION**

### **Legal Professional Ethics in Indonesia**

As we know, ethics is the concept of what is good or right in human behavior. Ethics are ideas, ideals about the desire for goodness in human deeds or behavior. Ethics always sets a good example, while morality always assesses the implementation of the examples given by ethics.<sup>5</sup> One of the aspects that is highlighted in ethics and morals in favor of a person's behavior is in the field of work or expertise called a profession,

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<sup>5</sup> Sidharta, B. A. (2015). *Etika dan Kode Etik Profesi Hukum*. Veritas et Justitia, 1(1). DOI: <https://doi.org/10.25123/vej.v1i1.1423>

because a profession is a job about theoretical and technical expertise that is standardized to honesty and justice. The professional code of ethics is a norm set and accepted by a group of professions that direct or give instructions to their members on how to make and at the same time ensure the quality of the profession in the eyes of the public. Ethics in the legal profession have a very important role in efforts to achieve fair law enforcement.<sup>6</sup>

Ethics in terms comes from the Ancient Greek word *ethos*. In the singular form has many meanings, namely ordinary residence, grassland, drum, rudeness, customs, morals, disposition, feelings, attitudes, and ways of thinking.<sup>7</sup> In the plural form (*ta etha*) it means custom. Etymologically, ethics is the teaching of good and bad, which is generally accepted about attitudes, deeds, obligations, and so on. Ethics can be equated with morals (*mores* in Latin), morality or morality, related to value issues, ethics basically talks about issues of moral values or good and bad moral actions.<sup>8</sup> In this case, ethics is included in the value area, while the value of ethics itself is related to the good and bad of human deeds. Some definitions of ethics are as follows: According to Istiono wahyu and Ostaria, ethics is the main branch of philosophy that studies values or qualities. Ethics includes the analysis and application of concepts, such as right and wrong, good-bad, and responsibility. Ethics is the science that deals with good and bad, rights, and moral obligations. According to Rafik Issa Bekum, ethics can be defined as a set of moral principles that distinguish between good and bad. Ethics is a normative field of science, because it plays a role in finding out what an individual should or should not do.<sup>9</sup>

The legal profession is a profession related to the field of law. The legal profession strives to realize and maintain a just order in people's

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<sup>6</sup> Muhammad Zuhriyadi, "Pentingnya Etika Dalam Profesi Hukum Sebagai Upaya Penegakan Hukum", <https://kumparan.com/muhammad-fadli-1608800907521699516/pentingnya-etikadalam-profesi-hukum-sebagai-upaya-penegakan-hukum-1uqgrt5tun4/3>, 25 Desember 2023

<sup>7</sup> Harmoko, Harmoko. 2022. "Kode Etik Profesi Advokat Dalam Menjaga Eksistensi Advokat Sebagai Profesi Terhormat (*officium Nobile*)". *IUS : Jurnal Ilmiah Fakultas Hukum* 10 (2), 184-93. <https://doi.org/10.51747/ius.v10i2.1155>.

<sup>8</sup> Langgeng, S. (2018). Peran Advokat Sebagai Penegak Hukum Dalam Mendukung Terwujudnya Sistem Peradilan Pidana Terpadu Dalam Penegakan Hukum Pidana Di Indonesia. *Jurnal Daulat Hukum*, 1(1). DOI: <http://dx.doi.org/10.30659/jdh.v1i1.2628>

<sup>9</sup> Heriyono, "Urgensi Etika Profesi Hukum Sebagai Upaya Penegakan Hukum Yang Berkeadilan di Indonesia", *Fakultas Hukum Univ. Al-Azhar Indonesia*, Hal 5

lives. The legal profession has moral values, namely: honesty, authenticity, responsibility, moral independence, moral courage. The legal profession strives to create and maintain a just order in people's lives.<sup>10</sup> Ethics are highly emphasized for law enforcement. The development of a person's profession depends entirely on the person concerned about what he does to develop his profession. Personally, he has full responsibility for the quality of his professional services. A person who carries out the legal profession must be a person who can be fully trusted, that he (legal professional) will not abuse the existing situation. The development of the profession must be carried out with dignity, and he must exert all the knowledge and scientific abilities that exist in him,<sup>11</sup> Because the duty of the legal profession is a social duty that is directly related to basic values that are the embodiment of human dignity, and therefore the service of the legal profession requires supervision from the community. If the professional carries out his profession well, correctly, then the person is said to be professional.<sup>12</sup>

It is said that a person has a professional character, if: he has good ethics, has skills, through education or training, is qualified, obeys the code of ethics developed and agreed upon in a professional organization.<sup>13</sup> A professional must at least be responsible to: clients, society, fellow professions and groups, the government and the country. A professional person must have a social personality, be responsible for all Actions, always strive to improve his knowledge; Skilled, trustworthy, loyal, able to avoid rumors and proud of his profession.<sup>14</sup>

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<sup>10</sup> Prasetyawati, Betty I., and Paramita Prananingtyas. "Peran Kode Etik Notaris Dalam Membangun Integritas Notaris Di Era 4.0." *Notarius* 15, no. 1 (2022): 310-323. Accessed February 14, 2024. <https://doi.org/10.14710/nts.v15i1.46043>

<sup>11</sup> Hapsari, Trisa Aprillia, Shelly Fitri Andriyani, Cahaya Padma Pertiwi, and Afiliati. 2024. "Urgensi Penguatan Etika Profesi Hakim Dalam Menjadikan Penegakan Hukum Yang Berkeadilan Di Indonesia". *Das Sollen: Jurnal Kajian Kontemporer Hukum Dan Masyarakat* 2 (01). <https://journal.forikami.com/index.php/dassollen/article/view/411>.

<sup>12</sup> Sinaga, N. A. (2020). Kode etik sebagai pedoman pelaksanaan profesi hukum yang baik. *Jurnal Ilmiah Hukum Dirgantara*, 10(2). DOI: <https://doi.org/10.35968/jh.v10i2.460>.

<sup>13</sup> Purwadhi, Purwadhi. "Peranan Etika Profesi Pendidik dalam Mewujudkan Karakter Bangsa." (2018). DOI: <https://doi.org/10.2121/atikan-journal.v8i2.1158>

<sup>14</sup> Rafsanjani, Daffa, and Mahendra Adhika Putra Purnama. 2024. "Peran Etika Profesi Hukum Dalam Sistem Peradilan Di Indonesia". *Nusantara: Jurnal Pendidikan, Seni, Sains Dan Sosial Humaniora* 1 (02). <https://journal.forikami.com/index.php/nusantara/article/view/442>.

In addition, the professional code of ethics is a guideline for attitudes, behaviors and actions in carrying out tasks in daily life. The professional code of ethics can be a counterbalance to the negative aspects of a profession so that the professional code of ethics is like a compass that shows the moral direction of a profession.<sup>15</sup> As well as ensuring the moral quality of the profession in society. In order for the code of ethics to function properly, the absolute requirement is that the code of ethics is made by the profession itself. The code of ethics will not be effective if it is just dropped from above, namely government agencies or other agencies, because it is not imbued with the ideals and values that live in the profession itself. External agencies can only advocate the creation of a code of ethics and can also help in formulating it. In order to function properly, the professional code of ethics must be self-regulation, of the profession.<sup>16</sup>

By creating a professional code of ethics, a profession will set black over white to realize moral values that it considers essential. Only a code of ethics that contains the values and ideals accepted by the profession itself can be ingrained and become the foundation of hope to be implemented diligently and consequentially. Another condition that must be met for the code of ethics to succeed properly is that its implementation is continuously supervised. Regarding the possibility of bad things happening, namely the demoralization of the profession, it is appropriate if the profession is followed by a moral foundation or normative rules that can be raised as a code of ethics. Some of the functions of the code of conduct include:<sup>17</sup>

- 1) The code of ethics is intended as a reference for moral control or a kind of behavioral supervision whose sanctions are more psychologically and institutionally concentrated.
- 2) The professional code of ethics leads to the formation of strong moral integrity among professional leaders.

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<sup>15</sup> Sujadi, E. (2018). Kode etik profesi konseling serta permasalahan dalam penerapannya. *Tarbawi: Jurnal ilmu pendidikan*, 14(2), 69-77. DOI: <https://doi.org/10.32939/tarbawi.v14i2.298>

<sup>16</sup> Achmad Asfi Burhanudin. 2018. "Peran Etika Profesi Hukum Sebagai Upaya Penegakan Hukum Yang Baik". *El-Faqih : Jurnal Pemikiran Dan Hukum Islam* 4 (2), 50-67. DOI: <https://doi.org/10.29062/faqih.v4i2.25>.

<sup>17</sup> Muhammad Nuh, "Etika Profesi Hukum", Bandung: Pustaka Setia, 2011, hal 125.



- 3) The dignity or identity of a professional organization will also be determined by the quality of empowerment of the organization's professional code of ethics itself.
- 4) The professional code of ethics is a reference so that members of the profession remain dignified in their profession.

The code of ethics becomes even more important when the challenges facing the legal profession are becoming more difficult and complex. The functional aspects of the legal profession associated with the code of ethics are more entrusted to the legal profession organizers themselves, while the community (clients) are limited to playing the control function. The choices, decisions, creations, and mobility of the legal profession will not be able to meet the results if the organizers of the legal profession are lacking and do not have good faith to empower them.

### **The Role of Legal Professional Ethics in Realizing Good Law**

A legal profession begins with a process of deepening and mastering scientific specifications in the field of legislation (law). People who intend to become organizers or practitioners of the legal profession must be included in the process circle or community. Without going through this path, it is difficult to produce a reliable (professional) legal enforcement figure. Professionalism is also determined by the role or contribution intended while in the professional community.<sup>18</sup> There is a stage where a new person can and should learn the meaning of law and profession, then continue by studying the functions, orientations and benefits of a legal profession in the community. These stages that need to be passed are an introduction to the enforcement, empowerment and glorification of the profession. The implementation of the profession, including the legal profession, actually depends on the person concerned because they personally have full responsibility for the quality of their professional services and must be independently able to meet the needs of the community or enshrined for the public interest that requires services in the field of law, for that of course it requires scientific and trustworthy expertise.<sup>19</sup> The dynamics of the quality of professional

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<sup>18</sup> Achmad Asfi Burhanudin. 2018. "Peran Etika Profesi Hukum Sebagai Upaya Penegakan Hukum Yang Baik". *El-Faqih : Jurnal Pemikiran Dan Hukum Islam* 4 (2), 50-67. <https://doi.org/10.29062/faqih.v4i2.25>.

<sup>19</sup> Tardjono, H. (2021). Urgensi Etika Profesi Hukum Sebagai Upaya Penegakan Hukum Yang Berkeadilan Di Indonesia. *Jurnal Kepastian Hukum Dan Keadilan*, 2(2), 51-64. DOI: <https://doi.org/10.32502/khdk.v2i2.3462>



services are related to the level and types of problems faced by the community. A type of profession, including the legal profession, will be able to see its development and prospects through various social conflicts that arise.<sup>20</sup>

Professional ethics basically contain values that provide demands for behavior, as well as the law. Professional ethics and law can actually be seen as part of culture.<sup>21</sup> Furthermore, when compared, the law requires that human behavior be in accordance with the rules of the law applied. Meanwhile, ethics pursues that human mental attitudes are in good inner will. Here the aim is not the fulfillment of outward deeds but the inner nature of human beings that originate from conscience, therefore it is hoped that virtuous human beings will be created. It can be emphasized again that law and professional ethics have similarities and differences.<sup>22</sup> The equation of both has a normative nature and contains ethical norms, which are binding. In addition, it has the same social purpose, namely for humans to do good in accordance with societal norms, and various violators will be subject to sanctions. As for the difference, regarding sanctions in professional ethics only apply to members of certain functional groups / members of a profession. Legal sanctions apply to everyone within a given region, all citizens/communities.<sup>23</sup>

In the efforts to enforce the law of a country, several main actors whose roles are very important, including judges, prosecutors, advocates, and police. Or better known as the chess of the law enforcement dynasty. Judges as the executors of judicial power are law enforcement agencies that represent the interests of the state, while prosecutors and police are law enforcement agencies that represent the interests of the government, then advocates are law enforcement

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<sup>20</sup> Achmad Asfi Burhanudin. 2018. "Peran Etika Profesi Hukum Sebagai Upaya Penegakan Hukum Yang Baik". *El-Faqih : Jurnal Pemikiran Dan Hukum Islam* 4 (2), 50-67. <https://doi.org/10.29062/faqih.v4i2.25>.

<sup>21</sup> Sujadi, E. (2018). Kode etik profesi konseling serta permasalahan dalam penerapannya. *Tarbawi: Jurnal ilmu pendidikan*, 14(2), 69-77. DOI: <https://doi.org/10.32939/tarbawi.v14i2.298>

<sup>22</sup> Livia V. Pelle, "PERANAN ETIKA PROFESI HUKUM TERHADAP UPAYA PENEGAKAN HUKUM DI INDONESIA", *Lex Crimen* Vol.1, No.3, 2012, <https://ejournal.unsrat.ac.id/index.php/lexcrimen/article/view/709>

<sup>23</sup> Dwie Afrizal, Rizky. 2023. "PERANAN ETIKA PROFESI HUKUM TERHADAP INTEGRITAS MORAL PENEGAK HUKUM". *Nusantara: Jurnal Pendidikan, Seni, Sains Dan Sosial Humaniora* 1 (01). <https://journal.forikami.com/index.php/nusantara/article/view/164>.

agencies that represent the interests of the community. In a position like this, the role of advocates is important because it can maintain a balance between the interests of the state and the government. Through the legal services he provides, advocates carry out their professional duties for the upholding of law and justice for the benefit of the justice-seeking community.<sup>24</sup>

The professional code of ethics must be complied with by the profession concerned, even if it is not in the form of a clear form like a law, but it has a coercive force just like the law. As Rudolf Von Jhering said in "Der Zweck Im Recht" said, law is a whole of compulsory rules that apply equally in a country. To be able to show itself as this coercive and egalitarian force, only the state through its sovereign strategic elements, such as law enforcement, is competent and able to realize and confiscate it.<sup>25</sup>

The ethics of the huku profession is an inherent inevitability and is integrated with the person concerned wherever he is. Not only when carrying out their duties, but must be part of their identity as a human being wherever they are. This is what also needs to be applied in the ethics of the legal profession which is also an effort to maintain the dignity of a profession so that it is good in the eyes of the public, especially in carrying out its duties.<sup>26</sup> This ethics must be part of a judge's personality when living his life in all activities. For this reason, an effort is needed that encourages the strengthening of the role of the code of ethics in the legal profession for the realization of fair law enforcement.<sup>27</sup>

## CONCLUSION

Based on the description above, it can be concluded that in an effort to enforce a culture of law enforcement/legal profession with integrity, it must start from the optimal implementation of the code of ethics of the

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<sup>24</sup> Dwie Afrizal, Rizky. 2023. "PERANAN ETIKA PROFESI HUKUM TERHADAP INTEGRITAS MORAL PENEGAK HUKUM". Nusantara: Jurnal Pendidikan, Seni, Sains Dan Sosial Humaniora 1 (01). <https://journal.forikami.com/index.php/nusantara/article/view/164>.

<sup>25</sup> Siti Marwiyah, "PENEGAKAN KODE ETIK PROFESI DI ERA MALAPRAKTIK PROFESI HUKUM", Bangkalan: UTM PRESS, 2015, Hal 136

<sup>26</sup> Suryono, Adityadarma Bagus Priasmoro, Dona Sri Sunardi Wijayanti, Irene Fransisca Liemanto, Qonrezti Shebilla Kalia, dan Andika Cahyo Bintoro. 2020. "Pandangan Filsafat Hukum Terkait Dengan Etika Profesi". Jurnal Hukum Lex Generalis 1 (7):1-19. DOI: <https://doi.org/10.56370/jhlq.v1i7.228>.

<sup>27</sup> Azizah, F. N., Kholifah, N., & Farhani, A. (2023). Penguatan Etika Profesi Hakim Dalam Mewujudkan Penegakan Hukum. SALAM: Jurnal Sosial dan Budaya Syar-i, 10(2), 661-682. DOI: <https://doi.org/10.15408/sjsbs.v10i2.32137>

legal profession. Legal professional ethics (professional code of ethics) is an integral part of regulating law enforcement behavior as a form of good and fair law enforcement. Law enforcement requires an attitude of moral integrity, this attitude is a capital for legal professional organizers in carrying out their professional duties. To become a good legal professional organizer in carrying out his professional duties in enforcing the law, it is necessary to have the qualifications of attitude, humanitarian attitude, attitude of justice, able to see and place objective values in a case handled, honest attitude, and have technical skills and ethical maturity. It is hoped that the integrity of good law enforcement officials will be built so that they are able to enforce good laws and justice so that welfare for all citizens can be realized.

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## Relevance And Analysis Of The Rights And Obligations Of Husband Wife In The Book *Irsyadul Ibad Ila Sabilirrosyad*

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### **Abstract**

*The discussion in this study is about the rights and obligations of husband and wife according to Zainuddin bin Abdul Aziz Al-Malibary in his work the book Irsyadul Ibad Ila Sabilirrosyad which is based on certain hadiths. This study is important to see the dynamics of understanding of leading ulama figures who have a broad and strong influence in world society, as well as ulama who produce many works which are often used as references in normative-theological studies in certain circles. This research is library research with a descriptive approach using primary book sources Irsyadul Ibad Ila Sabilirrosyad by Zainuddin bin Abdul Aziz Al-Malibary. The result is that Zainuddin bin Abdul Aziz Al-Malibary's thoughts about the rights and obligations of husband and wife cannot be separated from the social conditions of society at that time. In the context of the modern world, Zainuddin bin Abdul Aziz Al-Malibary's thoughts have had quite a big influence, however, not all of his thoughts are still relevant today. Thus, it is very likely that there will be a need for new interpretations of several similar works which are still used as references in various problems that arise.*

**Keywords:** *Rights and Obligations of Husband and Wife; Relevance; Zainuddin bin Abdul Aziz Al-Malibary; Irsyadul Ibad Ila Sabilirrosyad.*

### **Abstrak**

Pembahasan pada kajian ini tentang hak dan kewajiban suami istri menurut Zainuddin bin Abdul Aziz Al-Malibary dalam karyanya kitab *Irsyadul Ibad Ila Sabilirrosyad* yang didasarkan pada hadits-hadits tertentu. Kajian ini penting untuk melihat bagaimana dinamika pemahaman tokoh ulama terkemuka yang memiliki pengaruh luas dan kuat di masyarakat dunia, juga ulama yang banyak menghasilkan karya yang sering dijadikan acuan dalam kajian normatif-teologis di kalangan tertentu. Penelitian ini merupakan penelitian pustaka dengan pendekatan deskriptif dengan sumber primer kitab *Irsyadul Ibad Ila Sabilirrosyad* karya Zainuddin bin Abdul Aziz Al-Malibary. Hasil dari adalah pemikiran Zainuddin bin Abdul Aziz Al-Malibary tentang hak dan kewajiban suami istri tidak lepas dari kondisi sosial masyarakat pada masanya. Dalam konteks dunia modern, pemikiran Zainuddin bin Abdul Aziz Al-Malibary memiliki pengaruh yang cukup besar, meski demikian tidak semua pemikirannya masih relevan dengan zaman sekarang ini. Dengan demikian besar kemungkinan perlu adanya interpretasi yang baru terhadap beberapa karya yang serupa yang sampai sekarang masih dijadikan acuan dalam berbagai permasalahan yang muncul.

**Kata Kunci:** Hak Kewajiban Suami Istri; Relevansi; Zainuddin bin Abdul Aziz Al-Malibary; *Irsyadul Ibad Ila Sabilirrosyad*.

## INTRODUCTION

As a sacred bond or called *mitsaqan ghalizhan* Marriage has a very noble and sacred meaning as a solid agreement. A review of Islamic law shows that marriage is an official legal relationship between a man and a woman in a bond called a household with the aim of creating social stability that is *sakinah*, full of love, affection, mutual happiness and peace. Marriage as a trust between each other in committing to obtain a sense of security and guaranteed tranquility based on the principle of fair affection is the psychological message that exists in a marriage.

As a guarantee of creating the desired family, husband and wife should understand and be aware of the rights and obligations that each must fulfill. Both should accept and agree to mutually carry out what must be done, and also avoid all things that cause discomfort between the two of them. For this reason, husband and wife must work together and strive to fulfill their partner's rights and carry out their obligations.

In detail, the explanation regarding the rights and obligations of husband and wife has been explained in detail in several classical literatures or in the study of religious jurisprudence, which in fact rarely finds differences and disagreements regarding the interpretation or explanation, even in circles that have a gender perspective in understanding existing social realities.

As a result of social and cultural processes that have lasted for centuries, perceptions and actions have emerged that divide roles for each individual, especially in the context of men and women. As is generally understood, the man or husband is considered the head of the family who is responsible for providing financial support to the wife and family. Meanwhile, the wife's role as a housewife involves the responsibility to take care of household affairs, care for the children, and obey her husband.<sup>1</sup>

Likewise in the work of Zainuddin bin Abdul Aziz Al-Malibary book *Irsyadul Ibad* which is one of the teaching materials for the Indonesian Muslim population, especially Islamic boarding school

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<sup>1</sup> Septi Latifa Hanum, "Peran Ibu Rumah Tangga dalam Membangun Kesejahteraan Keluarga," *Academia: Journal of multidisciplinary studies* 1, no. 2 (2017): 257–70, <https://ejournal.uinsaid.ac.id/index.php/academica/article/view/1030>.



students, although it does not specifically discuss marriage. In general in the book *Irsyadul Ibad* explains various issues regarding fiqh and is equipped with advice sourced from hadith and stories from past scholars. Regarding the discussion about marriage in the book *Irsyadul Ibad* explained in the second volume, which specifically contains chapters explaining the rights and obligations of husband and wife in it. In this work by Zainuddin bin Abdul Aziz Al-Malibary, it also explains that in a household, men and women have rights and obligations that must be carried out. Even though it still indirectly places women in the domestic area, there is still an emphasis on treating women well.

So in accordance with the explanation above, of course it is important to review the rights and obligations of husband and wife, especially as explained in the work of Zainuddin bin Abdul Aziz Al-Malibary which is still widely studied in various Islamic boarding schools and other study forums.

## **RESEARCH METHODS**

This study is a type of library research with a descriptive approach that utilizes primary sources in the form of books *Irsyadul Ibad* written by Al-Malibary. In the data collection process, researchers used the documentation method. Data analysis was carried out using a descriptive-analytical approach and data reduction techniques. To ensure the validity of the data, researchers adopted the data triangulation method and carried out data verification to ensure the integrity of the data used.

## **RESULTS AND DISCUSSION**

### **A Glimpse into the Book of *Irsyadul Ibad***

Book *Irsyadul Ibad Ila Sabilirrosyad* is one of the works of a well-known scholar from India, namely Sheikh Zainuddin Bin Abdul Aziz Al-Malibary. In studying this book, the writing style used is quite different from the previous book, namely the book *Fathul Mu'in*, in this book at least the material is studied quite systematically in the style of Sufism jurisprudence. *Az-zawajir* and *Mursyidut Thullab* which was composed by Sheikh Syehabuddin Ahmad Bin Hajar Al-Haitami and Sheikh Zainuddin Bin Ali Al-Malibary is the main quote in this book. In addition to the Sufism jurisprudence style, this book presents some prophetic hadiths, jurisprudence problems, some advice and some inspirational stories.<sup>2</sup>

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<sup>2</sup> Muhammad Ali, *Terjemah Irsyadul Ibad* (Surabaya: Mutiara Ilmu, 2010).



Book *Irsyadul Ibad Ila Sabilirrosyad* The work of Sheikh Zainuddin Bin Abdul Aziz Al-Malibary is quite interesting because in this book it combines the language styles of fiqh and Sufism in a neat and proportional way. This approach may provide a more holistic understanding of Islam, including legal aspects and aspects of spirituality. At least this book summarizes various fundamental aspects of Islam, from issues of faith to criminal law issues, by referring to the original postulates that underlie each chapter. This is a common approach in fiqh literature, where Islamic laws are based on primary sources, such as the Koran and Hadith.

By combining fiqh and Sufism, this book may also provide insight into how the practical aspects of religion (fiqh) can be linked to spiritual development and a deep understanding of faith (tasawuf). This is an example of how various branches of Islamic knowledge can be combined to provide a more comprehensive view of the religion. Books such as these can be a valuable resource for deeper study and understanding of Islam.

In general the book *Irsyadul Ibad Ila Sabilirrosyad* Sheikh Zainuddin Bin Abdul Aziz Al-Malibary's work consists of two volumes with 88 chapters. The first volume includes chapters on faith, Islam, apostasy, knowledge, ablution, bathing, fadhilah fardhu prayers, sunnah prayers, congregational prayers, Friday prayers, niyanah (moaning for death), zakat, fasting, hajj, fadhilah al- Qur'an, dhikr for morning and evening, reading when going to bed.

Meanwhile, the second volume includes chapters on fadhilah reading the Prophet's prayers, minor shirk (*the way*), boasting and pride, anger, the virtue of forgiving and restraining anger, slander, flattery, lies, *amar ma'ruf nahi munkar*, noisy movement (work), criticizing customs officials, wrongdoing, wills, marriages, boycotts, disobedience to fathers and mothers, murder, fighting in the way of Allah (*jihad*), shamanism, guessing fate, astrology magic and determining fate with birds, adultery, *passed* (prostitute between men and men), drinking wine, perjury, false witness, repentance.

### **Rights and Obligations of Husband and Wife in the Book *Irsyadul Ibad Ila Sabilirrosyad***

After marriage, husband and wife each have rights and duties towards their partner. The aim of these rights and duties is to form a prosperous family, where there is no humiliation, belittlement or neglect of the rights and duties of any individual, be it husband or wife. Quoting Tihami and Sahrani's opinion in the *Munākaḥat Fiqh*, the

rights and obligations of husband and wife are classified into three forms: joint rights of husband and wife, husband's rights over wife and wife's rights over husband<sup>3</sup>.

In discussing the rights and obligations of husband and wife, Sheikh Zainuddin Bin Abdul Aziz Al-Malibary in his book entitled *Irsyadul Ibad Ila Sabilirrosyad* explains that relations in marriage are in principle an obligation to treat each other well or what is often called *mu'asyarah bil ma'ruf*. This is based on the verse of the Qur'an which he mentioned at the beginning of the discussion chapter, namely Q.S an-Nisa' verse 19 which means "*and associate with them properly*". Apart from that, it is also based on the words of Ibn Abbas' friend which is based on this verse, namely that he will treat his wife well as his wife treats him. Also, Sheikh Zainuddin Bin Abdul Aziz Al-Malibary expressed the views of some ulama' who stated that it is obligatory for husbands to fulfill the rights and goodness of their wives and it is also obligatory for wives to be obedient and obedient to their husbands.

Next, he briefly explained several hadiths relating to the rights and obligations of husband and wife. In this case the author can summarize it as follows:

1. Husband's obligations as rights for wife

At the beginning of the discussion, after explaining the relationships and basic principles in marriage, Sheikh Zainuddin bin Abdul Aziz Al-Malibary explained several hadiths relating to the obligations of a husband, including:

أَلَا وَاسْتَوْصُوا بِالنِّسَاءِ خَيْرًا فَإِنَّمَا هُنَّ عِوَانٌ عِنْدَكُمْ لَيْسَ  
تَمْلِكُونَ مِنْهُنَّ شَيْئًا غَيْرَ ذَلِكَ إِلَّا أَنْ يَأْتِيَنَّ بِفَاحِشَةٍ مُّبِينَةٍ  
فَإِنْ فَعَلْنَ فَاهْجُرُوهُنَّ فِي الْمَضَاجِعِ وَاضْرِبُوهُنَّ ضَرْبًا  
غَيْرَ مُبْرِحٍ فَإِنْ أَطَعْتَكُمْ فَلَا تَبْغُوا عَلَيْهِنَّ سَبِيلًا أَلَا إِنَّ لَكُمْ  
عَلَى نِسَائِكُمْ حَقًّا وَلِنِسَائِكُمْ عَلَيْكُمْ حَقًّا فَأَمَّا حَقُّكُمْ عَلَى  
نِسَائِكُمْ فَلَا يُوطِئَنَّ فُرُشَكُمْ مَنْ تَكَرَّهَوْْنَ وَلَا يَأْذَنَنَّ فِي  
بُيُوتِكُمْ لِمَنْ تَكَرَّهَوْْنَ أَلَا وَحَقُّهُنَّ عَلَيْكُمْ أَنْ تُحْسِنُوا إِلَيْهِنَّ  
فِي كِسْوَتِهِنَّ وَطَعَامِهِنَّ

*Know that you should give a will to do good to women,  
because they are like prisoners by your side. You have no*

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<sup>3</sup> Tihami dan Sohari Syahrani, *Fikih Munakahat: Kajian Fikih Nikah Lengkap* (Jakarta: Rajawali Press, 2014).

*right over them other than that, unless they are truly wicked. If they do, then get them off the bed and hit them with a non-painful blow. If they obey you, then do not find fault with them. sleep and hit them with painless blows. Just know; You have rights over your wife and your wife has rights over you. Your right over your wife is that she is not allowed to bring people you hate into your bed or your home. Just know; Your wives' right over you is that you do good to them in (giving) them clothes and food.*

From the hadith above, it can be understood that Sheikh Zainuddin Bin Abdul Aziz Al-Malibary is trying to convey the obligations of a husband, including giving a will to do good to the woman (wife), because the wife is like a prisoner of war for her husband. So the husband cannot freely do anything to his wife. The husband is allowed to warn the wife if the wife is wrong, if the wife has not made a mistake then the husband is not allowed to find fault with the wife.

Then, Sheikh Zainuddin bin Abdul Aziz Al-Malibary again mentioned another hadith which is still related to the obligations of a husband:

حَقُّ الْمَرْأَةِ عَلَى الزَّوْجِ أَنْ يُطْعِمَهَا إِذَا طَعِمَ ، وَ  
يَكْسُوَهَا إِذَا اكْتَسَى ، وَ لَا يَضْرِبُ الْوَجْهَ ، وَ لَا يُقَبِّحَ ،  
وَلَا يَهْجُرَ إِلَّا فِي الْبَيْتِ

*A woman's rights over her husband are to feed him if he eats, to clothe him if he is dressed, not to hit him in the face, not to mock him and not to leave him alone except in the house.*

This hadith is still related to the previous hadith which explains the obligations of a husband. Apart from the husband's obligation to treat his wife well, the husband is also obliged to provide clothing and food to his wife; also in terms of the ability to hit the wife, the husband is not allowed to hit the wife's face, the husband is also not allowed to silence the wife if the wife makes a mistake, but in the context of the husband having to silence the wife when she is guilty, that is when she is at home.

Next, Sheikh Zainuddin Bin Abdul Aziz Al-Malibary explained the hadith which explains the warning for husbands if they do not carry out their obligations, among the hadiths are:

أَيُّمَا رَجُلٍ تَزَوَّجَ امْرَأَةً عَلَى مَا قَلَّ مِنَ الْمَهْرِ أَوْ كَثُرَ لَيْسَ  
فِي نَفْسِهِ أَنْ يُؤَدِّيَ إِلَيْهَا حَقَّهَا خَدَعَهَا , فَمَاتَ , وَلَمْ يُؤَدِّ  
إِلَيْهَا حَقَّهَا لَقِيَ اللَّهَ يَوْمَ الْقِيَامَةِ وَهُوَ زَانٍ

*A man who marries a woman by giving her a small or large dowry while having no intention of fulfilling his wife's rights or cheating her if he dies and has not fulfilled his wife's rights, then on the Day of Judgment he will face Allah as an adulterer.*

In this hadith, Sheikh Zainuddin Bin Abdul Aziz Al-Malibary tries to convey the message that for a husband, if he deliberately does not carry out his duties as a husband, and then he dies, then he is one of those who commit adultery. Then Sheikh Zainuddin Bin Abdul Aziz Al-Malibary also conveyed the hadith:

لَا يَصْلُحُ لِبَشَرٍ أَنْ يَسْجُدَ لِبَشَرٍ , وَلَوْ صَلَحَ لِبَشَرٍ أَنْ يَسْجُدَ  
لِبَشَرٍ لِأَمْرِتِ الْمَرْأَةَ أَنْ تَسْجُدَ لِرَوْجِهَا ; مِنْ عِظَمِ حَقِّهِ  
عَلَيْهَا , وَالَّذِي نَفْسُ مُحَمَّدٍ بِيَدِهِ , لَوْ كَانَ مِنْ قَدَمِهِ إِلَى  
مَفْرِقِ رَأْسِهِ قُرْحَةٌ تَنْبَجِسُ بِالْقَيْحِ وَالصَّدِيدِ ثُمَّ تَسْتَقْبِلُهُ  
تَلَحَّسُهَا مَا أَدَّتْ حَقَّهُ

*It is not proper for humans to prostrate themselves to other humans. However, if it were permissible for a human being to prostrate himself to another person, I would certainly order a wife to prostrate herself to her husband because of the great rights her husband has over her. By the One in Whose Hand my soul is, if there were wounds/ulcers on the soles of her feet up to her husband's hair that were oozing pus mixed with blood, and then the wife turned to her husband to lick the wounds/ulcers, she would certainly not have fulfilled her husband's rights.*

From these last two hadiths, it can be concluded that the burden of a husband's obligations is not trivial, so husbands should not underestimate their obligations as a husband. On the contrary, he must be a person who is fully responsible for his wife.

## 2. Wife's Obligations as Rights for Husband

حق الزوج على زوجته أن لا تمنعه نفسها وإن كانت على ظهر قتب وأن لا تصوم يوماً واحداً إلا بإذنه إلا الفريضة فإن فعلت ائمت وأن لا تعطي من بيته شيئاً إلا بإذنه فإن فعلت كان له الأجر وكان عليها الوزر وأن لا تخرج من بيته إلا بإذنه فإن فعلت لعنها الله وملائكة الغضب حتى تتوب أو تراجع وإن كان ظالماً

*The right of a husband towards his wife is not to abstain from her husband even if he is on the camel's back, the wife cannot fast even one day except with her husband's permission, except for obligatory fasting. If the wife fasts without her husband's permission, then she sins. A wife cannot give anything from her house except with her husband's permission, and if she does, then the husband gets his reward and the wife gets her sin. A wife cannot leave her home except with her husband's permission, and if she does, God and the angels will curse her out of anger until she repents or returns home, even if her husband does injustice.*

From the hadith above, Sheikh Zainuddin Bin Abdul Aziz Al-Malibary explains that several obligations of a wife include fulfilling the biological needs of her husband even though he is on the back of a camel. This shows how important it is for a wife to obey her husband. The next obligation of the wife is that the wife is not allowed to fast without her husband's permission unless the fast is fardlu, apart from that the wife is not allowed to use or give charity without her husband's permission. The wife's request for permission from the husband to use the assets is considered necessary and important because it is a form of respect for the husband, as well as to train the wife's trust worthiness towards her husband's assets<sup>4</sup>.

Among the wife's next obligations is that she is not allowed to leave the house without her husband's permission even though she is considered a wrongdoer. If the wife does this then

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<sup>4</sup> Nurul Afifah, "Hak Suami-Istri Perspektif Hadis (Pemikiran Hasyim Asy'ari dalam *Ḍa'u al-Misbāh fī Bayān Ahkām an-Nikāh*)," *Jurnal Living Hadis* 2, no. 1 (2017): 19–47, <http://ejournal.uin-suka.ac.id/ushuluddin/Living/article/view/1321>.

she will receive curses from Allah and the angels until she returns.

Furthermore, Sheikh Zainuddin Bin Abdul Aziz Al-Malibary mentioned another hadith relating to a wife's attitude towards a husband's rights:

المرأة لا تؤدي حق الله تعالى حتى تؤدي حق زوجها  
كله ، ولو سألها وهي على ظهر قتب لم تمنعه نفسها

*A woman cannot fulfill the rights of Allah SWT until she fulfills all the rights of her husband, and if the husband asks her (to have intercourse) while she is on the camel's back, then she cannot refuse him.*

From this hadith it can be understood that the importance of the wife's obligation to fulfill her husband's rights is even more prioritized than the rights of Allah SWT. This also illustrates how much a wife must really respect her husband.

It is also important to achieve mutual happiness in relation to the relationship between husband and wife, there should not be unequal attitudes such as subordination and marginalization, even nowadays women have been guaranteed the freedom to have the right to work and study, which is of course very different from the time when Sheikh Zainuddin's work bin Abdul Aziz Al-Malibary was written<sup>5</sup>.

In line with the opinion above, Sheikh Zainuddin Bin Abdul Aziz Al-Malibary explained a story related to relationships in family relationships, the more famous one is the story about a man who came to Umar bin Khattab's house to complain about his wife's behavior, but he heard Umar scolded by his wife and just kept quiet. After being able to meet Umar, the man bravely explained his purpose and purpose in coming to Umar's house. Because he heard that Umar was being scolded by his wife and remained silent, the man dared to ask Umar why he was silent. Then Umar answered that he was silent because his wife had a big responsibility, she helped, cooked food, made bread, washed clothes, breastfed and looked after children,

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<sup>5</sup> Siti Musdah Mulia, *Membangun Surga Di Bumi; Kiat-Kiat Membina Keluarga Ideal Dalam Islam* (Jakarta: PT. Garamedia, 2011).

which basically was not an obligation for the wife but was the obligation of a husband, so Umar just kept quiet because his wife had done some of the work.

From this story it can be understood that apart from carrying out obligations and fulfilling the rights of husband and wife, both must also have a sense of mutual understanding towards each other. You must also pay attention to how to communicate well so that the problems you are experiencing can be resolved effectively, at least you must also pay attention to several attitudes including openness, empathy, supportive attitude, positive attitude, and equality.<sup>6</sup>

### **Ideology Feminism**

Uncovering the meaning of a movement is often a complex task. Especially when linking the meaning of the movement to the role of women, this further emphasizes aspirations for equality and social justice. The question is why did the women's movement emerge? This movement was born as a response to the existing social context, by positioning gender as a lens for understanding social reality. This movement first appeared in Europe in the 15th to 18th centuries, in line with the *aufklarung* ideology which emphasized rationalism, thought and logic. The French Revolution also triggered the emergence of the women's movement around 1870. The French Revolution, which promoted the idea of freedom from oppression, recognition of equal rights, and the spirit of brotherhood as a motto in overthrowing authoritarian monarchical government, succeeded in changing the state structure into a republic. with a democratic system.

The impact of system changes resulting from the revolution apparently did not change the situation for women. Women remain in a lower position. This was the background to the emergence of the women's movement in France and resulted in the formation of strong women's organizations. Interpreting social movements, including women's movements, always depends on the ideology that shapes the movement's views. This view can be simplified as the position from which humans stand and view reality. It includes the way humans see and understand problems. One of the ideological foundations that can be identified is the theoretical view of egalitarians who want balance

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<sup>6</sup> Hardsen Julsy Imanuel Najoan, "Pola Komunikasi Suami Istri dalam Menjaga Keharmonisan Keluarga di Desa Tondegesan II Kecamatan Kawangkoan Kabupaten Minahasa," *Acta Diurna* IV, no. 4 (2015).

(50:50), namely a condition where imbalances in all aspects of life are eliminated through social transformation in a more just societal structure.

An equal society refers to a situation where there is no clear division or separation in the social structure, so that all members of society are considered equal in all aspects. There are no differences in characteristics, abilities, or desires among individuals in this society, resulting in uniformity in their contributions and uses. Thus, resource allocation is considered to be equal and uniform for everyone. If this approach is applied to a gender context, there will be no division of labor (*division of labor*) in the family. As a result, society will be simple without a clearly defined structure.

However, it is important to note that this concept is often too idealistic and difficult to fully realize in practice. Differences in individuality, abilities, and preferences among members of society are natural. A system where there is no specific division of tasks and roles (*division of labor*) in families or communities may also be impractical in addressing complex needs. Social structures and division of tasks often arise because of specific needs, differences in abilities, and diverse goals in society.

The women's movement or feminism, which began decades ago, has experienced development with various organizations and approaches to struggle that have changed over time. However, to date, the fundamental issue of women's liberation from restrictive cultural norms and detrimental power roles has still not been fully resolved. Today's women's movements are often divided and fragmented by various social issues, and in some cases, can be carried away by environmental dynamics and special interests.

This shows that although much progress has been made by the women's movement, deeper challenges continue to exist in efforts to achieve gender equality and overcome structural problems involving culture and power. Sometimes, focusing on more specific issues or issues that dominate a particular environment can divert attention from the main goals of the women's movement.

Therefore, it is important for the women's movement to maintain a holistic direction of struggle, while still prioritizing the goal of women's liberation from all forms of cultural limitations and power domination. This requires collaboration, a deep understanding of the roots of the problem, as well as inclusive and sustainable strategies so that women's liberation efforts can continue and have a positive impact.



## **Gender equality**

The changes that occur in family life at this time do have complex impacts. The pattern of role division between husband and wife, the dynamics of gender relations, as well as efforts to emancipate women, have the potential to cause negative impacts such as increasing divorce rates, cases of domestic violence, challenges in child development, and increasing social pathology problems that can damage family ties.

In this context, it is important to recognize both the negative impacts and positive opportunities of change within the family. With deep understanding, commitment and cooperation between family members, as well as support from society and the government, families can face these changes better and achieve more sustainable happiness.

Gender equality and women's emancipation are areas that are now widely discussed and voiced by many audiences. The term gender was introduced by scientists to explain the differences between men and women in terms of traits that are innate and traits that can be formed from culture learned from childhood.<sup>7</sup> The discussion of gender equality is considered important because there are many understandings and assumptions that mix natural characteristics of a person with characteristics that are not natural.

Of course, for dynamic gender relations, it is necessary to think more about the different roles of gender so that they become appropriate and in accordance with the existing reality. The concept of different genders is socially capable of giving birth to different roles for men and women in society. In general, gender gives rise to changing roles, responsibilities, functions and places of human activity.

Gender can be explained as changes in the roles, functions, status and responsibilities inherent in men and women in society. This change is the result of social and cultural construction that develops through the socialization process from one generation to the next. This means that gender is not something that is determined naturally or naturally, but is the result of agreements and agreements between individuals in society. Therefore, views on gender can vary depending on an individual's background and experiences, and these views can differ from one culture or social group to another.

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<sup>7</sup> Nina Alia Ariefa dan Mutiawanthi, "Representasi Gender dalam Folklor Jepang," *Jurnal Al-Azhar Indonesia Seri Humaniora* 3, no. 3 (2016): 261–73.

Gender is defined as a sociocultural construction that differentiates masculine and feminine characteristics.<sup>8</sup> Gender can be understood as differences in roles, attributes, traits, attitudes and behavior that grow and develop in society. Gender equality refers to equal conditions for men and women in fulfilling their rights, obligations and role involvement. Gender equality will strengthen the progress of a country, people without distinguishing one from another just because of gender, can take a role in contributing to efforts for the welfare of society, civilization in the socio-economic fields of culture, education and so on.

This means that gender is closely related to several social rules related to gender. Different human reproductive organs have different functional consequences (women menstruate, become pregnant, give birth and breastfeed; men fertilize with spermatozoa). As God's creation, gender is natural, cannot change, cannot be exchanged and applies throughout the ages.

Gender equality promoted in the feminist movement is the result of the effects of globalization. The desire to achieve an equal position in various areas of life has given new impetus to the struggle for justice for women. The pursuit of gender equality gives hope that women will soon obtain the rights they should enjoy.<sup>9</sup>

With this, striving for gender equality is part of a development strategy that aims to provide empowerment to society, both women and men, to achieve a better life. In the Koran it is also explained that the picture of a perfect Muslim woman is an individual who is independent in various aspects of her life<sup>10</sup>. Gender equality needs to be fought for for the progress of a nation, especially in the field of education. Achieving educational goals and providing quality education is a collective mandate, both men and women can take a role and make an impact. Indonesia has made progress in gender equality, but the

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<sup>8</sup> Saguni Fatimah, "Pemberian Stereotype Gender," *Musawa* 6, no. 2 (2014): 195–224.

<sup>9</sup> Muhyidin, "Pengaruh Kesetaraan Gender Di Era Globalisasi Terhadap Konsep Harta Bersama Dalam Sistem Kewarisan Islam," *Diponegoro Private Law Review* 2, no. 1 (2018): 189–97, <https://ejournal2.undip.ac.id/index.php/dplr/article/viewFile/2830/1770>.

<sup>10</sup> Rohmatul Izzad, "Konsep Kesetaraan Gender Dalam Islam," *AL ITQAN: Jurnal Studi Al-Qur'an* 4, no. 1 (2018): 29–52, <https://doi.org/10.47454/itqan.v4i1.678>.

percentage of obtaining education still needs to be fought for because the percentage of women is less.<sup>11</sup>

Gender inequality is a system and structure that results in both men and women becoming victims. Women's underdevelopment reflects the inequality that still exists between the sexes in Indonesia. This is reflected in the condition of women in Indonesia. In fact, gender differences in the choice of characteristics, roles and positions are not a problem if they do not result in inequality. However, in reality, gender differences have created various inequalities, not only for women, but also for men. Various differences in roles, functions, duties, responsibilities and positions between men and women, both directly and indirectly, as well as the impact of legal regulations and policies, have caused various forms of inequality because they have been embedded in culture, norms and structures of society.<sup>12</sup>

Gender inequality which is the result of social and cultural construction has developed over a very long time. This process starts from the stage of socialization, strengthening and forming social and cultural norms through religious teachings and government. This prolonged process has created a cultural outlook that is seen as a divine teaching that cannot be changed and is considered a fate that must be accepted. This injustice appears in various forms such as economic exclusion, subordination of women, giving negative labels (*stereotype*), acts of violence, heavier household workload and various other aspects. These manifestations of gender inequality are interconnected and influence each other in a socialization process that continues to occur stably.<sup>13</sup>

So, the concept of gender equality refers to conditions where the roles and social cycles between women and men are equal, balanced and harmonious. This condition can be achieved through fair treatment between the two. It is important to understand that the implementation of gender equality and justice must take into account specific contexts and situations, not just follow mathematical calculations or apply

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<sup>11</sup> Inayatul Ulya, "Pendidikan Berbasis Gender: Studi Kebijakan Pemerintah dan Aplikasinya dalam Pendidikan," *MAGISTRA: Media Pengembangan Ilmu Pendidikan Dasar dan Keislaman* 4, no. 1 (2018): 11–32, <https://doi.org/10.31942/mgs.v4i1.946>.

<sup>12</sup> Bunga Febriyanti Abidin et al., "Ketidakadilan Kesenjangan Gender Yang Membudaya," *Research Gate*, 2018, <https://www.researchgate.net/publication/329643129>.

<sup>13</sup> Jamal Ma'ruf, *Rezim Gender di NU* (Yogyakarta: Pustaka Pelajar, 2015).

universally. In other words, the concept of equality is a quality philosophical concept and cannot always be measured quantitatively.<sup>14</sup>

Gender equality refers to the principle that all individuals, regardless of age or gender, should have the same opportunities to achieve success in life. This means that everyone must have equal opportunities and control over resources and benefits, in other words, proceed fairly, so that everyone can access these benefits and participate in the development process.<sup>15</sup>

Gender equality refers to a condition where all individuals, regardless of gender, have equal opportunities in terms of rights, responsibilities and opportunities in various aspects of life. This includes providing equal rights, fair access to education, employment, health, participation in political and social life, as well as protection from all forms of discrimination, violence and unfair treatment based on gender.

Gender equality involves changes in cultural norms and social structures that may limit an individual's role and potential based on gender. It also means overcoming gender stereotypes and expectations that can influence a person's life choices.

The concept of gender equality also recognizes the importance of overcoming gender gaps, whether related to economics, education, health, or participation in decision making. Gender equality is not only important for empowering women, but also for creating a just, inclusive and sustainable society for everyone. The feminist movement and efforts for gender equality are part of a broader effort to achieve this goal through social, cultural, political and economic approaches.

### **Analysis of the Rights and Obligations of Husband and Wife in the Book *Irsyadul Ibad Ila Sabilirrosyad Modern Era Equality Perspective***

In the previous presentation, it can be understood that Sheikh Zainuddin Bin Abdul Aziz Al-Malibary stated that the basic principles

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<sup>14</sup> Herien Puspitawati, "Pengenaln Konsep Gender, Kesetaraan dan Keadilan Gender," *Makalah* (Bogor: Institut Pertanian Bogor, 2012), <https://herienpuspitawati.files.wordpress.com/2015/05/5-pengenaln-konsep-gender-2012-rev.pdf> accessed on 19/1/2021 17:26.

<sup>15</sup> Nelen Haspels dan Busakorn Suriyasarn, *Meningkatkan Kesetaraan Gender dalam Aksi Penanggulangan Pekerja Anak serta Perdagangan Perempuan dan Anak: Panduan Praktis bagi Organisasi* (Jakarta: Kantor Perburuhan Internasional, 2005).

of a marriage *aremu'asyarah bil ma'ruf* as a foundation for building family relationships.

If you look at the time when Sheikh Zainuddin Bin Abdul Aziz Al-Malibary compiled the book *Iryadul Ibad*, it was a time when women were still quite marginalized, a woman's space for movement was still limited. Even during that period, conditions of marginalization and subordination of women were still found, where women were not given the space to learn like men.

From a gender perspective, there must be careful attention to the differences and social functions established by society, as well as the responsibilities of men and women in social and family life.<sup>16</sup>

Textually the book *Irsyadul Ibad Ila Sabilirrosyad* seems to marginalize a woman. For example, in the hadith quote which explains that wives must obey their husbands in their sexual needs even though he is reluctant to do so. Also in the hadith quote which explains that the wife must ask permission if she is going to fast sunnah, the wife must get her husband's permission if she wants to leave the house, the wife must get her husband's permission if she gives anything from home, even before the wife does the rights related to Allah take precedence. must fulfill the husband's rights.

So if you look at it from the perspective of the principle of monotheism in Islam, it is certainly contradictory, the article in monotheism states that the position of a man and a woman before Allah is the same, namely as a servant. As is clearly explained in several hadith literature and the Koran, what differentiates them is their level of devotion to Allah SWT.<sup>17</sup>

Back to principles *mu'asyarah bil ma'ruf* as the basis of family relationships, if you read the book *Irsyadul Ibad Ila Sabilirrosyad* Stopping at just understanding the text without looking at the realities of society and the period in which the book was written will give the impression that the husband has complete power over the wife. However, if understood from a gender perspective, this obligation is a shared responsibility, so there is no need for coercion and of course it must be considered by both parties. As in Surah al-Baqarah verse 187, it is explained that sexual intercourse is described as clothing that has

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<sup>16</sup> Mansour Fakihi, *Analisis Gender dan Transformasi Sosial* (Yogyakarta: Pustaka Pelajar, 2003).

<sup>17</sup> Hasnani Siri, "Gender dalam Perspektif Islam," *Jurnal Al-Maiyyah* 7, no. 2 (2014): 232–51.

the function of warming and pleasing the husband and wife, not as a form of coercion.

Regarding providing support as a husband's obligation, if you look at this issue from a gender perspective, if the obligation to provide maintenance is in the hands of the husband or men alone, it could cause marginalization in the issue of wages. For example, women who work will only be considered as additional income earners, so in some conditions this affects the salary they receive. In fact, many women are the main breadwinners, either because their husbands are unable to work or they are single mothers.<sup>18</sup>

If the understanding of the division of rights and obligations in marriage is not contextualized and flexible, it can also lead to a workload that becomes a form of gender inequality as well. For example, the understanding that the wife's work is only as a support, and she is still burdened with domestic work and caring for children, according to Mansur Fakhri in the book *Gender Analysis*, the wife has carried a double workload, and that includes gender inequality. Especially if the husband does not help at all with domestic and parenting matters.

Therefore, in understanding the text of the book, objective reality must be created to give rise to reconstructed interpretations that can be interpreted more democratically and contextually, so that religion can truly become a teaching and guideline that is very respectful of various issues.<sup>19</sup>

## CONCLUSION

Based on the explanation above, it can be concluded that Sheikh Zainuddin Bin Abdul Aziz Al-Malibary's thoughts regarding the rights and obligations of husband and wife are contained in the book *Irsyadul Ibad Ila Sabilirasyad* cannot be separated from the background and social conditions of society at that time. If seen in the Indonesian context, as a well-known ulama, Sheikh Zainuddin Bin Abdul Aziz Al-

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<sup>18</sup> Vevi Alfi Maghfiroh, "Analisis Relasi Hak dan Kewajiban Suami Istri dalam Kitab *Dau'u al-Misbah fi Bayani Ahkami al-Nikah dan Manba' al-Sa'adah*" (Kupipedia, n.d.), [https://kupipedia.id/index.php/Analisis\\_Relasi\\_Hak\\_dan\\_Kewajiban\\_Suami\\_Istri\\_dalam\\_Kitab\\_Dau%27u\\_Al-Misbah\\_fi\\_Bayani\\_Ahkami\\_Al-Nikah\\_dan\\_Manba%27\\_Al-Sa%27adah](https://kupipedia.id/index.php/Analisis_Relasi_Hak_dan_Kewajiban_Suami_Istri_dalam_Kitab_Dau%27u_Al-Misbah_fi_Bayani_Ahkami_Al-Nikah_dan_Manba%27_Al-Sa%27adah).

<sup>19</sup> Lailiy Muthmainnah, "Membincang Kesetaraan Gender dalam Islam (Sebuah Perdebatan dalam Wacana Hermeneutik)," *Jurnal Filsafat* 40, no. 2 (2006): 202–13.

Malibary, with his thoughts on the rights and obligations of husband and wife, can be said to have made quite a contribution, he provided a map of the rights and obligations of husband and wife as an explanation to the wider community. However, not all of Sheikh Zainuddin Bin Abdul Aziz Al-Malibary's thoughts are still relevant to the current situation, for example about the wife's permission to her husband if she wants to leave or about the wife having to get her husband's permission if she wants to give away assets from the house. Thus, it is very likely that there will be a need for new interpretations of several similar works which are still used as references in various problems that arise.

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## Fuqaha's Views On Siri Marriage

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### Abstract

*Marriage is a sacred institution that is safeguarded by Sharia to ensure fairness, openness and sustainability of the relationship between husband and wife. One of these safeguards is the presence of guardians and witnesses in the marriage contract. Hikmah at-Tasyri' shows that the presence of guardians and witnesses serves as a deterrent to fraud and as a form of strengthening the marriage bond. In fact, the Prophet Muhammad SAW recommended announcing the marriage through a celebration or walimah. This research uses a qualitative approach with a library research method, which examines the opinions of classical and contemporary scholars regarding the importance of the presence of witnesses and publication in marriage. The results show that marriage that is not witnessed, not publicized, and not registered is not permissible. As for marriages that are witnessed by two witnesses but the witnesses have been "ordered" or are not independent, it is ruled makruh by several companions and tabi'in such as Umar RA, Urwah, Abdullah ibn Ubaidillah, Ibn Utbah, Sa'bi, Nafi' (servant of Ibn Umar), as well as imams such as Abu Hanifah, Shafi'i, and Ibn Munzir. Thus, it can be concluded that the presence of witnesses and publication in marriage is a sunnah muakkadah that is highly recommended to maintain the transparency and legality of marriage in the view of sharia.*

**Keywords:** Views, Siri Marriage, Fuqaha.

### Abstrak

Pernikahan merupakan institusi sakral yang dijaga oleh syariat untuk memastikan keadilan, keterbukaan, dan keberlanjutan hubungan antara pasangan suami istri. Salah satu bentuk penjagaan tersebut adalah melalui kehadiran wali dan saksi dalam akad nikah. Hikmah at-Tasyri' menunjukkan bahwa kehadiran wali dan saksi berfungsi sebagai pencegah kecurangan dan sebagai bentuk penguatan ikatan pernikahan. Bahkan, Nabi Muhammad SAW menganjurkan untuk mengumumkan pernikahan melalui perayaan atau walimah. Penelitian ini menggunakan pendekatan kualitatif dengan metode studi kepustakaan (library research), yang mengkaji pendapat-pendapat ulama klasik dan kontemporer mengenai pentingnya kehadiran saksi dan publikasi dalam pernikahan. Hasil penelitian menunjukkan bahwa pernikahan yang tidak

disaksikan, tidak dipublikasikan, dan tidak dicatatkan hukumnya tidak boleh. Adapun pernikahan yang disaksikan oleh dua orang saksi namun saksi tersebut telah "dipesan" atau tidak independen, dihukumi makruh oleh beberapa sahabat dan tabi'in seperti Umar RA, Urwah, Abdullah ibn Ubaidillah, Ibnu Utbah, Sa'bi, Nafi' (sahaya Ibnu Umar), serta para imam seperti Abu Hanifah, Syafi'i, dan Ibnu Munzir. Dengan demikian, dapat disimpulkan bahwa kehadiran saksi dan publikasi dalam pernikahan merupakan sunnah muakkadah yang sangat dianjurkan untuk menjaga transparansi dan legalitas pernikahan dalam pandangan syariat.

**Kata Kunci:** Pandangan, Pernikahan Siri, Fuqaha.

## INTRODUCTION

Wisdom at tasri' (Ahmad al Jurjawi, tt, p. 150) which can be understood that in order to maintain the strength of the marriage bond from the act of fraud of one of the parties, the marriage must be attended by guardians and witnesses, even in order to strengthen the existence of two witnesses, the Prophet once encouraged the companions to announce the marriage that had been carried out by making a party (walimatul urusy or by beating the tambourine as a sign of a marriage that was last. As the Prophet said; *A'linu Hazan Nikah Wad Thousand 'Alaihi Bighairi Bali Aid Dufufi*.<sup>1</sup>

Of course, the prophet's command mentioned above is not a commandment without a purpose, but there must be a purpose that religion wants from the recommendation of the marriage publication. One of the purposes of the publication is the recognition of the public about the occurrence of a marriage between two people and with this publication it is hoped that the status of the marriage will be more guaranteed.<sup>2</sup>

Marriages that are not published in the view of scholars have three opinions, namely first, series marriages that are carried out without witnessing, without being published and without being recorded in official records, according to scholars of marriage law is invalid. Second, the marriage contract which was attended by witnesses but the

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<sup>1</sup> al Yami as Sunaini, Muhammad Ibn Ismail al Amir. (1991). Subul as Salam, Kitab Nikah, Cet I, Beirut; Dar alfikr III.

<sup>2</sup> Khoiriyah, R. (2017). ASPEK HUKUM PERLINDUNGAN PEREMPUAN DAN ANAK DALAM NIKAH SIRI. Sawwa: Jurnal Studi Gender, 12(3), 397-408. doi: <https://doi.org/10.21580/sa.v12i3.2094>

witnesses were ordered to keep the existence of the marriage secret.<sup>3</sup> In this matter, there was a debate among the scholars, namely about the existence of publications in marriage. Some scholars state that the existence of witnesses is the pillar of marriage and the existence of I'lan is not a condition that affects the shah's or not marriage.

Third, the opinion that states that the presence of witnesses and i'lan is not required in marriage, but both are only sunnah when there is a contract as evidence in the event of denial. This is seen and based on the existence of a marriage performed by Hasan Ibn Ali without the presence of witnesses but after that the marriage was made public. And once in a time Umar ibn Khattab aborted the had of qazaf adultery against a friend because the accused had performed a marriage that was not witnessed and not publicized.

A publicized marriage is not a mandatory commandment but only a sunnah which means that if it is done it will be rewarded and if it is left innocent. However, Abu Bakr as-Siddieq stated that nikah siri is a marriage that is not witnessed and not publicized and marriages like this are not allowed or prohibited.<sup>4</sup> However, the prohibition in this case is not so clear whether the prohibition is makruh as the Prophet did not like it or whether the prohibition is haram.

However, Umar ibn Khattab was once reported about a marriage that was carried out only in the presence of witnesses of a man and a woman, then he viewed siri marriage with the criteria of marriage which was only witnessed by a man and a woman as the same law as adultery. As for the law of I'lan marriage according to Malikiyah scholars is mandatory, as this was stated by Abu Bakr Abd al Azis a follower of Maliki who stated that a siri marriage by ordering the witnesses to keep the marriage a secret is canceled so that the marriage is i'lankan.<sup>5</sup>

The main issues are discussed in the form of the following questions: What is the opinion of the fuqoha on a marriage that is not publicized and not witnessed? And what is the opinion of the scholars of marriage where two witnesses are present but the witnesses are ordered

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<sup>3</sup> Wahyudani, Z. (2020). KEABSAHAN NIKAH SIRI DALAM PERSPEKTIF MASLAHAH. *Jurisprudensi: Jurnal Ilmu Syariah, Perundang-Undangan Dan Ekonomi Islam*, 12(1), 44-63. Doi: <https://doi.org/10.32505/jurisprudensi.v12i1.1508>

<sup>4</sup> Sobari, A. (2018). Nikah Siri Dalam Perspektif Islam. *Mizan: Journal of Islamic Law*, 1(1). Doi: <https://doi.org/10.32507/mizan.v1i1.117>

<sup>5</sup> al Muqaddasi, Abu Muhammad Abd Allah ibn Ahmad ibn al Qudamah al Muqaddasi. (tt p. 538), al Mughni li ibn al Qudamah, al Maktabah al Jumhuriyah al Arabiyah, vi.

not to publicize the marriage? What is the ruling on witnessing and I'lan in the view of the fuqoha?

The research objectives to be achieved in this presentation are, to find out the views of fuqaha in siri marriage. And to find out the marriage in the validity of the marriage contract. The usefulness of this research to be achieved in this presentation is, as a medium and vehicle to add to the wealth of knowledge, especially Muslims related to siri marriage, so that it can be used as a reference in carrying out a marriage.

## **RESEARCH METHODS**

This research uses a normative descriptive method, which is research that aims to describe objectively and thoroughly about a particular phenomenon or symptom. In this case, the focus of the research is to describe the fuqoha's views on siri marriage. Based on its type, this research is included in library research, which is research conducted by collecting data from various literatures, such as classical books and contemporary books that are relevant to the topic under study.<sup>6</sup>

The data sources in this research consist of primary and secondary data. Primary data is obtained directly from the original sources, namely fiqh books and the opinions of fuqoha who discuss siri marriage. Meanwhile, secondary data is obtained from other supporting literature such as books, journals, and documents related to the research topic, in order to enrich and strengthen the analysis.<sup>7</sup>

After the data is collected, the next step is to conduct an editing process to ensure the completeness and accuracy of the information. The data that has been prepared is then analyzed using the comparative method, namely by comparing the opinions of the fuqoha regarding siri marriage to find similarities and differences in views. This approach aims to produce a deeper and more comprehensive understanding of the various perspectives of Islamic law on the practice of siri marriage.<sup>8</sup>

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<sup>6</sup> Koentjaraningrat, *Metode Metode Penelitian Masyarakat*, Gramedia, Jakarta, 1981, h. 29

<sup>7</sup> Louis Gootshalk, *Understanding History a Primer Of Historical Method*, Nugroho Noto Susanto, UI Press, Jakarta, 1985, h.32

<sup>8</sup> Suharsimi Arikunto, *Prosedur Penelitian Suatu Pendekatan Praktek*, Renika Cipta, Jakarta, 1998, h.197

## RESULTS AND DISCUSSION

### Siri Marriage Without Witnesses, Publication, and Official Registration

In the form of nikah siri, which is conducted without witnesses, without being publicized and without being recorded in official records.<sup>9</sup> According to the fuqaha, this form of nikah sirri is not valid, because one of the pillars is not fulfilled, namely the presence of two witnesses.<sup>10</sup> This opinion is the opinion of the Sunnah, Druz<sup>11</sup> and Jumrur Ulama', although Abu Saur, Abi Laila and Abi Bakr do not require the presence of witnesses in marriage.<sup>12</sup> The latter opinion is the same as that of Imam Malik, which also means that witnesses are not included in the pillars of marriage<sup>13</sup>

However, because the majority of the fuqaha have determined that the witness is included in the pillars of marriage, the opinion that states that nikah siri in this form is not valid is more acceptable. The argument they used was the hadith of the Prophet which reads *La nikaha illa biwaliyyin wasyahiday 'adlin*.<sup>14</sup> And the hadith of the Prophet reads: *Ainamam raatun nakahat bighairi izini waliyyiha wasyahidai 'adlin fanikahuha batilun faindakhala biha falaha al mahru istajarru fassulton waliyyu man la waliyalahu*.

From these two hadiths, we can see that the existence of two witnesses is a necessity that should not be ignored, so Ala'uddin stated that a marriage contract without witnesses is invalid. (Ala ad Din Abu al-Hasan Ali ibn Sulaiman al-Mardawi al Hambali, tt, p. 102) The testimony in this case is in order to prove that there has been a valid marriage between a man and a woman so that there is no way for both parties to deny the marriage.<sup>15</sup> Besides being a tool to anticipate the

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<sup>9</sup> Mahmud Syaltut. (tt, p. 268). al Fatawa, Dar al Qalam.

<sup>10</sup> al Bajuri, Syaikh Ibrahim al Bajuri, tt, p. 132. Hasyiyah Syaikh Ibrahim al Bajuri, Beirut: Dar al Fikri, tt, ii.

<sup>11</sup> Ummar Farrukh, tt, p.90. *al Usrah fi asy Syar'I al Islami*, Beirut: al Maktabah al Asriyyah.

<sup>12</sup> Badran, Badran abu al Ainaini. (tt, p. 61). *az Zawaj wa at Talaq fi al Islam, Fiqh Muqarran Baina al Madzhahib al Arbaah as Sunniyah wa al Madzhahib al Ja'fariyah wa al Qanun*, Askandariyah: Muassasah Syabab al Jam'iyah.

<sup>13</sup> Abu Zahrah, Muhammad. (tt, p. 92). *al Ahwal asy Syakhsiah*, Dar al Fikr al Arabi.

<sup>14</sup> al Baihaqi, Abu Bakr Ahmad bin Husain ibn Ali. (tt, p. 125) *as Sunan al Qubro*, Dar al Fikri, vii

<sup>15</sup> asy Syarif, Mahmud ibn. (TT, p. 31). *al-Islami wa al Usrah*, Muassasah al Matbuah al Hadisah.

occurrence of adultery, because if a witness is not a requirement, it is impossible for adultery to occur with testimony.<sup>16</sup>

Therefore, two fair witnesses are required, although it is also permissible to be wicked witnesses if wickedness has penetrated the lives of the people.<sup>17</sup> This is done in order to make a proof strong. And most scholars state that marriage is invalid without the presence (bayyinah), which is evidence by the presence of two witnesses during the contract.<sup>18</sup> In fact, Abu Zahrah stated that marriage is invalid except for two conditions, namely the presence of two witnesses and the presence of a woman or future wife who is indeed allowed to be married.<sup>19</sup>

In this case the Prophet Muhammad once stated: *Al baghaya allati yankihna anfusuhunna bighairi bayyinah*. Moreover, the marriage is not recorded in the official record, of course, a marriage like this is worse when compared to the first form of sirri marriage, which is a marriage whose harmonious conditions have been met, it's just that the marriage is not recorded. Even though the first form of marriage is still problematic (muhtalaf fihi), especially marriages whose harmony requirements have not been fulfilled and are also not recorded.

Of course, the "inevitability" of marriage is greater than the first form of marriage. That is *Mafhum Muwafaqah* that we can capture from the information above. The Prophet also hated such a series of marriages as narrated by Abu Hasan al Mazini which reads: *An nan nabi shalallahu alaihi wasallam kana yakrahu nikahas siri hatta yudhrabu bidufin wayuqalu atainakum atainakum fahayyuna nuhayyikum*.<sup>20</sup> Perhaps in the hadith it is not so clear whether the marriage was witnessed or not, but what is certain is that the marriage has not been made public because the beating of Rebbana at that time was in the context of publication, as the

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<sup>16</sup> al-Hanafi, Ala ad-Din Abi Bakr Mas'ud al-Kasani. (TT, p. 378). *The Book of Bada'I as Sana'I fi Tartib as Syar'I*, Dar al Fikr, ii

<sup>17</sup> asy Syafi'I, Muhammad Amin al Kurdi al Irbili. (tt, p. 345) *Tanwir al Qulub fi Muamalah Allam al Guyub*, Surabaya, al hidayah.

<sup>18</sup> al Musawwa, Imam Wali Allah ad Dahlawi. (tt, p. 101). *Syarh al Muwatta'*, Beirut, dar al kutub al ilmiah, ii.

<sup>19</sup> Abu Zahrah, Muhammad. (tt, 60). *al Ahwal asy Syakhsiah*, Dar al Fikrr al Arabi.

<sup>20</sup> al Haitami, Nur ad Din Ali ibn Abi Bakr. (1988). *Majma' az Zawaid wa Manba' al Fawaid bab I'lan an nikah wa al Lahwi wa an Nasr, Tahqiq al Iraqi dan ibn Hajr*, Beirut, Dar al Kutub al Scientific, iv.

Prophet said: *A'linu hazan nikah wajalahu fil masajid wadhribu alaihi biddufuf*.<sup>21</sup>

And in this regard, the Prophet also forbade serial marriage as in a hadith narrated: *An nan nabi sallahualaihi wasallam naha anin nikah siri*.<sup>22</sup> It is even clearer that the nikah siri understood by the Companions at that time was a marriage that was not witnessed and also not published, we can see this from the words of Abu Bakr as-Siddiq as follows: *La yajuza nikahas siri hatta yu'lane wayusy hada alaihi*. But the easiest understanding we get is that if there is a publication, the wedding must have been witnessed because the presence of a large crowd at the wedding party can also be considered as a testimony.

But from the statement of Abu Bakr as. Siddiq, we can draw one conclusion that what is meant by nikah siri is a marriage that is not witnessed and is not publicized and marriages like this are not allowed or forbidden by law. However, the prohibition in this case is not so clear whether the prohibition is makruh as the Prophet did not like it or whether the prohibition is haram. However, Umar ibn Khattab once reported that a marriage that was attended only by a male and female witness then he said: *Haza nikahus siri wala ujizuhu walaunkuntu taqaddamtu fihi larajamtu*.<sup>23</sup>

From this asar it can be seen that Umar ibn Khattab views nikah siri with the criteria of marriage which is only witnessed by a man and a woman as the law is the same as adultery which has the consequence of stoning,<sup>24</sup> although according to Abu Saur and Jama'ah the witness is not a condition of marriage. Furthermore, it is said that the marriage that is witnessed by a witness of a man and a woman is called nikah siri because the requirements for testimony in the marriage are incomplete, namely it must be two men or one man with two women.<sup>25</sup>

This kind of opinion is also used by the Kufa Ulama. Meanwhile, the Shafi'i and Hambali scholars require that the witness must be male,

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<sup>21</sup> ibn Surah, Abu Isa Muhammad ibn Isa. (TT, p. 398). *al Jami' as Sahih wa Huwa Sunan at Tirmizi bab Maja'a la Nikaha illa bi Bayyinah*, III.

<sup>22</sup> al Haitami, Nur ad Din Ali ibn Abi Bakr. (tt, p. 285). *Majma' az Zawaid wa Manba* iv.

<sup>23</sup> Yusuf az Zarqaini, Abu Abdillah Muhammad ibn Abd al Baqi ibn. (TT, p. 122). *Syarh Muwatta' al Imam Malik*, Egypt, Maktabah Mustafa al Babi al Halabi wa Auladihi, iv.

<sup>24</sup> al Qurtubi, Ibn ar Rusy *Bidayatul Mujtahid.*, ii (tt, p. 13).

<sup>25</sup> ibn Hazm, Abu Muhammad Ali ibn Ahmad ibn Said. (TT, 465). *al Muhalla'*, Ordinated by Ahmad Muhammad Syakir, Dar al Fikri, tt, ix



the marriage contract with a witness of a man and two women is invalid. As narrated by Abu Ubaid from Zuhri he said: there has been an example from the Prophet that women should not be witnesses in criminal matters, marriage and talaq.<sup>26</sup> In addition, according to az Zarqaini, nikah siri is a marriage that is not publicized or a marriage that is deliberately ordered not to be disseminated.

### **Marriage Contract with Witness Message**

The marriage contract was attended by witnesses but the witnesses were ordered to keep the marriage secret.<sup>27</sup> In this matter, there was a debate among the scholars, namely about the existence of publications in marriage. Some scholars state that the existence of witnesses is the pillar of marriage and the existence of I'lan is not a condition that affects the shah's or not marriage. And the presence of two witnesses in the marriage has removed the marriage status from the serial credibility.<sup>28</sup>

However, some scholars also state that witnesses are not a valid condition in marriage, therefore the existence of two witnesses does not affect the validity or not. However, marriage is only valid if it has been 'ilan, even if the marriage is not witnessed. In more detail, there are three opinions related to the discussion of nikah siri in this group, namely; First, the opinion of some fiqh experts who stated that the presence of witnesses is sufficient as a prerequisite for i'lan even though the witnesses present are ordered not to disseminate the marriage. The basic argument they used was the existence of two witnesses and two people who agreed to have erased the marriage from the secret creed.<sup>29</sup>

Because a secret cannot occur between four or more people. In addition, there is actually an agreement among the three madhhab scholars, namely Maliki, Hanafi and Shafi'i, that the existence of two witnesses in the marriage is a condition, but the difference is whether the witness is included in the condition of perfection carried out at the time

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<sup>26</sup> Syyid Syabiq. (1980). *Fiqh Sunnah 6 Translation of Language*; Drs Muhammad Talib, Cet 1, Bandung, Pt al Ma'arif.

<sup>27</sup> Madaniy, Ha Malik (2001), *Nikah Siri dalam Perspektif Hukum Islam, Makalah Disampaikan Dalam Seminar Tentang "Nikah Siri Dalam Tinjauan Syar'I, Hukum Positif Dan Psiko Social*, Di Auditorium UII Pusat.

<sup>28</sup> Farid, Diana, Muhammad Pakarti, Hendriana Hendriana, Iffah Fathiah, and Moh. Imron Taufik. 2023. "Praktik Pernikahan Dan Perceraian Di Bawah Tangan". *Mutawasith: Jurnal Hukum Islam* 6 (1), 53-69. Doi: <https://doi.org/10.47971/mjhi.v6i1.612>.

<sup>29</sup> Alfin, Aidil, and Busyro Busyro. 2017. "Nikah Siri Dalam Tinjauan Hukum Teoritis Dan Sosiologi Hukum Islam Indonesia". *Al-Manahij: Jurnal Kajian Hukum Islam* 11 (1):61-78. <https://doi.org/10.24090/mnh.v11i1.1268>.

of duhul or including the legal condition that is performed at the time of the contract. Regarding this opinion, although Hanafiah scholars include marriage with a message from the husband to the witnesses to keep the occurrence of the marriage secret to the audience into the classification of nikah seri, according to them such a marriage is still valid only it is punished by makruh.<sup>30</sup>

Even if it is done deliberately, in the sense that the secrecy is agreed upon by the husband, guardian's wife and witnesses, because there is i'lan in this opinion the law is sunnah.<sup>31</sup> Meanwhile, Ahmad Husari stated that the existence of testimony is a form of publication effort itself. Because shari'i always provides its own procedures in determining its sharia. Therefore, with the shari'a, the testimony in marriage is in the context of i'lan itself.

Based on this assumption, the researcher added that the wedding that the witness had attended had been referred to as an open-ended marriage, even though the witnesses were ordered to keep the marriage secret. Ahmad Husari reasoned that a secret thing could not happen between four people. And if there is something that has been known by four people, it means that it is not a secret but has become a common thing,<sup>32</sup> as a verse says: *wasiruka ma kana indam riin wasiru assalasah ghairul khafi*.

Even more emphatically is the opinion of Ibn Hazm, who stated that a series is anything that is known by less than two people and if something is known by more than two people then it means that it is no longer serial. Likewise, a wedding that has been attended by five people, namely the husband-to-be (an nakih), the wife-to-be (al mankuhah), the wali (al munkih) and two witnesses are no longer called siri. As a verse states: *Ala kullu sirun ja waza istnaini syaiun*.

Another verse states: *As sirru yuktumuhual isnani bainahuma wakullu sirrun adalishnaini muntasirun*. According to Ibn Qudamah the existence of publication is only sunnah, what is obligatory according to him is the existence of two witnesses who are present at the time of the contract, on the grounds that marriage is a mu'awwadah contract which

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<sup>30</sup> az Zuhaili, Wahbah. (tt, p. 71), *al Fiqh al Islami wa Adillatuhu*, Dar al Fikr, vii

<sup>31</sup> al Bahuti, Masrur ibn Yunus Idris. (tt, 66), *kasyf al Qina an Matan al Iqna*, Dar al Fikr, v.

<sup>32</sup> Ahmad Husari. (tt, 183), *an Nikah wa al Qadaya al Mutaalliqah Bihi*, Maktabah al Kuliyat al Azhariyah.

is not mandatory to be published as a contract of sale<sup>33</sup> and purchase even though according to Yazid ibn Harun Allah actually requires testimony in the matter of buying and selling not the matter of marriage, as Allah said:

.....وَأَسْتَشْهَدُوا شَهِيدَيْنِ مِنْ رَجَالِكُمْ..... ٢٨٢ (2); 282 al-Baqarah

Then the scholars require testimony in the matter of marriage and not the matter of buying and selling. However, according to Salam Madkur, indeed in marriage it must be witnessed by two just men,<sup>34</sup> as Allah says:

فَإِذَا بَلَغَ الْبَلَغُ فَأَمْسِكُوهُنَّ بِمَعْرُوفٍ أَوْ فَارِقُوهُنَّ بِمَعْرُوفٍ وَأَشْهَدُوا ذَوِي عَدْلٍ مِنْكُمْ وَأَقِيمُوا الشَّهَادَةَ لِلَّهِ..... ٢ (65); 2 at-Talaq

The second opinion states that the existence of two witnesses is not a condition for the occurrence of a contract, but a condition for the occurrence of a contract is sufficient with the existence of publication, (Murad Syukri, tt, p. 154) therefore the existence of two witnesses cannot replace the position of i'lan.

And if there is a marriage contract attended by witnesses but the witnesses are ordered to keep the marriage secret, then the contract cannot be accepted.<sup>35</sup> This opinion was expressed by Malikiyah scholars. In Malikiyah's opinion, marriages that are carried out by ordering witnesses to hide the marriage are punished as null and void, even marriages like this in Malikiyah's opinion are identical to the nature of adultery.<sup>36</sup>

Therefore, if such a marriage occurs, it must be fasakh with talaq bain if there has been intercourse, as fasakh of marriage is done to two people who have a marriage without the presence of two witnesses and

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<sup>33</sup> al Muqaddasi, Abu Muhammad Abd Allah ibn Ahmad ibn al Qudamah. (tt, p. 1451), *al Mughni li ibn al Qudamah*, al Maktabah al Jumhuriyah al Arabiyah, vi.

<sup>34</sup> Muhammad Salam Madkur. (1993), *Justice in Islam*, Translated by Drs Imran am cet. Iv, Surabaya, Pt. Ibna Ilma.

<sup>35</sup> Anggi Nur Nisa Tanjung, and Wahyu Ziaulhaq. 2022. "An Analysis of Positive Law and Fiqh on Siri Marriage and Its Influence on Property Ownership". *SOSMANIORA: Journal of Social Sciences and Humanities* 1 (1):62-66. <https://doi.org/10.55123/sosmaniora.v1i1.207>.

<sup>36</sup> al Baghdadi, Al Qadi Abd al Wahab. (tt, p. 746), *al Ma'unah ala Madzhab Alam al Madinah li al Imam Malik ibn Anas*, dar al fikr, ii.

have had intercourse. And the person who performs this series of marriage is subject to the penalty of volume limit if there has been intercourse that is acknowledged by himself or with the presence of four witnesses who witnessed the intercourse directly.

According to Maliki, if the marriage that is carried out without witnesses is announced by beating tambourine or walimah, it is not obligatory to be restricted. Likewise, if the marriage is attended by a witness other than the guardian, or the marriage is witnessed by two fasiq witnesses, then the person who performs the marriage is not obliged to be limited because such a marriage according to Maliki is categorized as a subhat marriage which does not have implications for the punishment of had, this is based on the rules of fiqhiyah which reads: *Al hudud tasqutu bis syubuhat*.<sup>37</sup>

From the above information, we can see that the law of marriage according to Malikiyah scholars is mandatory, as stated by Abu Bakr Abd al Azis, a follower of Maliki, who stated that a serial marriage by ordering witnesses to keep the marriage secret is punished as null and void so that the marriage is annulled. So according to Malikiyah, the existence of i'lan is a condition for the validity of the contract, because the existence of i'lan is a differentiator between adultery and marriage. As the Prophet said: *Faslu ma bainal halal walharami dhufuf wassauth*.<sup>38</sup>

Although Malikiyah stated that the existence of witnesses is not a pillar of contract, they stated that witnesses are a condition for halal dukhul. Similarly, the opinion of Ibn Rushd from Abu Saur and some scholars that witnesses are not included in the condition of marriage but the condition of marriage is the existence of i'lan after the existence of ijab and qabul and before dukhul. The difference between Ibn Rushd and Malikiyah is that Malikiyah requires the existence of i'lan during sighat, but according to Ibn Rushd it is permissible after the occurrence of sighat and before dukhul.

The main basis in the problem of serial marriage with the criteria as mentioned above that they use is the hadith of the Prophet which reads: *A'linu hazan nikah wajaluhu fil masjid wadribu alaihi bid dufuf*. The Prophet (peace and blessings of Allaah be upon him) said: *The Prophet (peace and blessings of Allaah be upon him) said: "The Prophet*

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<sup>37</sup> Abi Bakr as Suyuthi, Jalal ad Din Abd ar Rahman. (tt, p. 84), *ibn al Syaibah wa an Nazair fi al Furu'*, Indonesia, Maktabah Dar Ihya al Kutub al Arabiyah.

<sup>38</sup> al Akh Wazi, Ibn al Arabi al Maki Aridah. (tt, p. 307), *Syarh Sahih at Tirmizi*, Beirut, Dar al Kutub al Ilmiah, iv.

(peace and blessings of Allaah be upon him) said, 'O Prophet (peace and blessings of Allaah be upon him).' The Prophet (peace and blessings of Allaah be upon him) said: "The Prophet (peace and blessings of Allaah be upon him) said: Where the Prophet forbade the existence of nikah siri this also means that the Prophet advocated i'lan on the basis of an expression: *An nahyu annis syaiin amrun biddidhi*."<sup>39</sup>

Which is the opposite of the rule of ushul which states about Amr which reads: *Al amru bis saiin nahyun an didhidihi*. That is the perspective of Malikiyah which states that witnesses are not a condition for the occurrence of a marriage contract, the existence of witnesses in marriage is only a condition for the halalness of dukhul and the consequences of the existence of dukhul. However, what is an absolute requirement in marriage for the existence of i'lan and the existence of i'lan in marriage according to Malikiyah is as one thing that separates marriage and adultery.

Meanwhile, among the scholars who stated that the marriage of series with the criteria as above is punished by Makruh are Abu Hanifah, as-Shafi'i and Ibn Munzir and among the groups of companions who hate nikah siri are Umar RA, Urwah, Abd Allah Ibn Ubaid Allah ibn 'Utabah, Sa'id and Nafi' sahaya Ibn Umar.

### **Witnesses and I'lan in the Marriage Series**

The opinion states that there is no requirement for witnesses and i'lan in marriage, but both are only sunnah when there is a contract as evidence in the event of denial. The lightest opinion among the two previous opinions, because the opinion views that the existence of two witnesses and publication is not a requirement in marriage, but this opinion views that the existence of two witnesses and the publication of the law is sunnah only.<sup>40</sup>

This is seen and based on the existence of a marriage performed by Hasan Ibn Ali without the presence of witnesses but after that the marriage was made public.<sup>41</sup> This opinion is held by the Shi'a madhhab, they state that the existence of i'lan and two witnesses is not included in the pillars of marriage and they also say that wali is also not included in the pillars of marriage, with one condition that the married woman is a

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<sup>39</sup> Abd al Hamid Hakim. (tt, p. 9), *Mabadii Awwaliyyah*, Jakarta, Sa'diyyah Putra.

<sup>40</sup> Zuhri, Saifudin. 2014. "Sanksi Pidana Bagi Pelaku Nikah Siri Dalam Perspektif Hukum Islam". *Asy-Syir'ah: Jurnal Ilmu Syari'ah Dan Hukum* 48 (2):363-87. <https://doi.org/10.14421/ajish.v48i2.121>.

<sup>41</sup> Rusyd, Ibn. (tt, p.13), *Bidayatul Mujtahid Wanihayatul Muktasid*.

woman who has reached puberty. This opinion is based on the asar narrated by Zararah when he asked as-Siddeq about a person who performs a marriage contract without the presence of two witnesses and he replied with an expression: "*La baksa bittazawujil battati bighairi syuhudin faima bainahu wabainallahi taala wainnama ju'ila as syuhudu min tazwijissunnah min ajlil waladi laula zalik lam yakun fihi baksun*".

Abu Saur and Jama'ah stated that witnesses are not included in the valid conditions of marriage and are not included in the requirements for perfection, the existence of witnesses is only sunnah if it is done in marriage. In addition, this opinion is also held by the Ja'fariyah and Zahiriyah schools. Both of them reasoned with an argument that the Qur'an clearly never states that witnesses are a condition in marriage, but witnesses are only required in buying and selling, then scholars require witnesses in marriage because marriage contracts are considered more important than buying and selling transactions.

And the existence of a hadith that commands testimony in marriage is a command that is sunnah only.<sup>42</sup> Although the Shia madhhab does not stipulate the existence of witnesses in the marriage directly, but if the marriage is performed with a representative they require the presence of witnesses in the marriage, because according to them the contract of representation is a transaction of a separate contract. They also said that the existence of two witnesses only witnessed the validity of the contract and not the validity of the marriage, because the validity of the marriage contract was sufficient with the existence of *ijab* and *qabul*.<sup>43</sup>

The opinion that witnesses and publications are not important in marriage is contrary to the opinion of most scholars, because Abu Hanifah, Shafi'i and Maliki agreed that witnesses are a condition of marriage. However, the criteria for the requirements in this case among the three scholars are different. It's just that according to Imam Malik, witnesses are not included in the pillars of marriage but only as a condition by including dowry as one of the pillars of marriage.<sup>44</sup>

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<sup>42</sup> az Zahabi, Muhammad Husain. (1968), *asy Syari'ah al Islamiyah*, Cet II, Egypt, Dar at Ta'lif.

<sup>43</sup> Raihan, Azka Fauzia, Djanuardi Djanuardi, and Renny Supriyatni. 2023. "KEDUDUKAN WALI PERKAWINAN DISEDIAKAN PENYEDIA JASA PERKAWINAN SIRI ONLINE DALAM PERSPEKTIF HUKUM ISLAM". *ACTA DIURNAL Jurnal Ilmu Hukum Kenotariatan* 6 (2), 193 - 205. <https://doi.org/10.23920/acta.v6i2.1396>.

<sup>44</sup> Ahmad as Sawi. (tt, 350), *Bulghoh as Salik li Aqrab al Masalik*, dar al Fikr, I.

And marriages without witnesses and publications are also marriages that are hated by the companions and punished by the law of makruh. Among the companions who hated such marriages were Umar RA, Urwah, Abdullah ibn Ubaidillah, Ibn Utbah, Sa'bi and Nafi' sahaya Ibn Umar. While among the tabi'in are Abu Hanifah, Shafi'i and Ibn Munzir. The existence of witnesses and publications is very important in a marriage contract, because both are evidence of the existence of a legitimate relationship between a man and a woman as well as a means to anticipate irresponsible actions from one of the parties.

Even if the Prophet had made a marriage contract without witnesses, it was one of the specificities of the Prophet in the matter of marriage that could not be equated with others. Once in a time Umar ibn Khattab annulled the had qazaf adultery against a companion because the person accused of having committed an unwitnessed and unpublicized marriage, as asar narrated by Ibn Umar: "*Tazawwaja rajulun imraatan fakana yakhtalifu ilaiha faraahu jarun lahu faqazafahu biha fasta'azahu ila umara radiyallahuanhu faqalalahu umar: bayyanituka ala tazwijuha faqala ya amiralmukminin kana amrun duna mqa ashadtu 'alaihi ahlaha Fadaraa al haddu 'an qazifihi waqala hassinnu furujannisa waa'linu hazabn nikah*".

## CONCLUSION

Based on the description above, it can be concluded First, marriages that are not witnessed, not published, and not administratively recorded are forms of marriage that cannot be justified by sharia or positive law, because they are contrary to the principles of transparency and legal protection in the institution of marriage. Second, a marriage that is carried out in the presence of two witnesses, but the witness has been booked in advance (not naturally present), is considered makruh by some of the companions and tabi'in such as Umar bin Khattab RA, Urwah, Abdullah ibn Ubaidillah, Ibn Utbah, Sa'bi, and Nafi' sahaya Ibn Umar. This view is also agreed by several fiqh scholars from the tabi'in circles such as Abu Hanifah, Ash-Shafi'i, and Ibn Munzir. This shows a serious concern for the independence and objectivity of witnesses in marriage. Third, the presence of witnesses and the publication of marriage (i'lan an-nikah) is basically part of the sunnah of mu'akkadah, which although it is not a legal requirement, is highly recommended for the sake of maintaining maqāṣid as-syarī'ah, especially in terms of maintaining nasab, family honor, and avoiding fitnah in society. Thus, it is important for the community and policy makers to continue to encourage the implementation of marriage that meets the aspects of

legality, publication, and religious ethics as part of efforts to strengthen family institutions and social order.

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## Transformation of Child Status: From Adopted Child to Child in Review of Positive Law and Islamic Law

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### Abstract

*Adoption refers to the act of taking a child who is not your biological child and making him your own child. The process of adopting a child must be carried out through legal procedures. When adopting a child, it is necessary to pay attention to existing law, namely from an Islamic legal perspective and from a state legal perspective. In this research, the law and the process of adopting a child are discussed according to Islam and state law. This research uses a library study method where the researcher relies on sources of information from literature as the main source. This research focuses on analyzing existing data or texts, not field data or information obtained directly from experience or eyewitnesses. Researchers only interact with sources available in the library or existing secondary data. The results of this study reveal the Islamic view of someone adopting a child and what laws apply in the process of adopting a child.*

**Keywords:** *Perspective; Islamic law; State Law.*

### Abstrak

Pengangkatan anak yaitu merujuk pada tindakan mengambil seorang anak yang bukan anak biologisnya dan menjadikannya sebagai anak sendiri. Proses pengangkatan anak harus dilakukan melalui prosedur hukum. Dalam pengangkatan anak perlu memperhatikan hukum yang ada yaitu dari segi hukum pandangan islam dan dalam pandangan hukum Negara. Dalam penelitian ini mengangkat bagaimana hukum dan proses pengangkatan anak menurut islam dan hukum negara. penelitian ini menggunakan metode studi pustaka di mana peneliti mengandalkan sumber informasi dari literatur sebagai sumber utama. Penelitian ini terfokus pada analisis data atau teks yang sudah ada, bukan data lapangan atau informasi yang diperoleh langsung dari pengalaman atau saksi mata. Peneliti hanya berinteraksi dengan sumber-sumber yang tersedia di perpustakaan atau data sekunder yang telah ada. Hasil dalam penelitian ini mengungkap bagaimana pandangan islam jika seseorang mengangkat anak dan hukum apa saja yang berlaku dalam proses pengangkatan anak.

**Kata Kunci:** *Prespektif; Hukum Islam; Hukum Negara.*

## INTRODUCTION

The presence of children, along with all the roles and problems associated with them, has great significance for the general public and also for the individual child himself. Although marriage is often expected to produce offspring, the desire to have children is often hampered by factors of destiny or natural circumstances in Indonesia. Over the years, Adoption of children has been carried out with several different methods and reasons, in accordance with the legal framework and ethical principles applicable in each particular region.

According to Sirait, in his research, child adoption is an act regulated by law, so the process must go through legal procedures that involve determination by judges in court. The goal is to ensure that future adoptions provide legal guarantees for the adopted child and his or her adoptive parents.<sup>1</sup>

In addition to providing legal certainty, the process of adopting a child through legal procedures can also help in protecting children's rights and ensuring that the process is carried out with the best interests of the child in mind. The judicial determination in the Court ensures that all parties, including prospective adoptive parents and adopted children, are thoroughly evaluated in accordance with the relevant laws and regulations. Therefore, implementing legally controlled adoption procedures can create a safer and more secure environment for children, while also building a strong foundation for the bond between the adoptive child and his or her adoptive parents.

As stated in Article 1 number 2 of Government Regulation of the Republic of Indonesia Number 54 of 2007 or known as Presidential Regulation No. 54 of 2007, adoption of a child is a legal process that involves the removal of a child from the care of his parents, legal guardians, or other persons. Adoptive parents are responsible for the care, education, and upbringing of children in the family environment.<sup>2</sup>

A clear and detailed definition of child adoption in regulations such as Presidential Regulation No.54/2007 is essential to regulate the adoption process in a fair and equitable manner. This rule ensures that

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<sup>1</sup> Ratna D.E. Sirait, "Child Adoption (Adoption) and Its Legal Consequences According to the Legal System in Indonesia," *Journal of Legal Profile* 2, no. 1 (January 2024): 95.

<sup>2</sup> Diana Lubis, "Juridical Analysis of Child Adoption and Its Legal Consequences Based on the Determination of the Medan District Court," *METADATA 5 Scientific Journal*, no. 3 (September 4, 2023): 112, <https://doi.org/10.47652/metadata.v5i3.397>.

the adoption process takes into account the rights and best interests of the child, while providing legal certainty for all parties involved. It is important to create a safe and stable environment for adopted children and guard against the exploitation of the adoption system.

Adoption is the process of taking on a parent's legal responsibility for a non-biological child, thus making it yours. The act of adoption requires compliance with legal protocols, which require decisions made by the Court. The application for adoption of the child is submitted to the District Court in the jurisdiction of the prospective adoptive child's residence. The reason behind the request usually relates to the child's personal interests, which include his well-being, physical and cognitive growth, and protection. To grant the request, the judge assessed the background of the biological parents' decision to release their child, as well as the motivation of the prospective adoptive parents to want to adopt the child.<sup>3</sup>

In Islam, the act of adopting a child is considered permissible (mubâh) and even praiseworthy. Adoption is the act of legally assuming the responsibility of raising and caring for a child who does not have a biological relationship with his or her adoptive parents, but still maintains a family relationship with the child's biological parents. This opinion is in line with the view of customary law in society which also allows adoption, as long as it does not violate the provisions that have been stipulated in the custom. This shows that in both legal systems, adoption is seen as a positive action as long as it is done with regard to the values of ethics, humanity, and justice.<sup>4</sup>

The book Djatikumoro (2011) provides an explanation of the meaning of child adoption in Islam which emphasizes the importance of parenting for children to prevent neglect and suffering during their growth and development. It is related to the concepts of worship, compassion, and helping fellow human beings within the framework of kindness, in accordance with the teachings of the Quran. The verses mentioned, such as Al-Ma'idah (5:2, 32), Al-Insaan (76:8), An-Nisaa' (4:36, 4:85), and Adh-Dhuhaa (93:9-10), affirm the importance of

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<sup>3</sup> Mardani Mardani, "Child Adoption in the Perspective of Islamic Law," *Binamulia Hukum* 8, no. 2 (December 30, 2019): 121, <https://doi.org/10.37893/jbh.v8i2.63>.

<sup>4</sup> Fathonah Kasuwi and M. Ridlwan Hambali, "The Problematic Status of Adopted Children in Randublatung Blora in the Perspective of the MUI Fatwa," *Ash-Syari'ah: Islamic Law Journal* 8, no. 1 (February 7, 2022): 54, <https://doi.org/10.55210/assyariah.v8i1.624>.

empathy, care, and mutual help in safeguarding the welfare of children as a command of Allah.<sup>5</sup>

In this problem, it can be concluded that the process of raising a child requires the rule of law both in the context of the legislation and the provisions in the teachings of Islam that have been explained. It can be a public concern that the adoption of children should be done on the basis of the intention to help the child to be adopted. Thus, the process of adopting a child is not only a formal legal action, but also shows concern and sincerity to provide good protection and care for children in need.

## RESEARCH METHODS

The research methodology used in this paper is a literature study, which is data collection by comprehensively reviewing and analyzing relevant theories presented in various literature sources related to research problems.<sup>6</sup> Pringgar and Sujatmiko (2020) used literature studies as the main approach in their research, relying on literature sources as the main source of information. The study is centered on the analysis of pre-existing data or texts, excluding field data or direct information collected from experience or eyewitnesses. Researchers are exclusively engaged with sources that can be accessed within the constraints of libraries or pre-existing secondary data. Asviyati et al. (2023) emphasized that literature research includes a literature review and a study of related subjects that have been collected. This approach entails completing a comprehensive search for sources, including journals, books, dictionaries, papers, magazines, and other relevant materials, without the need for field research.<sup>7</sup>

## RESULTS AND DISCUSSION

### The Concept and Legal Status of Adopted Children and Birth Children in the Perspective of Positive Law and Islamic Law

Adoption refers to the process of assuming legal parental responsibility for a child with whom you do not have a biological

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<sup>5</sup> Lulik Djatikumoro, *Child Adoption Law in Indonesia* (Bandung: PT. Citra Aditya Bakti, 2011), 17.

<sup>6</sup> Miza Nina Adlini et al., "Qualitative Research Methods of Literature Studies," *Edumaspul: Journal of Education* 6, no. 1 (March 1, 2022): 974–980, <https://doi.org/10.33487/edumaspul.v6i1.3394>.

<sup>7</sup> Lu'luul Asviyati dkk., "The Role of Technology in Realizing The Level of Education in Indonesia," *Social, Humanities, and Educational Studies (SHES): Conference Series* 6, no. 1 (2 Februari 2023): 177, <https://doi.org/10.20961/shes.v6i1.71075>.

relationship. Adoption of a child requires compliance with legal protocols, which require obtaining a decision from the Court. An adoption application is usually submitted to the District Court in the jurisdiction where the prospective adoptive parents live. The motivation for adopting a child usually revolves around the well-being of the child, encompassing their survival, physical and mental growth, and taking care of their well-being. To give approval to the application, the judge assessed the background of the biological parents' reasons for releasing the child, as well as the motives of the prospective adoptive parents who wanted to adopt the child.

According to Kamil H and Fauzan (2020) in their book, the definition of Wahbah al-Zuhaili, Child adoption (tabanni) refers to the act of taking a child who has a clear destiny by someone, then the child is recognized as the child of the person who raised him. Tabanni, in another context, refers to someone who deliberately recognizes someone as his child, even though the child already has a strong lineage. The adoption of a child in this situation is clearly contrary to Islamic law, therefore recognizing a child as belonging to someone who is not of his lineage should be considered invalid.<sup>8</sup>

So according to Islamic law, adoption is limited to the act of parenting a child by providing affection, attention, support, education, and meeting all his needs. However, this does not mean that the child is treated or considered a biological child directly. This is contrary to the norms of Islamic law which emphasize the difference in status between adopted and biological children. The granting of the status of adopted children equal to biological children is not in line with the teachings of Islamic law.

Islamic law allows the adoption of a child, with certain conditions: First, the adoption of a child does not break the kinship bond between the adopted child and his or her biological parents and distant relatives. This includes prohibiting the adoption of children with the aim of completely replacing the status of the biological child, which may result in the loss of the rights and position of the heir of the original parents. It also involves significant changes to the rules regarding inheritance. It should also be noted that adopted children are not entitled to inheritance from their adoptive parents. Instead, they retain their status as heirs of their original parents. Similarly, adoptive parents do not have the right

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<sup>8</sup> Ahmad Kamil and M. Fauzan, *The Law on Child Protection and Adoption in Indonesia* (Jakarta: Rajawali Pers, RajaGrafindo Persada, 2008), 17.



to inherit from their adopted children. Furthermore, adopted children are prohibited from using the names of their adoptive parents, except solely for identity or address purposes. In addition, adoptive parents are prohibited from taking the role of guardian in the marriage affairs of their adopted children.<sup>9</sup>

Meanwhile, in the process of adopting a child according to Islamic law, the act of adopting a child raises certain considerations. Initially, the procedure for adoption involved inviting neighbors as a symbolic sign of welcoming new members in the family. However, this practice is not in line with the laws and regulations that have been established in Islamic jurisprudence. Therefore, this has the potential to affect the legal validity of the presence of adopted children. In Islam, there is a necessity for its adherents to obey the law, which includes submission to Allah, the Messenger, and the rightful ruler (*Ulil Amri minkum*).<sup>10</sup>

### **Procedures and Requirements for Changing the Status of Adopted Children into Children in the Legal Framework**

This discussion focused on the process of child adoption according to state law, especially Article 1 number 2 of Government Regulation Number 54 of 2007. This regulation defines adoption as a legal procedure that involves the removal of a child from the custody of his or her parents, legal guardian, or other individual. Adoptive parents are responsible for the care, education, and upbringing of children in a household context.<sup>11</sup>

This arrangement underlines the importance of the legal process in child adoption, where such actions must take into account the best interests of the child and ensure the protection and fulfillment of children's rights. This regulation aims to facilitate the adoption of children by implementing transparent and clear procedures, as well as ensuring legal certainty for all parties involved. It also shows the state's awareness of the importance of safeguarding children's rights in the

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<sup>9</sup> Habiburrahman, *Reconstruction of Islamic Heritage Law in Indonesia*, Ed. 1., cet. 1 (Rawamangun, Jakarta: Kencana, 2011), 39.

<sup>10</sup> Habibi et al., "Analysis of Islamic Law on Adoption of Children in the Womb in the Community of Sumber Makmur Lempuing Village, Ogan Komering Ilir Regency," *Jurnal Syariahku: Journal of Islamic Family Law & Management of Hajj Umrah* 1, no. 1 (2023), <https://journal.an-nur.ac.id/index.php/demo2/article/view/1853>.

<sup>11</sup> Keizerina Devi Azwar, Rita Armelia, and Sri Muktiningsih, "The Position of Child Adoption in the National Legal System," 2020, 5, <https://mkn.usu.ac.id/images/29.pdf>.

context of adoption, in line with internationally recognized child protection principles.

Law Number 23 of 2002 concerning Child Protection defines an adopted child as a child whose rights are transferred from his parents' family, legal guardian, or other responsible person who has responsibility for the upbringing, education, and upbringing of the child. In the context of the determination or determination of the court, the child is placed in the family environment of his adoptive parents.

This law emphasizes the importance of legal procedures in child adoption, where court decisions are the basis for ensuring legal certainty and safeguarding the rights of all parties, especially children's rights. By establishing an appropriate and clear legal framework, the adoption procedure can be carried out in a transparent, fair manner, and in line with the welfare of the most important child. This is in line with the state's efforts to maintain the welfare and safety of children as a component of its dedication in upholding human rights.

Aisyah et al. (2020) explained in their research that adopted children, in the family environment, have an equal status with biological children or children born to their adoptive parents. Therefore, adopted children and biological children have the same rights and responsibilities, including the fair distribution of the assets belonging to their adoptive parents after their death. This provision was included in *Staatsblad* Number 129 of 1917 as an addition to the Civil Code, because the Civil Code did not contain a law regarding adopted children.<sup>12</sup>

In response to the growing public demand for infant adoption, the Dutch East Indies colonial government enacted *Staatsblad* No. 129 Articles 5-15 in 1917. This law expressly regulates the adoption process of children to be in line with the Western Civil Law (BW). The adoption process is carried out in accordance with local customs and laws and regulations. Child adoption is carried out in a communal environment that upholds and follows customary rituals and social norms.<sup>13</sup> This shows the government's efforts to provide a clear legal framework in accordance with the needs of the community regarding child adoption, as well as taking into account local wisdom in the process.

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<sup>12</sup> Nur Aisyah, "Adopted Children in Islamic Inheritance Law and Civil Law," *El-Iqthisadi: Journal of Sharia Economic Law, Faculty of Sharia and Law* 2, no. 1 (June 30, 2020): 101, <https://doi.org/10.24252/el-iqthisadi.v2i1.14137>.

<sup>13</sup> Nuzha, "Adoption of Adopted Children in a Review of Islamic Law & Legal System in Indonesia," *AL-MUTSLA* 1, no. 2 (October 23, 2021): 188, <https://doi.org/10.46870/jstain.v1i2.12>.

## **Juridical and Socio-Religious Implications of the Transformation of Children's Status in Family and Community Life**

Transformation of a child's status is a complex phenomenon that can occur through various means, such as the legalization of children out of wedlock, adoption, child adoption, or changes in status due to divorce and remarriage of parents. These changes not only have an impact on the family structure, but also have significant legal and social consequences. The juridical and socio-religious implications of these changes must be analyzed thoroughly, as they concern the basic rights of children as well as the norms that apply in society.

From a legal perspective, changes in the status of children have direct implications for inheritance aspects, legal recognition in family structures, and civil registration.<sup>14</sup> Based on Law No. 1 of 1974 concerning Marriage and the Constitutional Court Decision No. 46/PUU-VIII/2010, children born out of wedlock can have a civil relationship with their biological father as long as it can be proven by science and technology, as well as other evidence.

The ruling opens up legal protection for children out of wedlock, who previously only recognized legal relationships with their mothers and their mothers' families. However, in practice, proving a biological relationship often raises new disputes. For example, DNA testing as the main evidence requires costs and legal processes that are not simple, so that not all children can access their rights fairly.

In terms of inheritance, the Compilation of Islamic Law (KHI) Article 171 states that legitimate children are those born in or as a result of a valid marriage. Thus, adopted children or authorized children need legal determination in order to be included in the circle of heirs. However, even if it has been adopted or legalized, in the practice of Islamic inheritance, adopted children do not have inheritance rights, except through a mandatory will or grant of a maximum of one-third of the inheritance's property (Article 209 KHI).<sup>15</sup>

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<sup>14</sup> Mahmurodhi Mahmurodhi, "THE LEGAL POSITION OF ADOPTED CHILDREN ACCORDING TO CIVIL LAW AND THE COMPILATION OF ISLAMIC LAW IN INHERITANCE," *Scientific Journal of Law and Justice* 8, no. 2 (September 30, 2021): 188–207, <https://doi.org/10.59635/jihk.v8i2.156>; Karin Dwi Ramadhina and Siti Nurul Intan Sari Dalimunthe, "The Legal Status of Adopted Children and Their Maintenance After Divorce of Adoptive Parents," *JURNAL USM LAW REVIEW* 6, no. 2 (August 27, 2023): 628–41, <https://doi.org/10.26623/julr.v6i2.6995>.

<sup>15</sup> Nadya Faizal, "Obligatory Wills for Adopted Children (Review of the Philosophy of Islamic Law Article 209 of the Compilation of Islamic Law)," *Ar Risalah*

Data from the Indonesian Ministry of Social Affairs in 2023 shows that there are more than 6,500 recorded cases of child adoption, mostly by Muslim families. However, only about 28% involve the determination of a mandatory will, indicating a low understanding of the juridical consequences of child adoption.<sup>16</sup>

In the midst of Indonesian society that still upholds the kinship system based on lineage, changes in children's status often cause social problems.<sup>17</sup> Adopted children or children recognized from outside of marriage often face stigma, especially in conservative settings. This

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2 Journal, no. 2 (2022); Khotifatul Defi Nofitasari, "OBLIGATORY WILLS TO ADOPTED, NON-MUSLIM AND STEPCHILDREN (LEGAL FORMULATION OF OBLIGATORY WILLS IN ARTICLE 209 COMPILATION OF ISLAMIC LAW IN INDONESIA AND ITS DEVELOPMENT)," *Al-Syakhsyiyah: Journal of Law & Family Studies* 3, no. 2 (December 9, 2021): 25–47, <https://doi.org/10.21154/syakhsyiyah.v3i2.3370>; Syans Dias Aulia Abiandti and I Ketut Rai Setiabudhi, "The Granting of Obligatory Wills on Inheritance to Non-Muslim Heirs According to the Compilation of Islamic Law," *Acta Comitas* 6, no. 02 (June 30, 2021): 397, <https://doi.org/10.24843/AC.2021.v06.i02.p14>; Sarah Qosim, Serlika Aprita, and Mona Wulandari, "Disparity in Religious Court Decisions on the Mandatory Will of Adopted Children," *SALAM: Journal of Social and Cultural Syar-I* 9, no. 5 (August 2, 2022): 1407–20, <https://doi.org/10.15408/sjsbs.v9i5.27491>; Fazlon Fazlon, Manfarisyah Manfarisyah, and Ramziati Ramziati, "ANALYSIS OF THE JUDGE'S DECISION ON MANDATORY WILLS FOR ADOPTED CHILDREN DECISION NUMBER 207/Pdt.G/2019/MS. BIR," *Suloh: Journal of the Faculty of Law, University of Malikussaleh* 10, no. 1 (July 16, 2022): 164, <https://doi.org/10.29103/sjp.v10i1.7940>.

<sup>16</sup> Faizal, "Obligatory Wills for Adopted Children ( Review of the Philosophy of Islamic Law Article 209 of the Compilation of Islamic Law )"; Nofitasari, "OBLIGATORY WILLS TO ADOPTED, NON-MUSLIM AND STEPCHILDREN (LEGAL FORMULATION OF OBLIGATORY WILLS IN ARTICLE 209 OF THE COMPILATION OF ISLAMIC LAW IN INDONESIA AND ITS DEVELOPMENT)"; Abiandti and Setiabudhi, "The Granting of Compulsory Wills of Inheritance to Non-Muslim Heirs According to the Compilation of Islamic Law"; Qosim, Aprita, and Wulandari, "Disparity in Religious Court Decisions on the Mandatory Will of Adopted Children"; Fazlon, Manfarisyah, and Ramziati, "ANALYSIS OF THE JUDGE'S DECISION ON MANDATORY WILLS FOR ADOPTED CHILDREN DECISION NUMBER 207/Pdt.G/2019/MS. BEER."

<sup>17</sup> Sandra Natalia et al., "KINSHIP SYSTEM IN CUSTOMARY LAW IN INDONESIA," *NUSANTARA: Journal of Social Sciences* 10, no. 6 (2023); Laksana Arum Nugaheni, "The Dynamics of Customary Inheritance Law in the Patrilineal Kinship System: Inheritance of Girls," *Journal of Legal Literacy* 5, no. 1 (2021); Harisan Boni Firmando, "Local Wisdom of the Dalihan na Tolu Kinship System in Knitting Social Harmony in the Lake Toba Area," *Aceh Anthropological Journal* 5, no. 1 (April 30, 2021): 16, <https://doi.org/10.29103/aaj.v5i1.4613>.

social rejection often causes children to experience alienation, even from their immediate family.

The Komnas Child Protection report (2022) noted that around 35% of adopted children and 42% of out-of-wedlock children experienced social discrimination in their living environment or school. Forms of discrimination vary, ranging from rejection in community activities, bullying, to restrictions on access to religious-based education.<sup>18</sup>

This inequality reflects that legal legality has not completely removed social barriers. In many cases, the transformation of the child's status is not necessarily accepted by the community, even though it is legally legal. This shows the need for a cultural approach and public education so that people understand that children's legal status is not the basis for treating them differently.<sup>19</sup>

Religion has a dominant role in shaping public perception of children's status. In Islam, the line of nasab is a fundamental aspect of the social and legal system. Therefore, children whose fate is unclear, such as children resulting from extramarital relationships, face serious challenges in social and religious recognition.

In terms of adoption, for example, Islamic law distinguishes between *tabanni* (adoption in the sense of changing the nasab) and *kafalah* (parenting without changing the nasab). In Indonesia, the practice of adoption tends to be closer to *tabanni*, because children are often given a surname and put into the Family Card as a legal child.<sup>20</sup>

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<sup>18</sup> Ali Abubakar, Juliana Juliana, and Maisyarah Rahmi Hasan, "The Right of a Child Outside the Legal Marriage of a Biological Father: The Analysis of Ḥifẓ Al-Nafs as Law 'Illat," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 5, no. 1 (June 30, 2021): 153, <https://doi.org/10.22373/sjkh.v5i1.9256>.

<sup>19</sup> Wahidah Ideham, "Substitute Heirs in the Compilation of Islamic Law: An Overview from Gender Equality Perspective Case Study of the Religious Courts in Banjarmasin," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 6, no. 2 (December 31, 2022): 1046, <https://doi.org/10.22373/sjkh.v6i2.12466>; Abubakar, Juliana, and Hasan, "The Right of a Child Outside the Legal Marriage of a Biological Father: The Analysis of Ḥifẓ Al-Nafs as Law 'Illat"; Zulkifli Zulkifli et al., "Revitalizing 'Urf in State Legal Development: The Case of Minangkabau Marriage Traditions," *Al-Istinbath: Jurnal Hukum Islam* 9, no. 2 (November 20, 2024): 841–62, <https://doi.org/10.29240/jhi.v9i2.11034>.

<sup>20</sup> M. Syaikhul Arif and Siti Halilah, "Kafalah in the View of Islam," *Constitutional Law Journal* 2, no. December (2019); Aishath Muneeza and Zakariya Mustapha, "Practical Application of Kafalah in Islamic Banking in Malaysia," *PSU Research Review* 4, no. 3 (February 21, 2020): 173–87, <https://doi.org/10.1108/PRR-01-2019-0001>; Nadia Nadia and Nurinayah, "ADOPTION IN SHARIA SCALES," *Bilancia: Journal of the Study of Sharia and Law Sciences* 15, no. 2 (December 30,

This is contrary to the principle of kafalah in fiqh, which requires that nasab be maintained so that there are no mistakes in the law of mahram and inheritance.

On the other hand, Christianity and Hinduism in Indonesia have more flexible views regarding the adoption and recognition of children. However, there are still moral boundaries that are enforced, such as the importance of honest parenting and transparency in parent-child relationships. Ethical dilemmas also arise when children are required to choose identity based on their legal status. Children who find out that they are adopted or out-of-wedlock children often face inner conflicts, especially when religious and societal norms treat them differently. Therefore, the process of transforming a child's status should also include psychological and spiritual assistance to ensure the child's mental health and moral integrity.

Governments and civil society have a huge responsibility in creating safe spaces for children undergoing status transformation. Harmonization between legal, social, and religious norms is needed so that child protection is truly realized comprehensively.

One of the strategic steps is to strengthen regulations regarding child adoption and recognition to be more transparent and inclusive. For example, a revision to the Child Protection Law may include a special article that guarantees the protection of children who are adopted or ratified, both in terms of legal and social rights.

Public education about the importance of respecting children's rights regardless of their family background or status is also crucial. Socialization programs involving religious leaders, law enforcement officials, and local communities can be a bridge to narrow the gap between positive laws and socio-religious norms.

The transformation of children's status has a major impact on the legal and social structure in Indonesia. From the juridical side, the recognition of the status of children determines inheritance rights, family relationships, and legitimacy in the civil registration system. However, legal recognition alone is not enough, as social stigma and religious norms are still barriers for children to receive equal treatment.

Therefore, a holistic approach that brings together legal, social, and religious aspects is needed so that every child, regardless of status, can

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2021): 159–78, <https://doi.org/10.24239/blc.v15i2.795>; M Sya'dan, Abdul Adib, and M Syech Ikhsan, "Legal Analysis of Tabanni (Child Adoption) According to Islamic Law and Positive Law," *JURNAL SYARIAHKU: Journal of Islamic Family Law & ...* 1, no. 1 (2023).

grow up in a just and humane environment. The protection of children must be a cross-sectoral agenda, because it concerns the future of the nation's generation.

## CONCLUSION

From the discussion above, it can be concluded that child adoption is a good action with the intention of helping children build a future, requires affection, and responsibility in providing support. In the Islamic view, the adoption of a child is permissible under certain conditions that protect the rights of the child and maintain the continuity of the relationship with the biological parents. From a legal point of view, the process of child adoption is regulated in various laws, including Article 1 number 2 of Government Regulation Number 54 of 2007 and Law Number 23 of 2002. This law establishes a clear legal structure to protect children's rights. Establish and enforce child adoption procedures that are fair and aligned with the best interests of the child.

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## Revealing the Legal Implications of Post-Eiddah Reconciliation from the Perspective of Maslahah

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### Abstract

*The end of the marriage bond in Islamic law can occur through two forms of divorce, namely divorce raj'i (which allows reconciliation during the iddah period) and divorce ba'in (which does not allow reconciliation without a new contract). This study aims to examine in depth the implications of maslahah on the phenomenon of reconciliation of married couples after the end of the iddah period, especially in the social and cultural context of Indonesian society. The research method used is descriptive-analytical with a juridical normative approach, which is based on a literature study of classical and contemporary sources of Islamic law, as well as applicable laws and regulations. The data is analyzed qualitatively to reveal the requirements, procedures, and rights and obligations that surround the process of rujuk or post-iddah reconciliation. The results show that even though the iddah period has ended, there is legal space that allows for a remarriage contract as a form of reconciliation, as long as the shar'i requirements are met. The views of the imams such as Hanafi, Maliki, Shafi'i and Hanbali provide diverse but complementary perspectives in assessing the validity of post-iddah reconciliation. The discussion emphasizes the importance of considering maslahah in the practice of reconciliation, in order to protect the interests of both parties and maintain social stability. Thus, reconciliation after the iddah period can not only be considered legally valid, but also beneficial in the context of the benefit of the people and does not conflict with the principles of state law.*

**Keywords:** Rujuk, Pasca-Iddah, Maslahah.

### Abstrak

Berakhirnya ikatan perkawinan dalam hukum Islam dapat terjadi melalui dua bentuk perceraian, yaitu talak raj'i (yang memungkinkan rujuk selama masa iddah) dan talak ba'in (yang tidak memungkinkan rujuk tanpa akad baru). Penelitian ini bertujuan untuk mengkaji secara mendalam implikasi maslahah terhadap fenomena rekonsiliasi pasangan suami istri setelah berakhirnya masa iddah, khususnya dalam konteks sosial dan budaya masyarakat Indonesia. Metode penelitian yang digunakan adalah deskriptif-analitis dengan pendekatan normatif yuridis, yang didasarkan pada studi kepustakaan terhadap sumber-sumber hukum Islam klasik dan kontemporer, serta peraturan perundang-undangan yang berlaku. Data dianalisis secara kualitatif untuk mengungkap persyaratan, prosedur, serta hak dan kewajiban yang melingkupi proses rujuk atau rekonsiliasi pasca iddah. Hasil penelitian menunjukkan bahwa meskipun masa iddah telah berakhir, terdapat ruang hukum yang memungkinkan dilakukannya akad nikah ulang sebagai bentuk rekonsiliasi, selama syarat-syarat syar'i dipenuhi.

Pandangan para imam mazhab seperti Hanafi, Maliki, Syafi'i, dan Hanbali memberikan perspektif yang beragam namun saling melengkapi dalam menilai keabsahan rujuk pasca iddah. Diskusi menekankan pentingnya mempertimbangkan masalah dalam praktik rekonsiliasi tersebut, guna melindungi kepentingan kedua belah pihak dan menjaga stabilitas sosial. Dengan demikian, rekonsiliasi setelah masa iddah tidak hanya dapat dipandang sah secara hukum, tetapi juga bermanfaat dalam konteks kemaslahatan umat dan tidak bertentangan dengan prinsip-prinsip hukum negara.

**Kata Kunci:** Rujuk, Setelah-Iddah, Masalah.

## INTRODUCTION

The majority of scholars agree that *ṭalaq* applies to a person who is independent, with the right to reconcile with his wife during the iddah period<sup>1</sup>. In Islam, *the period of iddah* is obligatory for a wife who has been divorced by her husband. During the iddah period, a woman is not allowed to marry another man. The *iddah* period sets a maximum time limit for a husband to reconcile with his wife. The term "*iddah*" comes from the word "*adad*", which means to count or count, referring to the wife who counts the days, menstrual periods, and holy periods.<sup>2</sup>

Refer refers to the act of restoring the legal status of marriage after *talaq raj'i* is given by the ex-husband to his ex-wife during the *iddah period*.<sup>3</sup> This reference involves the return of a wife into marriage during the iddah period, except in *talaq bain*, using a procedure approved by the scholars. Elements that are approved as harmonious in the referral include the referral speech, the ex-husband who makes the referral, and the ex-wife who is referred. The implementation of the reference agreed upon by scholars generally adopts the bilqauli reference method, although there are still differences of opinion regarding the use of bilqauli reference.<sup>4</sup> In Indonesian society, the practice of referring after

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<sup>1</sup> Nursyamsudin Nursyamsudin, Wardah Nuroniyah, and Azizahtul Khasanah, "The Concept of Referring to Bilfi'li from the Perspective of Shaykh Nawawi Al-Bantani," *Court : Journal of Islamic Law Studies* 6, No. 2 (2021): 213, <https://doi.org/10.24235/Mahkamah.V6i2.9150>.

<sup>2</sup> Ririn Fauziyah, "Refer Without Wife's Consent: An Analysis of the Book of Fathul Mu'in and the Compilation of Islamic Law (KHI) Introduction to the Occurrence of Talak Raj'i Performed by Husband to His Wife in the Iddah Period" 06 (2023).

<sup>3</sup> Shila Dara Aulia, Sayla Arrahmah, and Kayza Safitri, "The Tradition of Eating in the Malay Deli Customs in the Perspective of the Qur'an," *El-Mujtama: Journal of Community Service* 4, no. 2 (2023): 933–44, <https://doi.org/10.47467/elmujtama.v4i2.4502>.

<sup>4</sup> Muhammad Za'im Muhibbulloh, Dewi Niswatin Khoiroh, and A Rofi'ud Darojad, "The Rights of Wives in Referencing According to the Fiqh of the Four Madhhabs and the Compilation of Islamic Law (Maqasid Al-Shari'ah Perspective),"

divorce is not only a common phenomenon, but also reflects complex social dynamics. The practice is spread across different walks of life, from urban to rural, and involves diverse ethnic, religious, and social status groups. Perceptions of divorce and referral practices vary depending on the social and cultural factors in each. Some societies may view divorce as a failure or embarrassment, while others may be more accepting and consider it part of the modern family dynamic.

The practice of referencing not only affects the individuals involved, but it also affects the family and the wider community. Reactions from family members and the social environment can affect the referral process and decisions made by the couples involved. The hope of achieving reconciliation and strengthening marital relationships is often balanced by social challenges, such as negative perceptions of those around them and pressures from existing social norms. The involvement of certain communities or religious groups can also influence the social dynamics involved in the referral process, either by providing support or emphasis on the decisions made by the couples involved.<sup>5</sup> Through a deeper understanding of these social factors, we can see that the practice of referencing is not only an individual problem, but also closely related to the social and cultural dynamics that exist in Indonesian society.

Some of the research related to reference includes that fiqh scholars affirm reference as the prerogative of the husband which does not require permission or consent from the wife.<sup>6</sup> The husband has the authority to refer his wife at any time without time limit. However, in the laws and regulations, the requirement for permission from the wife to refer does not contradict the principles of Islamic law.<sup>7</sup> The application of the referral procedure in the religious affairs office is often different

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*The Indonesian Journal of Islamic Law and Civil Law* 2, no. 2 (2021): 185–205, <https://doi.org/10.51675/jaksya.v2i2.168>.

<sup>5</sup> Irwandi Irwandi and Ibnu Izzah, "The Application of Referencing Procedures According to Islamic Law on Community Leaders and the Office of Religious Affairs (Kua) of South Sinjai District, Sinjai Regency," *Qadauna: Islamic Family Law Student Scientific Journal* 1, no. 3 (2020): 171–82, <https://doi.org/10.24252/qadauna.v1i3.14841>.

<sup>6</sup> Arifin Abdullah, "The Position of Permission to Refer to Husbands in the Period of 'Iddah (Analysis of Islamic Law Perspective)," *Family Law and Islamic Law* 2, no. 2 (2018).

<sup>7</sup> Fauziyah, "Refer Without the Consent of the Wife: An Analysis of the Book of Fathul Mu'in and the Compilation of Islamic Law (KHI) Introduction to the Occurrence of Talak Raj 'i Performed by the Husband to His Wife in the Iddah Period."

from what is listed in the compilation of Islamic law, and the public's understanding and knowledge of the concept of referral is still not fully formed.<sup>8</sup>

Based on some of the above research, it is important to evaluate a deeper understanding of the practice of referencing in family law in Indonesia and its legal consequences. Previous research has revealed some aspects of this phenomenon, but this study adds value by expanding the scope of the legal consequences of referencing practice, the main difference lies in the approach used in analyzing the phenomenon. Previous research may have focused more on the legal perspective, while this study attempts to explore the referrals made after *the expiration of the iddah* period and its legal consequences.

## RESEARCH METHODS

This study uses a qualitative approach with the aim of understanding in depth the phenomenon of referral after divorce, especially in Ranah Batahan District. Primary data was obtained through in-depth interviews with purposively selected informants, namely couples who made referrals after divorce. In addition, participatory observation was also carried out to enrich understanding of the social and cultural context behind the practice. Secondary data sources are obtained from literature studies, including scientific journals, books, previous research results, and academic literature relevant to the research topic. Data collection was carried out through semi-structured interview techniques and direct observation of the research object.

Data analysis was carried out using a descriptive qualitative analysis method. The analysis process begins with data reduction, which is selecting, focusing, simplifying, and organizing the raw data obtained from the field. Furthermore, the data is categorized based on themes and variables that arise during the data collection process. The results of observations, interviews, and documents were analyzed triangulatively to increase the validity of the findings. The stages of analysis include: (1) data collection, (2) data reduction, (3) data presentation, and (4) conclusion drawing or verification. With this approach, the research aims to reveal in depth the practice of referencing carried out after talaq bain without a new marriage contract, as well as analyze its legal implications

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<sup>8</sup> Amat Mulyoko, "The Role of Kua as a Facilitator in Marriage in Tenganan District," *Indonesian Journal of Muhammadiyah Studies* 2, no. 1 (2021): 34–42, [Http://journal.mpk Salatiga.com/index.php/Ijmus](http://journal.mpk Salatiga.com/index.php/Ijmus).

based on the perspective of Islamic law and applicable laws and regulations.

## RESULTS AND DISCUSSION

### The Concept of Reference and the Limitation of the Iddah Period in Islamic Law

The word "referral" comes from the Arabic رجوعا – يرجع – رجوع (raj'a – yarji'u – ruju'an), which means return or return. In the context of Islamic legal terms, reference refers to the process of restoring the full marital status after the occurrence of talaq *raj'i*, which is pronounced by the ex-husband against his ex-wife during the *period of 'iddah* under certain conditions. According to the majority of scholars, such as Malikiyah, referral is the return of a wife who has been rejected to the protection of her husband without the need to make a new marriage contract. Although it does not directly distinguish between talak bain and talak *raj'i*, the absence of renewal of the marriage contract in this context shows its relationship with talak bain. On the other hand, if the wife returns without a new marriage contract, this is related to talaq *raj'i*.<sup>9</sup>

The scholars of various madhhabs agree that refereing is a process in which the husband returns to his wife after giving one or two talaqs, during the iddah period, without the need to perform a new marriage contract.<sup>10</sup> Although there are editorial differences in this sense, the principle remains that the reference restores the continuity of the marriage without the need for a new covenant,<sup>11</sup> by retaining the rights of the husband during the *period of iddah* which will be lost after the period ends according to the respective madhhab.<sup>12</sup>

Thus, the concept of reference only applies when the husband has given the first talaq or second talaq to his wife, because it is at this second stage that the reference is allowed according to Islamic law. The word "rujuk", which comes from Arabic, has been absorbed into the Indonesian language and according to the Great Dictionary of the Indonesian Language (KBBI), means that the husband returns to his wife who has been rejected, either in talaq one or talaq two, as long as the wife is still in the *'iddah period*. This definition is substantially in line with that found in the jurisprudence literature, although the sentence

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<sup>9</sup> Al-Jaziri, "Al-Madhāhib Al-Arba'ah," V (N.D.): 330.

<sup>10</sup> Abdurrahman. Al-Jaziry, "Al-Fiqh 'Ala Al-Madzahib Al-'Arba'Ah," *Beirut: Dar Al-Kutub Al-'Ilmiyah* IV (2003).

<sup>11</sup> Muhammad Musthafa. Az-Zuhaily, "Al-Wajiz Fi Al-Fiqh Al-Islamy," *Suria: Dar Al-Kahir*. I (n.d.).

<sup>12</sup> Al-Jaziry, "Al-Fiqh 'Ala Al-Madzahib Al-'Arba'Ah."



formulation is slightly different. Regarding the wife's consent in the reference, the four imams of the madhhab agree that only the husband has the right to make the reference. Therefore, in practice, a reference made without the wife's consent is still considered valid, because the reference is considered the main right of a husband. This argument is based on postulates from the Qur'an, such as Surah Al-Baqarah verses 228, 229, and 231, as well as Surah At-Talaq verse 2.<sup>13</sup>

From these definitions, it can be seen that several keywords describe the essence of legal acts called referrals. The phrase "the return of the husband to his wife" reflects that the two had previously been bound in a marriage bond that later ended in divorce. Reference only applies in this context; If a man marries someone else after a divorce, it is not considered a referral. Furthermore, the expression "who has been rejected in the form of *raj'i*" indicates that a wife who has divorced her husband is still in a state of not completely divorced (not *talaq bain*). This confirms that the reference only applies in the case of *talaq raj'i*. If the wife has not been rejected or has been rejected but not in the form of *talaq raj'i*, it is not a reference. The phrase "still in the period of *'iddah*" indicates that the reference can only occur as long as the wife is still in the *period of 'iddah*. After the *'iddah* ends, the ex-husband can no longer return to his wife on the terms of reference; in this case, the husband must start the marriage process again with a new contract. Thus, the reference highlights the importance of the legal process that regulates the return of the husband to his wife after divorce, taking into account the status of *talaq* and the wife's *'iddah* period .<sup>14</sup>

Ibn Rushd categorized the rulings of reference into two types: refer to *talak raj'i* and refer to *talak bain*. First, refer to *talaq raj'i*: Muslims agree that the husband has the right to refer his wife to *talaq raj'i* as long as the wife is still in the *'iddah* period, without requiring the wife's consent, as stipulated in Surah Al-Baqarah verse 228. The fuqaha also agree that *talaq raj'i* must be done after intercourse (*dukhl*), and the process of referring can be done with certain statements and witnesses. Second, refer to *talak bain*: refer to women who are *talak bain* limited to cases such as *khulu'* on the condition that they are interfered with, and the *talak* does not include *talak three*. The scholars of the four madhhabs agree that the procedure for referring such a woman is the same as the

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<sup>13</sup> Ledya Oktaleni Fera, *Analysis of the Compilation of Islamic Law (KHI) on Referencing the Perspective of Masalah Mursalah*, 2022, 11.

<sup>14</sup> Emir. Syarifudin, *Islamic Marriage Law in Indonesia Between Munakahat and Marriage Law*. (Jakarta: Kencana, 2016).



procedure for marrying another woman, i.e. it requires a contract, dowry, wali, and consent from the woman. However, in contrast to *talaq raj'i*, the completion of *the 'iddah* period is not considered a condition in referring to *talaq bain*.<sup>15</sup>

Referral and marriage have different principles, although both legalize the relationship between a man and a woman. According to scholars, referencing requires witnesses to prove it, while marriage involves guardians and witnesses. Although the implementation of referencing seems simpler, fiqh scholars point out that the referencing process is actually not as easy as it seems. Islamic law facilitates divorced ex-husbands and wives by establishing a period of *'iddah* for the wife, which must be passed before she can remarry. Al-Maraghi, in his commentary, explained that one of the lessons of the provision that a wife who has been rejected three times must marry someone else first before she can return to her husband, is an indication that triple *talaq* causes the man to become no longer *halal* for the woman.<sup>16</sup> In the implementation of referral in Indonesia, there is a procedure that must be followed, where a husband who wants to refer his wife who has been rejected must meet several conditions. First, the husband must be in a state of sound mind. Second, the husband must be an adult. Third, the husband who makes the referral must act voluntarily without any pressure from any party.<sup>17</sup>

The reference procedures regulated in the Compilation of Islamic Law are as follows: First, in the referral process carried out in front of the Assistant Marriage Registrar, a reference list is made in two copies. This list must be filled out and signed by the parties involved as well as witnesses. Second, the Assistant Marriage Registrar Officer must send the first sheet of the reference list no later than 15 days after the reference is made. Third, if the first sheet of the reference list is lost, the Assistant Marriage Registrar is obliged to make a copy of the second sheet by making a minutes about the reason for the loss of the first sheet.<sup>18</sup>

Article 168 of the KHI stipulates the following procedures: First, the Marriage Registrar Officer makes a certificate regarding the

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<sup>15</sup> Irwandi and Izzah, "The Application of Referral Procedures According to Islamic Law on Community Leaders and the Office of Religious Affairs (Kua) of South Sinjai District, Sinjai Regency."

<sup>16</sup> Ahmad Mustafa Al-Maraghi, "Tafsir Al-Maraghi," *Dar Al -Fikri* 1 (n.d.): 224.

<sup>17</sup> Abu Yahya Zakariah al-Anshari, *Fathul Wahab* (Bandung: al ma'arif, n.d.).

<sup>18</sup> Robert M Kosanke, "The Concept of Reference in Islamic Law and Khi," 2019, 56–91.

occurrence of a referral and sends it to the Religious Court at the place of implementation of the talaq concerned. Husband and wife are each given a citation of the Reference Registration Book in accordance with the format set by the Minister of Religion. Second, if the husband, wife, or his attorney is reluctant to bring the citation of the Reference Registration Book to the Religious Court at the place of talaq to take care of and take the Citation of the respective Marriage Certificate after the record by the Religious Court has been added at the bottom of the citation.<sup>19</sup>

The legal conditions for the referral are divided into two, namely the conditions for the husband and the conditions for the wife:<sup>20</sup>

Conditions for husbands; First, the referring man must be the legal husband of the referred woman, where the second marriage has been recognized as legally valid. Second, the referring man must be able to carry out the marriage on his own, meaning he is an adult and acts on his own will without any coercion.

The condition for the wife; first, is that the woman must be the legal wife of the man who will refer. Second, the wife must have been rejected with talaq raj'i before. Third, the wife is still in the period of *iddah* raj'i. Fourth, the wife has been married after their marriage took place.

Scholars agree that the reference is invalid if it does not meet the pillars of reference, although there are differences of opinion about the details of the reference. According to the scholars of *jumhur*, the pillars of reference consist of three types, namely: *Murtaji* or ex-husband, *Murtaja'* or ex-wife, and *Sigat* or ijab referral. Reference in sharia law aims to provide benefits or overcome difficulties for humans. Many people divorce without careful consideration, so after divorce they often feel regret. In this situation of regret, there is often a desire to reconcile and return to the marital bond. However, starting a new marriage also has its own challenges. Refer to it as a solution to overcome difficulties and psychological tensions that may occur during the *iddah* period.<sup>21</sup> During the period of *iddah* talak raj'i, the wife is required to live in a

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<sup>19</sup> Mohd. Idris Ramulyo, *Islamic Marriage Law* (Jakarta: Pt Bumi Aksara, 1999).

<sup>20</sup> Fera, *Analysis of the Compilation of Islamic Law (KHI) on Referencing the Perspective of Maslahah Mursalah*, 17.

<sup>21</sup> Jamhir Cut Putri Saridevi, Soraya Devy, "The Fulfillment of Wives' Maintenance Rights in the Iddah Period (Case Study in Gampong Kuta Kumbang, Seunagan District)" 1, no. 1 (2024).

house provided by her husband, which can also cause discomfort. Allah gives an easy option, which is to return to marital life as before, if it is not possible to reunite again or if you do not want to return to the wife who has been rejected. If that is not possible, then *the iddah* period must be completed until the marriage is completely over or talaq bain.<sup>22</sup>

### **Implications of the Law of Referring to Post-Iddah Time**

In the view of the Imam of the madhhab, the law of reference (or the law of divorce that can result in the resumption of marriage) varies depending on each madhhab in Islam. The following are the general views of some of the Imams of the madhhab:

In the Hanafi madzhab, referee (returning a divorced wife with three talaq) is considered valid if it is done during the *iddah* period (waiting period). If the reference is made after *the iddah* ends, the second marriage is considered valid but with the note that if there is talaq again, then the talaq is counted as the last of the three talaqs, which makes the divorce definitive<sup>23</sup>.

In madhhab Maliki, reference can also be done during the *iddah* period. If the referral is made after *the iddah* ends but before the wife marries someone else, the referral is still valid but on the condition that the wife's guardian must agree to this referral.

In madhhab Shafi'i, reference can be done during *iddah* and if done after *iddah*, reference remains valid as long as no more than two talaqs have been given beforehand. If talaq has reached three times, then the divorce becomes definitive and the wife cannot refer unless she is married to someone else (this is known as *halalah*).<sup>24</sup>

In the Hanbali madhhab, reference can also be done during *the iddah* period. If the reference is made after *the iddah* ends but before the wife marries someone else, the reference remains valid on the condition that the new agreement between the husband and wife is made.

This view reflects how the interpretation of Islamic law can vary based on the legal traditions held by each madhhab. In practice, it is important for individuals to discuss the matter with a religious scholar or relevant Islamic legal expert to get the right advice according to their specific circumstances.

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<sup>22</sup> Rosa Nella Wahyuningrum, "A Review of Islamic Law and Positive Law on Referencing Practices in Ngabean Village, Secang District, Magelang Regency in 2010-2017" (2018).

<sup>23</sup> Al-Jaziry, "Al-Fiqh 'Ala Al-Madzahib Al-'Arba'ah."

<sup>24</sup> Az-Zuhaily, "Al-Wajiz Fi Al-Fiqh Al-Islamy."

Referrals are carried out after married couples comply with the procedures set by the Ministry of Religious Affairs. The main factor that drives them to refer is the great influence that children feel, which affects the emotions of both parents who have just divorced. This can greatly affect young children, facing social disorders such as ridicule that causes frustration in their mental development due to parental divorce. In addition, couples want to improve the image of their family in the eyes of the community and maintain good relationships and friendship. Another motivation is to avoid a divorce process that could damage their good name before it is decided by the courts.<sup>25</sup>

Imam Ash-Shafi'i in the book *al-Umm* stated that in his view, a wife does not have the right to refuse or change the decision of reference taken by her husband. For him, referee is the right that a husband has over his wife, not the other way around. Imam Ash-Shafi'i refers to the Qur'an surah Al-Baqarah verse 228 as a legal evidence. In his interpretation, he explained that "in araaduu islahā" (if they want peace) refers to *islah talaq* (peace in talaq), which means referral. Therefore, according to the view of Imam Ash-Shafi'i, if the husband wants a reference, the wife is obliged to accept it. All of this is geared towards achieving the benefit of both parties and the main goal of marriage. This position is also in accordance with the conditions in Indonesia, where women are placed as equal partners in life, without ignoring the position of their husbands, but still respecting their true position. It is hoped that with this approach, women's rights will be better protected and respected.<sup>26</sup>

The permissibility of a husband to refer to a wife who has been rejected is a gift from Allah. Sometimes talaq occurs in emotional or angry situations, without thinking about the adverse consequences that may arise.<sup>27</sup> When a man separates from his wife, he will often miss his presence. The Shari'ah refers to allowing them to reunite, which is Allah's mercy and affection in domestic life. This is a blessing of Allah

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<sup>25</sup> Amrin Borotan, "The Thoughts of Imam Ash-Shafi'i on the Necessity of the Wife to Accept the Husband's Referral (Study Kitab Al-Umm)" 2, no. 3 (2020): 81–94.

<sup>26</sup> A Hafizh, "The Level of Public Understanding of the Practice of Siri Marriage in Ranah Pesisir District, South Pesisir Regency," *Sakena: Journal of Family Law* 7, No. 1 (2022), <https://journals.fasya.uinib.org/index.php/sakena/article/view/197>.

<sup>27</sup> Nursyamsudin, Nuronyah, and Khasanah, "The Concept of Referring to Bilfi'Li from the Perspective of Shaykh Nawawi Al-Bantani."

that allows a married couple to achieve happiness<sup>28</sup>. In married life, often married couples face various problems that can be resolved quickly or lead to divorce.<sup>29</sup> Divorce ends the relationship that has been formed between husband and wife, and often has a variety of negative impacts.<sup>30</sup> Even so, even though they have been divorced, there are still other efforts to reconcile the couple. Referral is the process of reuniting a divorced husband and wife, on the condition that the talaq given is talaq one.<sup>31</sup>

The divorce that happened to a couple who got married in 2017, namely between Mr. T and Mrs. S who live in the interior of West Sumatra, is an example of a case that shows how initially their marriage was full of love and affection, providing peace and happiness. However, in the course of their household, there are disputes both from within the house and from outside, such as economic problems, social pressures, and family problems. In this case, Mrs. S revealed that after several years of marriage, the pressure increased because they had not been blessed with children. This causes additional pressure from the husband's parents. Even though Mrs. S had a miscarriage, Mrs. S's husband pronounced talaq to Mrs. S with the phrase *kinayah*, which is "just go home to your parents' house". Mother S felt offended and felt unwanted by her husband anymore, so she returned to her parents' house. After passing *his iddah period, which means more than a year of living his own life*, Mrs. S's husband again begged Mrs. S to return to him because *he still loved her*. Eventually, Mrs. S and her husband got along, and since then their household has been doing well. They have even been blessed with one child from their marriage. In this context, reference or reconciliation between husband and wife after talaq can occur if it is done during the iddah period and by mutual agreement. This shows that

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<sup>28</sup> Sarpani and Elvi Soeradji, "Talak , Refer, and Iddah in the Perspective of the Qur'an," *Transparency Law* 10, No. November (2022).

<sup>29</sup> M. Mutamakin and Ansari, "Philosophical Study of Islamic Family Law as the Obligation of the Husband to Provide for His Wife and Children M. Mutamakin Ansari Institute of Islamic Religion Ibrahimy Genteng Banyuwangi Introduction Sociologically, Law is a reflection of the value system believed by the community," *Al-Bayan: Journal of the Science of the Qur'an and Hadith* 3, no. 1 (2020): 47–82.

<sup>30</sup> Rosa Nella Wahyuningrum, "A Review of Islamic Law and Positive Law on Referencing Practices in Ngabean Village, Secang District, Magelang Regency in 2010-2017."

<sup>31</sup> Arifin Abdullah, "The Position of Permission to Refer to Husbands in the Time of 'Iddah (Perspective Analysis of Islamic Law)."

even if talaq occurs, there is room to repair the relationship and continue the marriage with renewed love and commitment.<sup>32</sup>

This *iddah* period is a waiting period that aims to ensure that there is no pregnancy from the previous husband and provide an opportunity for couples to reconcile or improve their relationship.<sup>33</sup> According to KHI, the *iddah* period for a divorced wife with talaq *raj'i* (recallable talaq), including talaq one, is three months for those who have menstruated, three months for those who have not menstruated (or until she menstruates, if menstruation occurs before the end of three months) and if the divorced wife is pregnant, the husband is obliged to provide alimony until she gives birth. However, the Qur'an also explains that this waiting period is four months and ten days. As mentioned earlier, that referencing, is the right of the husband as well as the right of talaq that he has.<sup>34</sup>

According to the view of Shaykh Hasan Ayyub, '*iddah* is a waiting period that is obligatory for a woman who is divorced by her husband, either because of a living divorce or a divorce for life. During '*iddah*, a woman can wait for the birth of the child she conceives, or through the quru' or the number of months. During this time, women are not allowed to marry or look for other men to marry her<sup>35</sup>. According to the agreement of the fuqaha, the husband who gives talaq has the right to refer to his wife by speech, as well as through deeds according to the Hanafi, Hambali, and Malik schools, as long as the wife is still in the *iddah* period. This action can be done without the need to ask permission or consent from his ex-wife.<sup>36</sup>

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<sup>32</sup> Susi, Interview (2024).

<sup>33</sup> Nurul Aqidatul Izzah et al., "The Fulfillment of Wives' Rights in the Iddah Period After the Implementation of Circular Letter No. P005 / DJ . III/Hk . 00 . 7/10/2021 Study at the Office of Religious Affairs of Parepare (Islamic Family Law Perspective) Fulfillment of Wives' Rights During the Iddah Period After the " 19, no. 1 (2024): 98–112, <https://doi.org/10.56338/iqra.v19i1.4673>.

<sup>34</sup> Sarpani and Soeradji, "Talak , Refer , and *Iddah* in the Perspective of the Qur'an."

<sup>35</sup> Shaykh Hasan Ayyub, *Fiqhul Ushrah Al-Muslimah*, ed. In, *Family Fiqh*, (Terj: Abdul Ghofar), 5th ed. (Jakarta: Pustaka Al-Kautsar, 2008).

<sup>36</sup> Muhammad Hasbi Ash-Shiddieqy, *The Laws of Islamic Fiqh, Second Edition* (Semarang: Pustaka Rizki Putra, 1997).

## Maslahah Perspective in Weighing the Validity of Post-Iddah Reference

The word *maslahah* comes from an Arabic verb which means something that brings good.<sup>37</sup> Imam Ghazali defines *maslahah* as an effort to achieve benefits and avoid losses. Muhammad Abu Zahra gave a definition similar to that of Jalal al-Din al-Suyuti which is in line with the purpose of Islamic sharia and the evidences that show its confirmation or rejection.<sup>38</sup> *Maslahah* in language is the *plural* *maslahah al-maslahah* taken from the word *al-shilah* (good) as opposed to *façade* (damaged).<sup>39</sup> The scholars have different opinions in judging *maslahah*.<sup>40</sup> Some scholars consider *maslahah* as a shari'iyah argument and as one of the postulates in the formation of law, while other scholars have a different view. Abdul Wahab Khalaf, in his work, stated that Imam Malik and Ahmad bin Hanbal and their followers adhered to the *istislah* approach as a shari'iyah method to establish laws related to events for which there was no *nash* (textual evidence) or *ijma'* (agreement of the scholars). On the other hand, the Shafi'i school and its followers reject the use of *istislah*. They view that the person who uses *istislah* is considered the same as the person who applies *istihsan*, and that *istislah* is actually synonymous with *istihsan*.

Abd al-Wahhab Khallaf, in his view, sets the conditions that must be met in order for *maslahah* to be used as shari'iyah argument. First, *maslahah* must be essential and should not be based on mere prediction (*wahm*); this means that the decision taken must consider the potential harm that may arise as a result. Second, *maslahah* must apply universally for the benefit of the majority of human beings, not just for certain groups or individuals (partial). Third, the constitutionality of the law based on *maslahah* (*maslahah mursalah*) must not contradict the principles contained in the Qur'an, Sunnah, and the agreement of the scholars (*ijmak*). Thus, Khallaf's approach emphasizes the importance of clarity, universality, and conformity with Islamic legal values in using *maslahah* as a legal basis.<sup>41</sup>

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<sup>37</sup> Khoirul Umam. et al., *Ushul Fiqih* (Bandung: Pustaka Setia, 2000), 132.

<sup>38</sup> Khoirul Umam. Et al., 135–236.

<sup>39</sup> Mardani., *Ushul Fiqih* (Jakarta: Rajawali Press, 2013), 228–29.

<sup>40</sup> Fera, *Analysis of the Compilation of Islamic Law (KHI) on Referencing the Perspective of Maslahah Mursalah*.

<sup>41</sup> Saifudin Zuhri, *Ushul Fiqih Reason as the Source of Islamic Law*, n.d.



Based on its level, *Maslahah* can be divided into three levels, namely: <sup>42</sup> *First, Maslahah dharuriyah*: this is a *fundamental and essential maslahah* for human survival. Everything that is included in this *maslahah* is a must to be done in order to protect religion, soul, intellect, descendants, and property. Examples include obligatory worship, prohibitions on harmful acts, and laws that protect property.

*Second, maslahah hajiyyah*: this *maslahah* is what humans really want to eliminate difficulties or overcome obstacles that are not urgent as in *maslahah dharuriyah*. Although it is not mandatory, *this maslahah* is allowed and regulated by law to make human life easier. Examples are the rules of economic transactions and waivers in worship such as *jama'* and *qashar*.

*Third, maslahah tahsiniyah*: this is a *maslahah* related to improving the quality of human life in worship, civility, and social interaction. Although not a primary need, this *maslahah* contributes to morality and virtue in religion and association. Examples are actions that preserve noble morals and maintain honor in customs and *muamalah*.

Maslahat is divided into three types in terms of their existence;<sup>43</sup> *First*, *maslahat al-mu'tabarah* is a benefit that clearly exists in the legal text that recognizes the importance of safeguarding religion, soul, intellect, honor, and property. Examples are *jihād* which is prescribed to defend religion, as well as punishments such as *qiyas* to protect the soul, punishment of limitation for adulterers and theft to protect honour and property.

*Second*, *maslahat al-mughah* is a benefit that is contrary to the provisions of the legal text. An example is the equalization of inheritance shares for boys and girls, which may have certain benefits even if they are not in line with existing legal provisions.

*Third*, *maslahat al-mursalah* adalah kemaslahatan yang tidak dijelaskan atau diakui oleh teks hukum secara langsung. Ini mencakup kemaslahatan yang muncul dalam konteks mengkodifikasi al-qur'an, pembukuan hadis, dan inovasi lainnya yang memperoleh manfaat dan menolak kerugian, menurut pandangan *ushuliyin*.

In terms of changing or not *maslahah*, the scholars divide it into two, namely *maslahah al-ammah* and *maslahah al-khassah*. *Maslahah al-ammah* refers to the benefits that involve the interests of many people or the majority of the people, such as when scholars allow the act of killing the spreaders of heresy that can damage the faith of the people.

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<sup>42</sup> Suwarjin, *Ushul Fiqih* (Yogyakarta: Teras, 1012), 142.

<sup>43</sup> Mardani., *Ushul Fiqih*, 230.



Meanwhile, *maslahah al-khassah* refers to personal or individual benefits, as in the case of terminating the marriage of someone who is considered missing.<sup>44</sup>

## CONCLUSION

From the above discussion, we can see that the status of reference in marriage is only found in *talaq raj'i* and *bain sugrha*. This study reveals that the law of reference in Islam, especially after the *iddah* period, has important implications in the context of *maslahah* or the public interest. The concept of referential allows reconciliation between husband and wife after *talaq*, taking into account the values of justice, domestic harmony, and the protection of individual rights, especially women's rights. The various approaches of the various *madhhabs* in Islam show the flexibility and adaptability of the law in response to social and cultural dynamics. The *iddah* period or waiting period for a woman is three times the holy period with the aim of making it clear that there is no fetus left in a woman's womb left by her husband. Then the legal consequences of referring to those carried out after the expiration of *the iddah* period can be tolerated according to the applicable customary law so that there is no realization of legal order as well as in the existing administration, but in order for the realization of the practice of reference and *talaq* must be adjusted based on the provisions that have been regulated in the Compilation of Islamic Law articles 167-169. Thus, an in-depth understanding of the implications of the post-*iddah* reference law from the perspective of *maslahah* can provide better guidance in handling divorce cases in an increasingly complex and diverse society, to achieve justice and harmony in the family and society at large.

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<sup>44</sup> Fera, *Analisis Kompilasi Hukum Islam (KHI) Tentang Rujuk Perspektif Maslahah Mursalah*, 26.

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