HUKUM ISLAM

HUKUM YANG HIDUP DI INDONESIA

Bunga Rampai Tulisan
Para Partisipan 4th ICILI 2019 di Palembang

Editor :
Heru Susetyo, S.H., M.Si., LL.M., Ph.D.
Vidya Nurchaliza, S.H.
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FAKULTAS HUKUM
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Dipersembahkan untuk Prof Abdullah Gofar, Ketua Panitia 4th ICILI 2019 di Palembang, yang wafat pada Senin, 24 Agustus 2020 di Palembang, semoga konferensi dan buku ini menjadi amal jariyah bagi beliau…

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KATA SAMBUTAN
LEMBAGA KAJIAN ISLAM DAN HUKUM ISLAM

Assalamualaikum warrahmatullahi wabarakatuh,

Alhamdulillah biidznillah atas ijin Allah SWT buku bungai rampai berisikan tulisan terpilih dari para partisipan 4th ICILI 2019 di Universitas Sriwijaya Palembang dapat juga diterbitkan.

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Semoga buku ini membawa pencerahan, kebaikan dan kemanfaatan buat kita semua. Utamanya untuk mendukung bekembangnya Hukum Islam selaku hukum yang hidup di Indonesia.

Wassalamualaikum warrahmatullahi wabarakatuh,

Heru Susetyo, SH. LL.M. M.Si. Ph.D
Ketua LKIHI FHUI

DAFTAR ISI

MODEL FOR SUSTAINABLE FOREST MANAGEMENT BY THE LOCAL GOVERNMENT BASED ON ECOLOGICAL WISDOM VALUES IN RIAU PROVINCE

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Abstract

Forest management by the regency government is still far from the principles of well government management, transparency, participation, accountability, and professional. The obstacles for local government to do forest management authority in the Province of Riau such as, firstly, law and regulations. Secondly, permit and supervision instruments. Thirdly, law enforcement officers. Fourthly, community. Then fore this paper explores the Sustainable Forest Management by local governments on institutions based on Good Forest Governance by strengthening and regulating community participation. The model implemented is Sustainable Forest Management Model by Local Governments, a combination of the concepts of Sustainable Forest Management and Malay Ecological Wisdom Values in Riau Province. The Sustainable Forest Management Model and Malay Ecological Wisdom Values in Riau Province in Sustainable Forest Management by the Local Government are in line with the values in Pancasila. Forest management is not only on the regulations and systems, but also emphasizes on the values of wisdom and moral values of the officials implementing policies in the field of forestry and society in Riau Province.
Keywords : Forest, Ecological Wisdom, Malay

I. Introduction

Forests have a very important position, function and role in supporting national development. This is because the forest is beneficial for the maximum prosperity and welfare of the people of Indonesia.[1] Forest is a gift from the Almighty God that is priceless, therefore it is obligatory for us, human beings, to protect and preserve it by not doing damages to forests, so that forests can

[1] Salim H.S. 2013, *Dasar-dasar Hukum Kehutanan*, Edisi Revisi, Jakarta: Sinar Grafika, hal. 1.

continue to provide prosperity not only for current generations but also for future generations.

Problems in forest management have resulted in an alarming condition of forests. Improvements have been made both in terms of laws and regulations and the forest management system, but sustainable forest management has not yet been carried out. Many problems that arise in the field are ranging from forestry conflicts, licensing and supervision and forestry corruption committed by forestry officials.

Indonesia's deforestation in 2016-2017 was recorded at 479,000 Ha. From this note, the area of deforestation that occurred in the forest area of 308,000 Ha and the remaining area of 171,000 Ha occurred in the Other Use Areas (APL). Deforestation that occurred in 2016-2017 continues the downward trend after briefly skyrocketing in the 2014-2015 period which reached 1.09 million hectares. In the period of 2015-2016 deforestation was recorded at 630,000 Ha.[2]

The same thing happened in Riau Province as the province with the highest deforestation rate. While forest areas in Riau Province from year to year is decreasing, deforestation and degradation of natural forests in Riau Province take place very quickly. Over a period of 24 years (1982-2005), Riau Province has lost 3.7 million ha of natural forest cover. In 1982, natural forest cover in Riau Province still covered 78% (6,415,655 hectares) of Riau's land area of 8,225,199 ha (8,265,556 hectares after expansion). Until 2005, the remaining natural forests were only 2,743,198 ha (33% of Riau's land area). During this period, Riau Province lost 160,000 ha/year of natural forest annually and during the 2004-2005 period, the loss of natural forest reached 200,000 ha, leaving 22% or 2.45 million ha in 2009. Data on forest cover in 2013 was left 2,005,512 Ha. Based on the observation of Landsat 8 satellite imagery, Riau's remaining forest area in 2015 was approximately 1,644,862 ha (15% of Riau's land area, whereas forest areas must be maintained at least 30% of land area).[3] This condition is already very alarming, given the large benefits of forests for the community and the magnitude of the consequences arising from the destruction of the forest for humans, plants and animals. The forest area in Riau Province is always decreasing every year.

Forest management in Riau Province has caused so many problems. First, ranging from deforestation and forest degradation in Riau. Second, conflicts with local communities and pollution/environmental damage have occurred since industrial plantation forest companies and oil palm plantations are operating. Third, forests damage in Riau have caused floods in every rainy season and dry

[2] www.menlhk.go.id angka deforestasi tahun 2016-2017, diunduh tanggal 23 Agustus 2019.

[3] Jaringan Kerja Penyelamat Hutan Riau (Jikalahari) 2016, dalam 14 Tahun Melawan Monopoli Pengusaha Hutan dan Lahan, *Catatan Hitam Tata Kelola Hutan dan Lahan di Riau 2002-2016*, Pekanbaru, hal. 125.

forest fires. Fourth, corrupt practices are the beginning of the entrance to monopolistic practices which lead to ecological damages. Forest management practices that is perceived to be able to guarantee the preservation of natural forests in Riau have not been implemented. On the contrary, the ongoing forest management has increasingly threatened the existence of forests and the people of Riau. Flood disasters, forest fires and land that hit Riau Province is evidence that Riau's existing forests are no longer able to maintain environmental balance. Slogans of forest management for community welfare do the complete opposite. Poverty is happening precisely in and around forest areas.[4]

Therefore, sustainable forest management needs to be carried out by the Regional Government based on Malay Ecological Wisdom Values in Riau Province. Wisdom means wise, clever and smart in doing an action or deed which is based on knowledge. The wisdom of the Malays is formed of intelligence and empiricism through dialogue with nature and ideas that develop later. However, Islam has become the main stream of dismissal from the empirical knowledge and dialogues. Islam as a reference is outlined in the customs of the Malays.

Ecology is a determinant factor in every cultural process. Ecological factors include operating in a relation, firstly, referential compliance gives rise to a culture that moves to follow given ecological movements. Second, reciprocal existence in the natural environment is explored, read and examined with as the subject of the sharing of cognition, emotions and blessing as sharing needs (nature is considered as a teacher). Third, the objective-exploitative in the environment is made as an object for things that focus on practical-pragmatic human needs (anthropocentric), the environment is placed as mere natural resources, which are offered to fulfill human unlimited desires. [5]

With regard to abstinence, in the world of Malay life, it is always associated with threats because there are threats present. In relation to that, the threat of shame for those who violate abstinence is imposed on the Malays. Feeling ashamed of committing crimes, doing despicable acts, destroying the environment and so on.

Avoiding bad luck is a Malay way of keeping abstinence. When breaking the taboo, the Malays believe that disaster will be overwritten. In damaging forests, for example, many disasters will arise as a result of these actions. Therefore, the Malays abstain from destroying the natural environment (Riau Malay Customary Institution, Riau Malay Cultural Education, Handbook Resource of Riau Malay Cultural Education Teachers, 2018: 50). The problem that will be analyzed in this paper is the kind of model of Sustainable Forest Management by Local Governments based on Malay Ecological Wisdom Values in Riau Province can be implemented.

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[4] *Ibid*, hlm. 144

[5] Lembaga Adat Melayu Riau, 2018, *Pendidikan Budaya Melayu Riau, Buku Sumber Pegangan Guru Pendidikan Budaya Melayu Riau*, hal. 50.

II. Research Method

This research is a legal research with empirical type of legal research or also called as field research.[6] Empirical legal research is the one type of legal research that analyzes and examines the working of law in society.[7] Empirical legal research is a legal research methodology that seeks to see the law in a real sense or can be said to see, examine how the law works in society.[8]

Empirical legal research use 2 kinds of data, there are (1) primary data, data that obtained the source directly from the field, and (2) secondary data. Secondary data includes primary legal material, secondary legal material, and if necessary tertiary legal material.[9] The data in empirical legal research consists of primary data and secondary data. The primary data was collected through observation, interview, and questionnaire.

Data analysis used in empirical legal research can be done qualitatively, which describe the data in a quality and comprehensive manner in the form of regular sentences, logic, not overlapping, and effective in order to ease comprehension and interpretation data.[10] Based on the research characteristic that used analytic descriptive research method, thus the data analysis is qualitative approach towards primary data and secondary data, then, followed by deduction analysis.[11]

III. Discussion

Sustainable Forest Management by Local Governments on Institutions based on Good Forest Governance done through strengthening and regulating community participation, the Sustainable Forest Management Model by Local Governments, is a combination of the concepts of Sustainable Forest Management and Malay Ecological Wisdom Values in Riau Province.

Sustainable Forest Management (SFM) is highly dependent on policy, legal and institutional conditions, all of which are covered by Good Forestry Governance. The main cause of poor forest management is that policies, laws and institutions are not working. Weak forestry institutions cannot enforce the law. Weaknesses of forest governance tend to underlie forestry issues such as clearing

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[6] Jonaedi Efendi dan Johnny Ibrahim, 2018, *Metode Penelitian Hukum Normatif dan Empiris*, Prenadamedia Group, Jakarta, hal. 149.

[7] Ishaq, 2017, *Metode Penelitian Hukum, Penulisan Skripsi, Tesis serta Disertasi*, Alfabeta, Bandung, hal. 70

[8] Jonaedi Efendi dan Johnny Ibrahim, *Op Cit*, hal. 150.

[9] Abdul Kadir Muhammad, 2004, *Hukum dan Penelitian Hukum*, Citra Aditya Bakti, Bandung, hal. 151

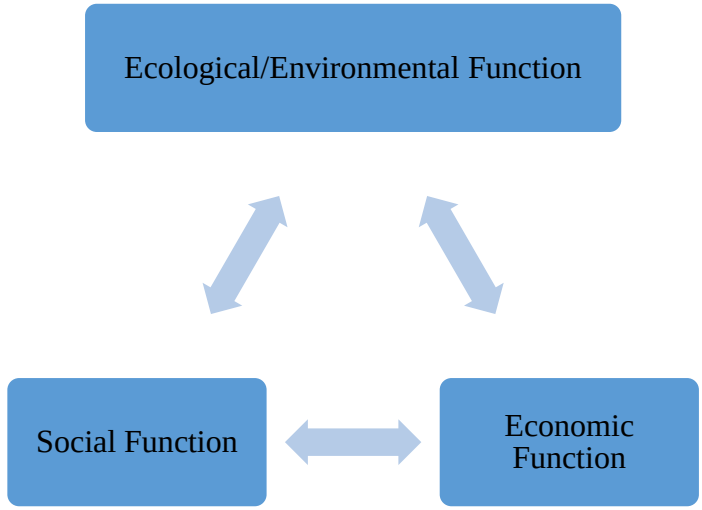
[10] Ishaq, *Op Cit*, 74.

[11] Zainuddi Ali, 2009, *Metode Penelitian Hukum*, Sinar Grafika, Jakarta, hal. 107.

primary forests, reforestation that does not respect the rights and needs of local communities, forest management that ignores biodiversity and so on.[12]

The concept of sustainable forest management is based on the fulfillment of the preservation of the three main functions of the forest namely :[13] (a) Ecological/Environmental Functions, forest ecosystems must support the life of healthy organisms, while maintaining productivity, adaptability and ability to recover; (b) Social Functions, reflecting the link between forests and culture, ethics, social norms and development. An activity is said to be socially sustainable if it complies with ethics and social norms or does not exceed the tolerance threshold of the local community for change; (c) Economic function: Indicates that the benefits of the forest exceed the costs incurred by the management unit and the equivalent capital can be invested from one generation to the next.

The interaction pattern of the three functions of the concept of sustainable forest management is illustrated below:



Ecological/environmental functions is elaborated according to the quality of natural resources, environment and diversity to achieve a balance of sustainable development. In the context of the relationship between social and economic goals, economic policies are needed which include directed

[12] Mayer J, Bass S, Macqueen D. 2002. *The Pyramid. A Diagnostic and Planning Tools for Goood Forest Governance*. The World Bank and WWF. http://www.ibcperu.org/doc/isis/8593, dalam ementerian Kehutanan Badan Penelitian Dan Pengembangan Kehutanan Pusat Penelitian dan Pengembangan Perubahan Iklim dan Kebijakan, *REDD+ & Forest Governance*, Penerbit Pusat Penelitian Sosial Ekonomi dan Kebijakan Kehutanan Kampus Balitbang Kehutanan, 2010, hal. 78.

[13] Alan Purbawiyatna dkk, 2011, *Analisis Kelestarian Pengelolaan Hutan Rakyat Di Kawasan Berfungsi Lindung*, (Analysis of Sustainability of Private Forest Management in Protection Area), Jurnal Pengelolaan Sumber Daya Alam dan Lingkungan Hidup (JPSL) Vol. (1) 2 : 84- 92 Desember 2011. hal. 85

government intervention, income distribution, job creation and subsidies for development activities.[14]

Social function is elaborated according to the elements of life assurance, equitable access to basic services, democracy and participation, positive social interactions and the development of human values for quality life.

On the other hand, economic function is elaborated as an element of the wise use of natural resources, encouraging the utilization of the local economy, economic value added development and prioritizing the impact of ecological sustainability.[15]

The new paradigm relies on a balance between the sustainability of ecological/environmental function, social/cultural function and economic function of decentralized forest resource management by building community independence based on the ecology of justice.

To achieve this paradigm, the following are needed: (1) institutions based on good forest governance relying on good governance in the management of forest resources that are based on: (a) legal certainty; (b) benefits and sustainability; (c) democracy and justice; (d) togetherness; (e) openness; (f) integration; (g) impartiality; (h) accuracy; (i) accountability; (j) nonarbitrary; (k) public interests; (l) good service; (m) participatory. (2) Formulation of Forest Law Legal Instruments based on the values of Pancasila, namely Godliness, Humanity values, Unity values, Community values and Justice values in the regulation and management of forests in Indonesia. (3) Legal Culture through strengthening, regulating and empowering community participation through sustainable forest development and community independence in the forestry sector; (4) Reorienting the objectives of forestry development towards the balance and sustainability of ecological/environmental functions, social/cultural functions and economic functions in the management of forest resources to improve the quality of the community, especially the community around the forest.

The Sustainable Forest Management Model and Malay Ecological Wisdom Values in Riau Province in Sustainable Forest Management by the Local Government are in line with the values in Pancasila. Forest management is not only on the regulations and systems, but also emphasizes on the values of wisdom and moral values of the officials implementing policies in the field of forestry and society in Riau Province.

Therefore, sustainable forest management needs to be carried out by the Local Government based on Malay Ecological Wisdom Values in Riau Province. Wisdom means wise, clever and smart in doing an action or deed which is based

[14] Tutut Ferdiana, dkk, 2017, *Rekonstruksi Kebijakan Publik tentang Izin Pinjam Pakai Kawasan Hutan yang berbasis Sustainable Development*, Diponegoro Law Journal, Volume 6, Nomor 3 Tahun 2017, hlm. 16

[15] Ibid.

on knowledge. The wisdom of the Malays is formed of intelligence and empiricism through dialogue with nature and ideas that develop later. However, Islam has become the main stream of dismissal from the empirical knowledge and dialogues. Islam as a reference is outlined in the customs of the Malays. Thus, the Malays regulate all wisdom by referencing to Islam. The wisdom of the Malays is manifested in the rules that should be derived from if they break the shari'a or required for if they are obliged in the Al-Quran or Al-Hadith. Similarly, in managing and protecting forests and nature, damaging the earth is prohibited. Al-Quran surah Al-A'raf verse 56 states the following:

"And cause not corruption upon the earth after its reformation. And invoke Him in fear and aspiration. Indeed, the mercy of Allah is near to the doers of good" . (Surat al-A'raf: 56)

With regard to abstinence, in the world of Malay life, it is always associated with threats because there are threats present. In relation to that, the threat of shame for those who violate abstinence is imposed on the Malays. Ashamed of committing crimes, doing despicable acts, destroying the environment and so on.

Avoiding bad luck is a Malay way of keeping abstinence. When breaking the taboo, the Malays believe that disaster will be overwritten. In damaging forests, for example, many disasters will arise as a result of these actions. Therefore, the Malays abstain from destroying the natural environment.[16]

The exploitative and business-oriented way of exploiting natural resources has caused a decrease in the level of community life. An increased poverty level in people living in and around forest areas. Misrepresentation of the principle of forest area management that has been practiced for decades has increased the rate of forest area damage that continues to occur until now. That is also happening in Riau Province so far.

In the Malay realm, forest and land become something that is nurtured, protected and guarded: [17]

Sign of a trustworthy person
Refrain from damaging the forest and soil
Gathering without damaging the woods
Threshing without damaging the forest
Logging without damaging the jungle
Housing without damaging the soil
Gardening without damaging the village
Assembling without damaging the mountain
Farming without damaging the meadow
Custom of life by holding the trust
Conscious to preserve land and forest

[16] Lembaga Adat Melayu Riau, 2018, *Op Cit* hlm. 50.
[17] *Ibid*, hal. 53.

Conscious to preserve hills and valleys
(Effendy, 2006)

The function and division of space is tightly managed through traditional institutions which are entrenched in the community. Forest-land for the Riau Malay community is a communal living space (lebensraum) with a sequence of functions, which are (Riau Malay Customary Institution, 2018: 60): (1) Markers of existence and fortune as the symbols of luck and fortune, dignity of the people, tribe and clan; (2) sources of cultural philosophy and dynamics; and (3) source of income.

In the Malay language teaching point, Tenas Effendy explained in the form of a poem "many pots are attacked by people//large pots have black hoods//many instructions are remembered by people//teachings containing nature," that Malays learn from the universe. A person should abstain from destroying nature. From this expression, it is concluded that the Malays view nature as a space of life that is highly considered.

The Sustainable Forest Management Model and Malay Ecological Wisdom Values in Riau Province in Sustainable Forest Management by the Regional Government are in line with the values in Pancasila. Where forest management is not only on the regulations and systems, but rather emphasizes the values of wisdom and moral values of the officials implementing policies in the field of forestry and society in Riau Province.

IV. Conclusionss

1. The Authority of Local Government in Sustainable Forest Management In Riau Province so far has not been running as it should. There are irregularities that occur in the management of forests, whether committed by officials, companies or individual communities around the forest. Forest management by district governments is far from the principles of good governance, transparency, participation, accountability and coordination. Forest management is almost always not transparent as evidenced by irregularities and corruption in the forestry sector that occurs in Riau province, closing public access and space for people around the forest to participate actively in forest preservation and decision making so that forestry conflicts often occur between the community and the company as well as the community and government officials, the lack of government accountability in forest management that shows deforestation rates in Riau Province continue to occur as well as a lack of commitment to coordinate to carry out an activity between the central government and local governments as well as local governments and communities around the forest for sustainable forest management.
2. Sustainable Forest Management by Local Governments on Institutions based on Good Forest Governance done through strengthening and regulating community participation, the Sustainable Forest Management

Model by Regional Governments, is a combination of the concept of Sustainable Forest Management and Malay Ecological Wisdom Values in Riau Province. The Sustainable Forest Management Model and Malay Ecological Wisdom Values in Riau Province in Sustainable Forest Management by the Regional Government are in line with the values in Pancasila. Where forest management is not only on the regulations and systems, but rather emphasizes the values of wisdom and moral values of implementing officials in the field of forestry and society in Riau Province.

V. Suggestions

1. Community participation is needed as part of the implementation of sustainable forest management and as an observer of government policies in forestry.
2. Sustainable Forest Management by Local Governments on Institutions based on Good Forest Governance done through strengthening and regulating community participation with a combination of the concept of Sustainable Forest Management and Malay Ecological Wisdom Values in Riau Province is very necessary because the relationship does not only occur between humans and nature (forests), but rather to the Human-Nature-God relationship.

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EKSISTENSI HUKUM ADAT PASCA PENERAPAN SYARIAT ISLAM DI NANGROE ACEH DARUSSALAM (NAD)

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Abstract

The purpose of this research is to know how the legal design of the protection of ADAT Law post the application of Islamic sharia in Nangroe Aceh Darussalam (NAD). As it is known Aceh is a province that gained special autonomy through the law, Law Number 11 year 2006 concerning ACEH government (UUPA). The problem that became the focus of this research is how the juridical design of the customs of the customary law post-application of Islamic sharia in Aceh. What about the existence of customary law in ACEH region with the enactment of Islam. Furthermore, what if between adat law and Islamic Law is contrary, which will be used first. This research is an empirical research law. The location of this research is in Nangroe ACEH Darussalam (NAD). The type of data used by primary data is a result of interviews with interviewees and secondary data obtained from search results. Data collection methods with interviews to interviewees, documentation studies, and library studies. Data analysis techniques are used qualitatively. The results showed that the juridical design of protection against the customary law of Islamic jurisprudence can be seen in Qanun Number 10 year 2008 about indigenous institutions. In the Qanun the customary law in ACEH received recognition and protection. The pattern of interaction between Islamic law and customary law occurs in such a way. Where customary law is not contrary to Islamic law will be accepted and kept preserved. However, if customary law is contrary to Islamic law, the public will abandon it.
Keywords: protection of customary law, Islamic sharia, ACEH

Abstrak

Tujuan penelitian ini untuk mengetahui bagaimana desain yuridis perlindungan hukum adat pasca penerapan syariat islam di Nangroe Aceh Darussalam (NAD). Sebagaimana diketahui Aceh merupakan provinsi yang mendapatkan otonomi khusus melalui Undang-undang No. Undang – Undang Nomor 11 Tahun 2006 tentang Pemerintahan Aceh (UUPA). Masalah yang menjadi focus penelitian ini adalah bagaimana desain yuridis perlindunagn terhadap hukum adat pasca penerapan syariat Islam di Aceh. Bagaimana dengan eksistensi hukum adat diwilayah Aceh dengan diberlakukannya syariat Islam. Lebih jauh bagaimana apabila antara hukum adat dengan hukum islam terdapat bertentangan, mana yang terlebih dahulu akan digunakan. Penelitian ini merupakan penelitian hukum

empiris. Lokasi penelitian ini di Nangroe Aceh Darussalam (NAD). Jenis data yang digunakan data primer berupa hasil wawancara dengan narasumber dan data sekunder yang diperoleh dari hasil penelusuran. Metode pengumpulan data dengan wawancara kepada narasumber, studi dokumentasi, dan studi pustaka. Teknik analisis data yang digunakan secara kualitatif. Hasil penelitian menunjukkan bahwa desain yuridis perlindungan terhadap hukum adat pasca penerapan syariat Islam dapat dilihat pada Qanun nomor 10 tahun 2008 tentang Lembaga Adat. Didalam qanun tersebut hukum adat yang ada di Aceh mendapatkan pengakuan dan perlindungan. Pola interaksi antara hukum Islam dan hukum adat terjadi sedemikian rupa. Dimana hukum adat yang tidak bertentangan dengan hukum Islam akan diterima dan terus dilestarikan. Akan tetapi apabila hukum adat bertentangan dengan hukum Islam maka secara sadar masyarakat akan meninggalkan hal tersebut.
Kata kunci: *perlindungan hukum adat, syariat islam, Aceh*

I. Latar Belakang

Sejarah lahirnya Aceh sebagai provinsi yang menerapkan otonomi khusus tidak dapat dilepaskan dari kenyataan bahwa masyarakat Aceh telah melakukan resepsi terhadap hukum islam secara keseluruhan. Hal ini diperkuat dalam pandangan Van den berg yang menyebutkan bahwa orang Islam Indonesia telah melakukan resepsi hukum islam dalam keseluruhannya dan sebagai satu kesatuan; *reception in complexu*.[1] Agama bagi masyarakat Aceh tidak hanya merupakan simbol – simbol perjuangan dan politis, melainkan juga tujuan akhir dari perjuangan itu sendiri.[2] Proses resepsi terjadi sedemikian rupa sehingga sulit membedakan antara hukum Islam dengan adat istiadat masyarakat Aceh sebagaimana tercermin dalam peribahasa yang sangat dikenal masyarakat Aceh 'adat bersendikan syara', syara' bersendikan kitabulloh. Peribahasa ini dapat diartikan bahwa adat istiadat dalam masyarakat Aceh tidak boleh bertentangan dengan syariat Islam yang bersumber dari Alquran. Islam diresapi begitu mendalam sehingga menjadi pedoman utama dalam menjalankan seluruh aktivitas tidak terkecuali dipemerintahan.

Penerapan syariat Islam di Aceh diakui lahir dari sebuah perjuangan panjang yang tidak dapat dilupakan dari sejarah bangsa Indonesia secara keseluruhan. Para ahli sejarah mengatakan bahwa hukum yang berlaku dalam wilayah kerajaan Aceh waktu itu merupakan perpaduan antara hukum yang berdasarkan agama Islam dan adat-istiadat yang dianggap sesuai serta tidak bertentangan dengan syara'. Perpaduan tersebut dapat dibuktikan dalam pepatah "agama dan adat bagaikan zat dan sifat yang tidak dapat dipisahkan, dan layaknya

[1] Mohammad Daud Ali. 2011. *Hukum Islam Pengantar Ilmu Hukum dan Tata Hukum Islam di Indonesia*. Jakarta: Rajawali Press.

[2] Syamsul Rijal dkk.2007.*Dinamika Sosial Keagamaan Dalam Pelaksanaan Syariat Islam.*Banda Aceh : Dinas Syariat Islam Provinsi Nanggroe Aceh Darussalam.

seperti mata hitam dan putih".[3] Pepatah ini dapat memberikan gambaran yang begitu kuat tentang pengaruh Islam dalam dinamika kemasyarakatan di Aceh. Penerimaan yang utuh terhadap hukum Islam seolah menggantikan sistem keyakinan lama dengan yang baru. Sehingga realitas ini dapat dilihat pada keseharian masyarakat Aceh yang secara totalitas menerima keberadaan syariat Islam tanpa penolakan.

Aceh sebagai wilayah otonomi khusus kedudukannya dapat dilihat pada Pasal 18 B ayat (1) UUD 1945 menyebutkan negara mengakui dan menghormati satuan-satuan pemerintahan daerah yang bersifat khusus atau bersifat istimewa yang diatur dengan undang-undang. Dengan demikian "Perkataan khusus" memiliki cakupan yang luas[4] antara lain karena dimungkinkan membentuk pemerintahan daerah dengan otonomi khusus (Aceh dan Irian Jaya). Sebagai wilayah otonomi khusus, Aceh menjadi objek yang menarik untuk dikaji dari berbagi sisi, termasuk bagaimana dengan keberadaan hukum adat masyarakat setempat dengan diberlakukannnya syariat Islam. Bagaimana eksistensi hukum adat setelah ditetapkannya Nomor 11 Tahun 2006 tentang Pemerintahan Aceh adalah fokus kajian permasalahan dalam penelitian ini.

II. Metode

Desain Penelitian yang digunakan adalah *legal constructivism* yang melihat realitas itu ada dalam bentuk bermacam-macam konstruksi mental, berdasarkan pengalaman sosial, bersifat lokal dan spesifik dan tergantung pada orang yang melakukannya. Hubungan epistemologis antara pengamat dan objek bersifat satu kesatuan, subyektif dan merupakan hasil perpaduan interaksi diantara keduanya. Oleh karena itu metode utama yang digunakan adalah *hermeneutic dan dialectics.* maka metode penelitian yang digunakan adalah *socio legal research* berupa penelitian lapangan dengan istrumen pengumpul data berupa: studi pustaka dan wawancara mendalam dengan nara sumber terpilih. Sumber data di samping socio legal research penelitian dilengkapi dengan kajian normatif menggunakan pendekatan perundang-undangan (*statute approach*) terhadap bahan-bahan hukum yang relevan. Tehnik pengumpulan data dengan studi pustaka dan wawancara dalam penelitian ini diperoleh melalui penelusuran referensi dan dokumen yang akan dilakukan antara lain pada: (1) Pemerintah Provinsi Nangroe Aceh Darussalam (2) Pemerintah Kabupaten Aceh Besar (3) Pemerintah Gampong. Narasumber wawancara di lapangan yang terpilih (purposive sampling) berasal dari kepala gampong Mulia. Analisis data dilakukan secara kualitatif non positivistik menggunakan metode interpretasi. Interpretasi yang digunakan adalah interpretasi hermeneutic dengan memperhatikan sinkronisasi teks maupun konteks hukum secara vertikal maupun

[3] *Ibid.* hal 106.

[4] Bagir Manan, Menyongsong Fajar Otonomi Daerah, Pusat Studi Hukum, Fakultas Hukum Universitas Islam Indonesia, Yogyakarta, 2001, hal. 152

horisontal terhadap peraturan perundang-undangan yang terkait. Penafsiran hermeneutika hukum, yaitu interpretasi terhadap teks-teks hukum tidak semata-mata dari aspek legal formal berdasar bunyi teks, tetapi juga dilihat dari faktor yang melatar belakangi (konteks masa lalu), aspek sosio-politik, kulturalnya, dan konteks masa kini atau disebut penafsiran dari teks ke konteks (kontektualisasi) . Dari hasil analisis akan diperoleh pemecahan dan jawaban terhadap permasalahan yang dirumuskan sekaligus sebagai kesimpulan penelitian yang menjadi dasar bagi perumusan rekomendasi penelitian sehingga penelitian ini dapat memberi manfaat sebagaimana yang diharapkan.

III. Hasil dan Pembahasan

1. Desain yuridis perlindungan terhadap hukum adat di wilayah Nangroe Aceh Darussalam.

Politik hukum pemerintah dalam memberikan perlindungan hukum terhadap hukum adat di wilayah Nangroe Aceh Darussalam (NAD) dapat dilihat setidaknya dari Undang-undang Nomor 11 Tahun 2006 tentang Pemerintahan Aceh khususnya Pasal 98 dan Pasal 99 yang secara khusus menyebutkan keberadaan lembaga adat sebagai wadah penyelesaian masalah sosial kemasyarakatan secara adat. Hal ini diperkuat dengan disahkannya Qanun No. 10 Tahun 2008 tentang Lembaga Adat. Dalam qanun tersebut diakui keberadaan lembaga adat yang berkembang dalam kehidupan masyarakat Aceh mempunyai peranan penting dalam membina nilai-nilai budaya, norma-norma adat, dan aturan untuk mewujudkan keamanan, ketertiban, ketentraman, kerukunan, dan kesejahtaraan bagi masyarakat Aceh sesuai dengan nilai Islam. Oleh karenanya pemerintah setempat berupaya untuk menjaga dan melestarikan lembaga adat setempat dalam upaya memberikan perlindungan secara yuridis terhadap hukum adat.

Pengakuan terhadap hukum adat secara kelembagaan di laksanakan oleh lembaga adat yang dalam Qanun No. 10 Tahun 2008 disebutkan bahwa lembaga adat merupakan suatu organisasi kemasyarakatan adat yang dibentuk oleh suatu masyarakat hukum adat tertentu mempunyai wilayah tertentu dan mempunyai harta kekayaan tersendiri serta berhak dan berwenang untuk mengatur dan mengurus serta menyelesaikan hal-hal yang berkaitan dengan adat di Aceh. Lembaga adat berfungsi sebagai wahana partisipasi masyarakat dalam penyelenggaraan pemerintahan, pembangunan, pembinaan masyarakat, dan penyelesaian masalah-masalah sosial kemasyarakatan.

Fungsi dan peran lembaga adat yang dikukuhkan dalam Qanun Nomor 10 Tahun 2008 memperlihatkan adanya upaya pemerintah Aceh untuk tetap melestarikan hukum adat beserta perangkatnya dengan batasan sepanjang tidak bertentangan dengan syariat Islam. Selain itu lembaga adat juga memiliki peran dalam proses perumusan kebijakan oleh Pemerintah Aceh dan Pemerintah kabupaten/kota sesuai dengan tingkatannya yang berkaitan dengan tugas, fungsi, dan wewenang masing-masing lembaga adat sebagaimana disebutkan pada Pasal

6 qanun tersebut. Ruang yang diberikan oleh pemerintah kepada lembaga adat untuk turut serta dalam perumusan kebijakan pada setiap tingkatan nampak sebagai upaya untuk terus melestarikan hukum adat dalam ruang pembaharuan hukum.

2. Eksistensi lembaga adat pasca penerapan syariat Islam

Dalam sejarah, Aceh dikenal sebagai sebuah "Negara Islam" dengan berbagai keterbatasan dan kelebihan yang memerlukan penjelasan yang benar-benar lurus dan netral dari berbagai muatan subjektivitas.[5] Hal inilah yang menyebabkan pengaruh hukum Islam begitu kuat di Aceh. Dimasa kerajaan Aceh hukum yang berlaku merupakan perpaduan antara hukum Islam dengan hukum adat yang dianggap tidak bertentangan dengan syara'. Di masa ini telah dikenal adanya pembagian kekuasaan dalam kerajaan Aceh Darusssalam yaitu:[6]

a. Kekuasaan eksekutif atau kekuasaan politik dan adat berada ditangan sultan atau kepala pemerintahan
b. Kekuasaan yudikatif atau pelaksanaan hukum berada ditangan ulama
c. Kekuasaan legislative atau kekuasaan pembuat Undang-undang berada ditangan Putro hang, karena putri Pahang inilah yang memberi nasehat kepada Iskandar Muda agar membentuk lembaga yang bernama Balai Majelis Mahkamah Rakyat.
d. Peraturan keprotolkoleran atau *reusam* berada ditangan Laksamana atau Panglima Angkatan Perang Aceh.
e. Dalam keadaan bagaimanapun, adat, qanun dan *reusam* tidak boleh dipisahkan dari hukum yang diartikan sebagai ajaran Islam. Antara adat dan Islam merupakan harmonisasi yang tidak dapat dipisahkan satu sama lain.

Untuk mengukur eksistensi hukum adat pasca diterapkannya syariat Islam di Aceh dapat dilihat dari seberapa besar peran lembaga adat yang menjalankan fungsi hukum adat secara kelembagaan. Peran lembaga adat dalam ruang lingkup Qanun Nomor 10 Tahun 2008 tentang Lembaga Adat, pasal 4 menyebutkan bahwa "Dalam menjalankan fungsinya sebagaimana dimaksud dalam Pasal 2 ayat (1) lembaga adat berwenang:

a. menjaga keamanan, ketentraman, kerukunan, dan ketertiban masyarakat;
b. membantu Pemerintah dalam pelaksanaan pembangunan;
c. mengembangkan dan mendorong partisipasi masyarakat;
d. menjaga eksistensi nilai-nilai adat dan adat istiadat yang tidak bertentangan dengan syari'at Islam;
e. menerapkan ketentuan adat;
f. menyelesaikan masalah sosial kemasyarakatan;

[5] *Op., cit*, hal 108

[6] Syamsul Rijal dkk.2007.*Dinamika Sosial Keagamaan Dalam Pelaksanaan Syariat Islam*.Banda Aceh : Dinas Syariat Islam Provinsi Nanggroe Aceh Darussalam. Hal. 110

g. mendamaikan sengketa yang timbul dalam masyarakat; dan
h. menegakkan hukum adat."

Berdasarkan kewenangan yang diberikan oleh qanun dapat dilihat adanya pengakuan terhadap lembaga adat di Aceh. Pengakuan ini menunjukkan masih diakuinya hukum adat masyarakat Aceh dalam batas-batas yang diatur qanun, diantaranya sepanjang tidak bertentangan dengan syariat Islam.

Pada prakteknya peran lembaga adat bagi masyarakat Aceh masih dirasakan hingga saat ini. Hal ini terbukti dari beberapa persoalan yang dihadapi masyarakat pada tahap awal diselesaikan melalui lembaga adat. Penyelesaian dilakukan secara bertahap melalui cara damai atau musyawarah adat, pada tingkat gampong yang berwenang adalah *geuchik* yang merupakan kepala persekutuan masyarakat adat gampong yang bertugas menyelenggarakan pemerintahan gampong, melestarikan adat istiadat dan hukum adat, serta menjaga keamanan, kerukunan, ketentraman dan ketertiban masyarakat, yang bekerjasama dengan *Tahu Peut* adalah unsur pemerintahan gampong yang berfungsi sebagai badan permusyawaratan gampong, dan *Tuha Lapan* lembaga adat pada tingkat mukim dan gampong yang berfungsi membantu imeum mukim dan keuchik atau nama lain.

Jika pada tingkat gampong perselisihan tidak dapat diselesaikan maka penyelesaian akan dilimpahkan ke Kemukiman. Pada tingkat ini proses penyelesaian perkara dipimpin oleh Imeum Mukim yang berkedudukan sebagai kepala pemerintahan mukim yang merupakan kesatuan masyarakat hukum di bawah kecamatan yang terdiri atas gabungan beberapa gampong yang mempunyai batas wilayah tertentu yang dipimpin oleh Imeum mukim atau nama lain dan berkedudukan langsung di bawah camat. Proses penyelesaian ditingkat mukim dapat melibatkan tokoh adat. Ruang lingkup permasalahan dapat berupa persawahan, laut, hutan, pasar, dan lain sebagainya. Proses penyelesaian seperti ini dianggap efektif bagi masyarakat Aceh karena pendekatan damai yang dilakukan cenderung menghilangkan permusuhan. Hal ini juga dibuktikan dengan diperkuatnya peran lembaga adat melalui Qanun Nomor 10 Tahun 2008. Secara umum penyelesaian melalui mekanisme ini mampu memberikan kepuasan kepada para pihak yang bersengketa, sehingga tidak banyak dijumpai kasus persengketaan yang diteruskan ke jalur hukum. Jenis sengketa yang diselesaikan biasanya berupa pelanggaran ringan yang secara hukum dapat diselesaikan melalui jalan damai, misalnya pencurian ringan yang disebabkan karena kebutuhan hidup, penganiayaan ringan, perbatasan tanah, sengketa warisan dan lain sebagainya. Maka penyelesaian dilakukan melalui musyawarah/perdamaian, dengan menghadirkan para pihak yang bersengketa, tokoh adat, para saksi. Sedangkan apabila jenis pelanggaran yang dilakukan merupakan pencurian berat penyelesaiannya diserahkan melalui mekanisme hukum positif.

Selain berfungsi sebagai lembaga penyelesai sengketa, lembaga adat juga berperan penting dalam kontrol sosial dimasyarakat. Dalam hal ini lembaga adat

menjadi penguat bagi masyarakat untuk tetap melestarikan niai-nilai budaya yang selaras dengan hukum islam. Dengan demikian masyarakat akan patuh terhadap norma sosial sebagaimana mereka patuh terhadap norma hukum. Fungsi lain dari lembaga adat yang tidak kalah penting adalah sebagai pelembagaan dan pembudayaan hukum adat. Dalam konteks ini lembaga adat bertanggungjawab dalam melestarikan tradisi masyarakat agar terus dapat dilaksanakan dalam setiap aktivitas, terutama pada simbol-simbol tertentu dimana tradisi muncul sebagai bentuk kearifan lokal ditengah masyarakat misalnya *peusijuek* yang diapakai ketika terjadi sengketa dana perselisihan.

3. Pola interaksi antara hukum adat dan hukum Islam dalam sejarah Aceh

Para ilmuwan berupaya mendeskripsikan pola islamisasi di Indonesia dengan beragam teori. Muncul beragam teori yang tidak dapat secara pasti menyebutkan bagaimana kedatangan islam di Indonesia. Proses islamisasi di Indonesia harus dilihat dari perspektif yang komprehensif meliputi global dan lokal sekaligus. Dari perspektif global, islamisasi di Indonesia harus dipahami sebagai bagian yang tidak terpisahkan dari dinamikan dan perubahan yang terjadi didunia Islam secara global.[7] Selain dikaitkan dengan dinamika global maupun lokal, proses islamisasi dapat dilihat dari sisi percepatan dimana faktor pengaruh hubungan antara kerajaan Aceh dengan dinasti Turki Utsmani yang berkontribusi besar dalam penyebaran Islam di nusantara.[8] Catatan tionghoa dari Dinasti T'ang memberikan informasi tentang kehadiran orang-orang muslim di nusantara, teks tersebut memberikan bukti perkembangan islam telah dimulai pada abad ke-7, ketika wilayah Sumatera memegang posisi strategis dalam perdagangan jarak jauh yang menghubungkan dunia muslim di Timur Tengah dan Persia hingga ke China di Timur.[9]

Diantara teori yang berupaya menjelaskan proses islamisasi di Indonesia adalah teori konversi dan adhesi. Adhesi adalah perpindahan orang Indonesia kedalam Islam tanpa meninggalkan keyakinan dan praktik ritual lamanya. Dalam adhesi, agama baru merupakan pelengkap agama lama. Sedangkan konversi adalah perpindahan orang Indonesia dari keyakinan dan praktik ritual lama kedalam Islam, dimana agama baru bukan lagi sebagai pelengkap keyakinan dan praktik ritual lama, melainkan sebagai pola dan sistem baru keyakinan orang yang bersangkutan.[10] Menurut Hood, Hill dan Spilka, terdapat dua paradigma dalam konsep konversi, yaitu paradigma klasik dan paradigma kontemporer.[11]

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[7] Azyumardi Azra, 2002. *Jaringan Global dan Lokal Islam Nusantara*. Bandung: Mizan.hal 15

[8] Dedi Ismatullah.2011.*Sejarah Sosial Hukum Islam*. Bandung: Pustaka Setia.hal. 357

[9] Wade dalam Jajat Burhanudin. 2017. *Islam dalam Arus Sejarah di Indonesia*. Jakarta: Kencana. hal. 2

[10] *Ibid*

[11] Hood,R.W, Jr.Hill,P.C. & Splika,B. 2009. *The psychology of religion:An Empirical Approach*. New York.Us:Guilford Press

a. Paradigma klasik

Menurut paradigma klasik, konversi merupakan perubahan religiusitas dalam diri seseorang yang perubahan tersebut terjadi lebih dikarenakan oleh proses individu menemukan diri (self) yang baru, daripada karena proses pendewasaan semata. Konsekuensi dari perubahan ini bersifat radikal, diindikasikan dengan beberapa hal misalnya adanya pusat perhatian, tindakan yang jauh berbeda dengan yang sebelumnya. Diri yang baru ini dirasa lebih "mulia" dan dilihat sebagai pembebasan dari dilema atau keadaan yang sulit sebelumnya.

b. Paradigma kontemporer

Menurut paradigma kontemporer, konversi merupakan perubahan religiusitas seseorang dari satu keyakinan ke keyakinan lain, yang karakteristiknya: terjadi dalam proses bertahap, lebih melibatkan pemikiran daripada emosi semata, pelaku konversi bersifat aktif mencari orang-orang yang dapat menghubungkannya dengan agama yang baru, dan pelaku konversi melakukannya dengan sadar dan penuh pemaknaan.

Apabila merujuk pada teori adhesi dan konversi, proses islamisasi di Aceh lebih condong pada pola konversi dimana agama baru bukan sebagai pelengkap keyakinan dan praktik ritual lama, melainkan sebagai pola dan sistem baru keyakinan orang yang bersangkutan. Hal ini dapat dibuktikan dengan diakuinya islam sebagai sistem keyakinan yang diterima secara keseluruhan menggantikan sistem keyakinan lama, konversi ini terjadi sedemikian rupa termasuk pada nama-nama yang diganti sesuai dengan nama-nama Islam. Dasar inilah yang menjadi sebab kuatnya pengaruh hukum islam terhadap hukum adat bagi masyarakat Aceh. Apabila dijumpai hukum adat yang bertentangan dengan hukum islam maka akan dilakukan penyesuaian sedemikian rupa sehingga hukum adat yang dipercaya oleh masyarakat teap bias dilestarikan akan tetapi tidak bertengan dengan hukum Islam. Sedangkan apabila hukum adat tersebut tidak dapat disesuaikan, maka masyarakat akan secara sadar meninggalkan praktek hukum adat yang bertentangan dengan hukum islam. Misalnya kebiasaan sedekah laut dengan mempersembahkan hewan sebagai simbol keselamatan yang juga menjadi tradisi dibeberapa daerah diwilayah nusantara, karena dianggap bertentangan dengan hukum islam maka tradisi ini kemudian ditinggalkan oleh masyarakat Aceh. Kesadaran ini lahir antara lain dari pemahaman yang dibangun para pemuka agama setempat mengenai hal-hal prinsip yang terdapat dalam ajaran islam. Dari hal ini dapat dilihat bagaimana pola interaksi antara hukum islam dengan hukum adat yang begitu kuat.

IV. Simpulan

1. Desain yuridis perlindungan terhadap hukum adat di wilayah Nangroe Aceh Darussalam dapat dilihat setidaknya dari Undang-undang Nomor 11 Tahun 2006 tentang Pemerintahan Aceh khususnya Pasal 98 dan Pasal 99 yang secara khusus menyebutkan keberadaan lembaga adat sebagai

wadah penyelesaian masalah sosial kemasyarakatan secara adat. Hal ini diperkuat dengan disahkannya Qanun No. 10 Tahun 2008 tentang Lembaga Adat. Dalam qanun tersebut diakui keberadaan lembaga adat yang berkembang dalam kehidupan masyarakat Aceh mempunyai peranan penting dalam membina nilai-nilai budaya, norma-norma adat, dan aturan untuk mewujudkan keamanan, ketertiban, ketentraman, kerukunan, dan kesejahtaraan bagi masyarakat Aceh sesuai dengan nilai Islam.

2. Eksistensi lembaga adat pasca penerapan syariat masih dirasakan hingga saat ini. Hal ini terbukti dari beberapa persoalan yang dihadapi masyarakat pada tahap awal diselesaikan melalui lembaga adat. Penyelesaian dilakukan secara bertahap melalui cara damai atau musyawarah adat, pada tingkat gampong yang berwenang adalah geuchik yang merupakan kepala persekutuan masyarakat adat gampong yang bertugas menyelenggarakan pemerintahan gampong, melestarikan adat istiadat dan hukum adat, serta menjaga keamanan, kerukunan, ketentraman dan ketertiban masyarakat.
3. Pola interaksi antara hukum adat dan hukum Islam dalam sejarah Aceh apabila merujuk pada teori adhesi dan konversi, maka proses islamisasi di Aceh lebih condong pada pola konversi dimana agama baru bukan sebagai pelengkap keyakinan dan praktik ritual lama, melainkan sebagai pola dan sistem baru keyakinan orang yang bersangkutan. Hal ini dapat dibuktikan dengan diakuinya islam sebagai sistem keyakinan yang diterima secara keseluruhan menggantikan sistem keyakinan lama, konversi ini terjadi sedemikian rupa termasuk pada nama-nama yang diganti sesuai dengan nama-nama islam. Dasar inilah yang menjadi sebab kuatnya pengaruh hukum islam terhadap hukum adat bagi masyarakat Aceh. Apabila dijumpai hukum adat yang bertentangan dengan hukum islam maka akan dilakukan penyesuaian sedemikian rupa sehingga hukum adat yang dipercaya oleh masyarakat tetap bias dilestarikan akan tetapi tidak bertengan dengan hukum islam. Sedangkan apabila hukum adat tersebut tidak dapat disesuaikan, maka masyarakat akan secara sadar meninggalkan praktek hukum adat yang bertentangan dengan hukum islam.

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Abstrak

Wakaf linked sukuk adalah salah satu instrumen investasi yang dapat ditinjau dari beberapa aspek yaitu apesk agama, aspek ekonomi dan aspek sosial. Dalam aspek sosial, salah satu manfaat yang didapat dari adanya wakaf linked sukuk ini meningkatnya pendapat negara guna membangun berbagai fasilitas dan infrastruktur untuk mewujudkan suatu pelayanan publik. Sedangkan, dalam pandangan agama Islam, wakaf linked sukuk dipandang sebagai suatu ibadah kepada Allah SWT apabila memang benar wakaf linked sukuk ini telah memenuhi persyaratan sebagaimana wakaf yang disyariatkan dalam agama Islam. Oleh karena itu, dalam hal ini dirasa perlu untuk mengetahui dan membahas mengenai pengaturan tentang standar penerbitan dan jangka waktu wakaf linked sukuk di Indonesia serta penerapannya dalam hal pelayanan publik. Metode yang akan dilakukan dalam penelitian ini adalah yuridis-normatif yaitu penelitian yang menggunakan bahan hukum primer dan data sekunder dalam pengumpulan data-datanya. Penelitian ini memiliki tujuan untuk menganalisis peraturan perundang-undangan di Indonesia yang terkait dengan *wakaf linked sukuk* dan kaitannya dengan pelayanan publik.
Kata Kunci: Wakaf Linked Sukuk, Pelayanan Publik, Fasilitas.

Abstract

Sukuk linked waqf is one investment instrument that can be reviewed from several aspects, namely religious apparatus, economic aspects and social aspects. In the social aspect, one of the benefits gained from the existence of sukuk linked waqf is increasing state opinion in order to build various facilities and infrastructure to realize a public service. Meanwhile, in the view of Islamic religion, sukuk linked waqf is seen as a worship to Allah SWT if it is true that sukuk linked waqf has fulfilled the requirements as endowments are prescribed in Islam. Therefore, in this case it is deemed necessary to know and discuss the regulations regarding the issuance standard and the period of sukuk linked waqf in Indonesia and their application in terms of public services. The method to be carried out in this study is juridical-normative namely research that uses primary legal material and secondary data in collecting data. This study aims to analyze the laws and regulations in Indonesia related to sukuk linked waqf and its relation to public services.
Keywords: Waqf Linked Sukuk, public service, facilities.

I. Pendahuluan

Investasi merupakan salah satu instrument penting dalam pertumbuhan ekonomi di Indonesia. Menteri Keuangan, Sri Mulyani pernah menyatakan bahwa investasi sangatlah penting agar ekonomi Indonesia bisa tumbuh sesuai target dan dengan komposisi pertumbuhan ekonomi lebih merata yang tidak didominasi oleh satu mesin pertumbuhan, seperti misalnya konsumsi. Investasi yang dilakukan ini dapat berupa beberapa hal pertama, simplifikasi regulasi dan *policy.* Hal ini dilakukan dengan mengurangi berbagai peraturan yang menghalangi dan kemudian menciptakan proses yang lebih singkat dan mudah. Kedua, dengan menggunakan insentif seperti APBN secara lebih aktif. Sri Mulyani juga menambahkan bahwa dalam hal seperti Kementerian Perindusrian, akan melihat dari komposisi industri-industri yang memiliki potensi.[1]Tingginya minat terhadap peluang investasi ini membuat banyak pihak yang melihat hal ini sebagai peluang. Kemudian, muncul sebuah inovasi yakni investasi dengan mekanisme ekonomi syariah.

Dalam Islam, kegiatan berinvestasi termasuk dalam *muamalah* yang mana hukum dari *muamalah* itu adalah diperbolehkan sepanjang tidak dilarang. Kini, setidaknya terdapat dua permasalahan penting. Pertama, potensi keuangan sosial Islam di Indonesia sangat tinggi, namun belum dioptimalkan dengan baik. Kedua, yakni masih rendahnya produk keuangan komersil Islam yang ditujukkan dengan *market share* yang masih rendah. Pada umumnya, masyarakat mengira bahwa permasalahan tersebut merupakan sesuatu yang terpisah atau tidak ada hubungannya. Namun, sejatinya dua permasalahan tersebut dapat diatasi secara bersamaan.[2]

Di Indonesia, salah satu produk investasi berciri hukum Islam yang sedang berkembang di Indonesia adalah *wakaf linked sukuk*. Beberapa lembaga seperti Muamalat juga telah membuka peluang bagi masyarakat untuk berinvestasi dan beribadah melalui fitur *wakaf linked sukuk.* Program *Cash Wakaf Linked Sukuk* adalah program khusus antara Badan Wakaf Indonesia dengan Kementerian Keuangan. Nantinya, uang wakaf tersebut akan ditempatkan pada Surat Berharga Syariah Negara (SBSN). Dengan ditempatkan di SBSN, uang yang diwakafkan masyarakat kelak akan dipergunakan sebesar-besarnya bagi kesejahteraan dan kemartabatan Indonesia. Kementerian Keuangan berkomitmen penuh untuk memfasilitasi Badan Wakaf Indonesia dan para pewakaf (*Wakif)* agar dapat menginvestasikan uang wakaf pada Sukuk Negara atau Surat Berharga Syariah Negara (SBSN).

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[1] Hendrik Penu, "*Menkeu Sri Mulyani Tegaskan Pentingnya Investas*i", http://indonesiasatu.co/detail/ menkeu-sri-mulyani-tegaskan-pentingnya-investasi diakses pada 1 November 2019.

[2] Amrial, **"*Sukuk Linked Wakaf: Ketika Berinvestasi Syariah Memberikan Dampak Sosial*"**,http://www.ibec-febui.com/ sukuk-linked-wakaf-ketika-berinvestasi-syariah-memberikan-dampak-sosial/ diakses pada 1 November 2019.

Oleh karena itu, telah disiapkan perangkat peraturan, yang memungkinkan bagi Badan Wakaf Indonesia untuk melakukan transaksi penempatan wakaf uang dalam Sukuk Negara melalui *Cash Wakaf Linked Sukuk* ini. Kementerian Keuangan bersama dengan Bank Indonesia, Kementerian Agama dan Badan Wakaf Indonesia telah menyusun dan menandatangani MoU yang mengatur mengenai aspek-aspek kebijakan dan operasional dalam pengembangan *wakaf linked sukuk* tersebut.[3]

Ketika membahas instrumen *wakaf linked sukuk,* maka akan terbagi dalam 2 pandangan yakni pandangan ekonomi, pandangan sosial dan pandangan agama. Dalam pandangan ekonomi, *wakaflinked sukuk*merupakan instrumen investasi yang berbasis syariah. Dalam pandangan sosial, *wakaflinked sukuk* dapat dikategorikan sebagai pemasukan dalam APBN. *Wakaf linked sukuk* juga membantu pemerintah dalam mewujudkan pelayanan terhadap masyarakat untuk membangun berbagai fasilitas di Indonesia. Dalam pandangan agama Islam, wakaf linked sukuk dipandang sebagai suatu ibadah kepada Allah SWT apabila memang benar wakaf linked sukuk ini telah memenuhi persyaratan sebagaimana wakaf yang disyariatkan dalam agama Islam. Jika wakaf linked sukuk ini dikategorikan sebagai suatu wakaf uang, maka dalam agama Islam, wakaf uang tetap diperbolehkan. Hukum wakaf uang adalah boleh. Terdapat sebuah pendapat dari Imam Az-Zuhri bahwa wakaf dinar hukumnya boleh. Caranya dengan menjadikan dinar sebagai modal udaha dan keuntungannya disalurkan kepada mauquf'alaih. Selain itu, mutaqaddim dari ulama mazhab Hanafi juga berpendapat bahwa wakaf dinar dan dirham adalah boleh[4] Sedangkan, dalam pandangan sosial, wakaf linked sukuk dapat turut serta membantu masyarakat dalam hal pembangunan baik sarana kesehatan, jalan raya, dan fasilitas umum lainnya.

Berdasarkan latar belakang yang telah diuraikan, maka penulis merasa perlu untuk membahas mengenai pengaturan tentang standar penerbitan dan jangka waktu wakaf linked sukuk di Indonesia serta penerapannya dalam hal pelayanan publik.

II. Mekanisme Wakaf Linked Sukuk

Wakaflinked sukuk atau *Cash Waqf Linked Sukuk* merupakan salah satu bentuk investasi sosial di Indonesia dimana wakaf uang yang dihimpun oleh Badan Wakaf Indonesia (BWI) sebagai *Nadzhir* melalui Lembaga Keuangan Syariah Penerima Wakaf Uang (LKSPWU) akan dikelola dan ditempatkan pada

[3] Uji Sukma Medianti, "*Muamalat Fasilitasi Wakaf Linked Sukuk, Apa itu*?", https://finance.detik. com/ moneter /d-4606645/ muamalat-fasilitasi-wak af-linked-sukuk-apa-itu diakses pada 1 November 2019.

[4] Suri Nur, "*Hukum Wakaf Uang dalam Islam",* www.rumahwakaf.org/hukum-wakaf-uang-dalam-islam/amp/ diakses pada 2 November 2019.

instrument Sukuk Negara atau SBSN yang kemudian akan diterbitkan oleh Kementerian Keuangan.

Cash Waqf Linked Sukuk dijalankan oleh 5 lembaga atau *stakeholders* yang saling bekerjasama yaitu:

1. Bank Indonesia sebagai lembaga akselerator dalam mendorong implementasi *Cash Waqf Linked Sukuk* dan Bank Kustodian;
2. Badan Wakaf Indonesia (BWI) sebagai lembaga regulator, *leader* sekaligus sebagai *nadzhir* yang mengelola *Cash Waqf Linked Sukuk;*
3. Kementerian Keuangan sebagai lembaga *issuer* Surat Berharga Syariah Nasional (SBSN) dan juga sebagai pengelola dana di sektor riil;
4. *Nadzhir* wakaf produktif sebagai lembaga mitra Badan Wakaf Indonesia yang melakukan penghimpunan dana wakaf; dan
5. Bank Syariah sebagai Lembaga Keuangan Syariah Penerima Wakaf Uang (LKSPWU).

Jika seseorang ingin berinvestasi dengan metode *Cash Waqf Linked Sukuk,* maka dapat melakukan mekanisme sebagai berikut:

a. Mendatangi *customer service* di dalah satu Bank Syariah yang tentunya mengadakan fitur *Cash Waqf Linked Sukuk;*
b. Mengisi formulir wakaf dan menandatangani persetujuan dalam formulir tersebut;
c. Memberikan uang wakaf sejumlah yang tertera dan disetujui dalam formulir tersebut;
d. Seorang yang berwakaf tersebut (*wakif)* kemudian akan mendapatkan sertifikat atau akta wakaf.

Namun, saat ini telah tersedia pula layanan *Cash Waqf Linked Sukuk*melalui mekanisme daring yakni dengan *website*. Dalam contoh kasus Bank Muamalat, Bank Muamalat memberikan suatu fasilitas *Cash Waqf Linked Sukuk* melalui *website* https://www.bankmuamalat.co.id/ziswaf. Dalam *website* tersebut, mekanisme yang dilakukan adalah menghimpun dana dari perseorangan *wakif*. Sistem ini juga dapat disebut dengan sistem *crowdfunding.* Istilah *crowdfunding* berarti pendanaan secara beramai-ramai melalui sebuah platform berbasis website. Melalui *crowdfunding* memungkinkan puluhan hingga ratusan orang yang berpatungan mewujudkan suatu proyek komersial maupun penggalangan dana untuk kepentingan sosial.[5]

Wakaf Linked Sukuk dalam penerbitannya harus berjumlah minimal Rp50 Miliar untuk sekali penerbitan. Target minimal Rp50 miliar tersebut telah ditetapkan oleh Badan Wakaf Indonesia (BWI). Pemerintah akan menerbitkan Sukuk Negara dengan seri khusus "SW" yang juga dengan fitur khusus antara lain: tenor kurang dari 5 tahun, bersifat *non-tradeable,* pembayaran imbalan

[5] Ferry Fitriadi, "*Mengenal Seluk Beluk Crowdfunding*", https://www.kreditpedia.net/mengenal-crowdfunding/ diakses pada 1 November 2019.

secara diskonto dan tingkat imbalan tetap yang dibayarkan secara periodik[6]. Kepala Departemen Ekonomi dan Keuangan Syariah Bank Indonesia, Anwar Nashori menyatakan bahwa hingga bulan Oktober 2018, *Nadzir* sudah mengumpulkan dana sebanyak Rp25 miliar untuk Wakaf Linked Sukuk ini.

Nadzir merupakan perseorangan, organisasi dan/atau badan hukum yang ditugaskan untuk memelihara dan mengurus benda wakaf. Kemudian, nantinya *Nadzir* bersama dengan pemerintah akan menentukan proyek apa yang bisa dibiayai dengan uang wakaf tersebut. Dalam memilih dan menentukan *Nadzir*, tentunya pemerintah akan memilih *Nadzir* yang pernah terlibat dalam penerbitan instrument investasi seperti Surat Berharga Negara (SBN) atau sukuk.[7]

Namun, mengutip pada sumber dari *website* Bank Muamalat dengan mekanisme *crowdfunding*, nyatanya hingga 1 Oktober 2019 ini dana yang terkumpul untuk*Cash Waqf Linked Sukuk* baru mencapai Rp88 juta. Jumlah initentunya masih sangatlah jauh dari target yang telah ditentukan oleh Badan Wakaf Indonesia (BWI) untuk sekali penerbitan sukuk negara yakni sebesar Rp50 miliar. Sebenarnya, kendala terberat dalam pengumpulan dana ini yaitu berkaitan dengan tingkat literasi yang rendah.[8]

III. Rukun Wakaf dalam Wakaf Linked Sukuk

DiIndonesia, Wakaf Linked Sukuk sebenarnya belum memiliki dasar hukum tersendiri. Aturan mengenai wakaf dan sukuk diatur dalam peraturan perundang-undangan yang berbeda. Peraturan mengenai wakaf diatur dalam Undang-Undang Nomor 41 Tahun 2004 Tentang Wakaf. Sedangkan mengenai sukuk itu sendiri diatur dalam Undang-Undang Nomor 19 Tahun 2008 Tentang Surat Berharga Syariah Negara (SBSN).

Oleh karena itu, Wakaf Linked Sukuk ini tidaklah memiliki satu peraturan perundang-undangan yang mengatur mengenai produk yang merupakan kombinasi dari instrumen investasi dan unsur wakaf ini. Menurut para ulama, rukun wakaf terbagi menjadi 4 yaitu wakif (orang yang berwakaf), mauquf'alaih (orang yang menerima wakaf), mauquf (harta yang diwakafkan) dan sighat (pernyataan wakifsebagai suatu kehendak untuk mewakafkan harta bendanya). Sedangkan dalam Pasal 6 Undang-Undang Nomor 41 Tahun 2004 Tentang Wakaf, wakaf dilaksanakan dengan memenuhi unsur wakaf yaitu: *wakif*,

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[6]https://www.bnisyariah.co.id/idid/beranda/promoacara/promo/ArticleID/1721/Cash%20Wakaf%20Link%20Sukuk%202019%20BNI%20Syariah diakses pada 1 November 2019.

[7] Desy Setyowati, "*Bank Indonesia Meluncurkan Surat Utang Syariah Berbasis Wakaf*", https://katadata.co.id/berita/2018/10/14/bank-indonesia-meluncurkan-surat-utang-syariah-berbasis-wakafdiakses pada 1 November 2019.

[8] Retno Wulandhari, "*Dana Wakaf Linked Sukuk Tahap Pertama Terkumpul Rp15 miliar*", https://www.republika.co.id/berita/ekonomi/keuangan/19/02/26/ekonomi/syariahekonomi/19/02/22/pnboox370-dana-wakaf-linked-sukuk-tahap-pert ama-terkumpul-rp-15-miliar diakses pada 2 November 2019.

Nadzhir, Harta Benda Wakaf, Ikrar Wakaf, Peruntukkan Harta Benda Wakaf dan Jangka Waktu Wakaf.

Untuk wakaf dengan skema Wakaf Linked Sukuk, jika diuraikan maka terdapat pula unsur-unsur wakaf yaitu:

1. Wakif (orang yang berwakaf)
   Dalam mekanisme Wakaf Linked Sukuk ini, tentulah jelas orang yang berwakaf adalah seseorang atau badan hukum yang mewakafkan hartanya.
2. Mauquf'alaih (orang yang menerima wakaf)
   Mauquf'alaih dalam hal ini adalah lembaga-lembaga yang telah bekerjasama untuk mewujudkan terjadinya Wakaf Linked Sukuk ini salah satunya adalah bank syariah yang pertama dan langsung menerima dana wakaf dari para wakif.
3. Mauquf (harta yang diwakafkan)
   Dalam wakaf dengan mekanisme Wakaf Linked Sukuk ini yang menjadi mauquf atau harta yang diwakafkan adalah uang sejumlah yang tertera dalam akta wakaf yang telah disetujui dan didaftarkan.
4. Sighat (pernyataan *wakif* sebagai suatu kehendak untuk mewakafkan harta bendanya).
   Sighat dalam mekanisme Wakaf Linked Sukuk ini dapat berupa persetujuan wakif dengan pihak yang menerima wakaf. Apabila dilakukan dengan mekanisme *crowdfunding*, maka *Sighat*wakaf ini berupa pengisian akta secara daring yang dapat diakses melalui *website* atau aplikasi yang pada umumnya telah disediakan oleh bank syariah yang membuka fitur Wakaf Linked Sukuk.

Selanjutnya apabila mengaitkan antara Wakaf Linked Sukuk dengan manfaat yang akan diberikan atas terbitnya Surat Berharga Negara Syariah (SBSN), dapat kita lihat lebih dahulu pada mekanisme *Wakaflinked sukuk* atau *Cash Waqf Linked Sukuk*dimana wakaf tersebut akan dikelola dan ditempatkan pada instrument Sukuk Negara atau SBSN, kemudian akan diterbitkan oleh Kementerian Keuangan. Wakaf produktif melalui Sukuk Negara dilandasi keinginan untuk mensinergikan potensi wakaf temporer yang dimiliki oleh masyarakat Indonesia baik secara langsung maupun melalui berbagai lembaga ZISWAF (zakat, infaq, shodaqoh dan waqaf) dengan penggunaan *proceed* (hasil penerbitan) Sukuk Negara untuk keperluan pembangunan. Sinergi tersebut diharapkan memberikan dampak besar dalam mendorong pembangunan dalam hal pengembangan pelayanan publik dengan memanfaatkan dana hasil dari Sukuk Negara yang telah diterbitkan dalam SBSN.[9]

[9] *Wakaf Produktif melalui Sukuk Negara, Salah Satu Solusi Pengentasan Kemiskinan* https://www.kemenkeu.go.id/publikasi/artikel-dan-opini/wakaf-produktif-melalui-sukuk-negara-salah-satu-solusi-pengentasan-kemiskinan/ diakses pada 11 Desember 2019.

IV. Wakaf Linked Sukuk sebagai Pembiayaan Pembangunan Pelayanan Publik

Kontribusi SBSN sebagai alternatif pembiayaan dan investasi berbasis syariah, menunjukkan perkembangan yang baik, bahkan menjadi kontributor terbesar bagi pasar modal syariah sebagai bagian dari sektor jasa keuangan syariah Indonesia.Selain Fatwa DSN-MUI, dengan diterbitkannya Undang-Undang No. 19 Tahun 2008 Tentang Surat Berharga Syariah Negara (SBSN) atau sukuk negara, maka landasan hukum bagi pemerintah untuk melakukan percepatan pembangunan seharusnya sudah kokoh, tinggal bagaimana kemauan pemerintah (*political will*) untuk menggunakan dan mengoptimalkan sukuk, baik sukuk negara maupun korporasi sebagai alternatif pembiayaan pembangunan.[10]

Pasal 1 Angka 1 UU SBSN mendefisikan SBSN atau sukuk negara sebagai "surat berharga negara yang diterbitkan berdasarkan prinsip syariah, sebagai bukti atas bagian penyertaan terhadap aset SBSN, baik dalam mata uang rupiah maupun valuta asing". Selanjutnya Pasal 1 Angka 3 menjelaskan bahwa yang dimaksud dengan aset negara adalah "objek pembiayaan SBSN dan/atau Barang Milik Negara yang memiliki nilai ekonomis, berupa tanah dan/atau bangunan maupun selain tanah, yang dalam rangka penerbitan SBSN dijadikan sebagai dasar penerbitan SBSN."[11]

Berdasarkan Pasal 4 UU SBSN, tujuan penerbitan sukuk adalah untuk membiayai Anggaran Pendapatan dan Belanja Negara termasuk membiayai pembangunan proyek.[12]Sukuk negara hanya dapat digunakan untuk membiayai infrastruktur nonprofit, dan diperuntukkan bagi pelayanan publik dan ditujukan untuk kesejahteraan masyarakat. Syarat proyek yang dibiayai dengan sukuk negara harus merupakan proyek pemerintah pusat dan menjadi prioritas di rencana pembangaunan jangka menengah.

Selain itu, proyek yang akan dibiayai harus memenuhi kriteria kesiapan dan kelayakan, yang masukannya berasal dari Bappenas. SBSN yang diterbitkan oleh pemerintah dapat berupa:[13]

a. SBSN ijarah, yaitu SBSN yang diterbitkan berdasarkan akad ijarah (akad sewa menyewa atas suatu aset);

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[10] Lastuti Abubakar & Tri Handayani,"*Kesiapan Infrastruktur Hukum Dalam Penerbitan Sukuk (Surat Berharga Syariah) Sebagai Instrumen Pembiayaan Dan Investasi Untuk Mendorong Pertumbuhan Pasar Modal Syariah Indonesia*", Jurisprudence, Vol. 7 No. 1 Juni 2017, hal 5.

[11] Indonesia, Undang-Undang Nomor 19 Tahun 2008Tentang Surat Berharga Syariah Negara (SBSN),Lembaran Negara Republik Indonesia (LNRI) Tahun 2008 Nomor 70, dan Tambahan Lembaran Negara (TLN) Nomor 4852, Pasal 1 Angka 1 dan Angka 3.

[12] Indonesia, Undang-Undang Nomor 19 Tahun 2008 Tentang Surat Berharga Syariah Negara, Pasal 4.

[13] Lastuti Abubakar & Tri Handayani, "*Kesiapan Infrastruktur Hukum Dalam Penerbitan Sukuk",* hal 9.

b. SBSN mudharabah; yaitu SBSN yang diterbitkan berdasarkan akad mudharabah (akad kerjasama dimana salah satu pihak menyediakan modal dan pihak lain menyediakan keahlian, dimana keuntungan akan dibagi berdasarkan presentase yang disepakati sebelumnya, apabila terjadi kerugian maka akan menjadi beban dan tanggung jawab pemilik modal);
c. SBSN musyarakah; yaitu SBSN yang diterbitkan berdasarkan akad musyarakah (akad kerjasama dalam bentuk penggabungan modal);
d. SBSN Istisna; yaitu SBSN yang diterbitkan berdasarkan akad istishna (akad jual beli untuk pembiyaan suatu proyek dimana cara jangka waktu penyerahan barang dan harga barang ditentukan berdasarkn kesepakatan para pihak);
e. SBSN berdasarkan akad lainnya sepanjang tdaik bertentangan dengan prinsip syariah; dan
f. SBSN yang dterbitkan berdasarkan kombinasi dari dua tau lebih jenis akad.

Sebagai perbandingan misalnya, Malaysia merencanakan pembangunan jalur MRT Sungai Buloh- Kajang line (SBK Blue Line) yang diestimasi akan menelan dana lebih dari RM 30 miliar melalui penerbitan sukuk. Saat ini Malaysia memang dikenal sebagai salah satu pemimpin pasar sukuk dunia. Berdasarkan laporan Zawya Quarterly Bulletin Q1 2012, penerbitan sukuk global meningkat 55 % pada kuartal II 2012 dari kuartal II 2011 meningkat dari USD 25 miliar atau menjadi USD 67,9 miliar, dan penerbit terbesar adalah Malaysiadengan 69,8 %. Tahun 2012, Malaysia melalui CIMB Islamic kembali mengeluarkan sukuk berdenominasi poundsterling yang permintaannya diprediksi akan sangat kuat. Beberapa alasan bagi perusahaan-perusahaan Malaysia dapat menggunakan kesempatan dengan sangat baik adalah perekonomian Malaysia yang sehat dan regulasi yang baik dengan dukungan pemerintah yang sangat kuat.[14]

Saat ini, di negara negara Islam lainnya seperti halnya Malaysia, Uni Emirat Arab, pemanfaat sukuk sebagai sumber pembiyaan sudah menjadi kebutuhan, baik sukuk yang diterbitkan oleh korporasi maupun sukuk negara. Potensi Indonesia untuk mengembangkan sukuk sangat besar, namun masih terdapat beberapa kendala yang perlu diatasi untuk mendorong pertumbuhan sukuk sebagai instrumen pembiayaan dan investasi. Beberapa kendala dalam mengembangkan industri keuangan syariah, termasuk sukuk di pasar modal adalah kesiapan infrastruktur legal yang menjadi landasan bagi penerbitan sukuk, rendahnya kuantitas dan kualitas sumber daya manusia yang memahami instrumen sukuk serta rendahnya kepercayaan masyarakat terhadap produk dan layanan keuangan syariah. Selain itu, diakui juga lemahnya visi dan kordinasi

[14] *Ibid*.

antar pemangku kepentingan serta dorongan pemerintah terhadap industri keuangan Syariah.[15]

Berkenaan dengan praktik penerbitan sukuk sebagai alternatif pembiayaan, pemerintah sejak tahun 2011 sudah menerbitkan SBSN untuk mempercepat pembangunan infrastruktur di tanah air. Nilai sukuk berbasis proyek tersebut mencapai Rp. 20,9 Triliun. Setidaknya pada tahun 2011 ada 2 jenis sukuk yang diterbitkan, yakni:[16]

a. Sukuk yang diterbitkan menggunakan proyek-proyek kementerian/ lembaga (K/L) yang sudah ada dalam APBN sebagai dasar penerbitan (project underlying).
b. Sukuk yang diterbitkan secara khusus untuk membiayai proyek-proyek baru (project based sukuk). Proyek yang didanai dari hasil penerbitan sukuk ini antara lain untuk pembangunan jalan tol 40%, perumahan atau rusunawa sebesar 15%, fasilitas penyeberangan dan pelabuhan 16 % dan peningkatan kapasitas bandara 5,6%.

Mengacu pada tujuan dan manfaat penerbitan sukuk dalam menunjang pembangunan ekonomi, maka sudah selayaknya Indonesia mempersiapkan infrastruktur legal dan meminimalisasi hambatan lainnya guna meningkatkan peran sukuk sebagai alternatif pembiayaan dan investasi, khususnya di pasar global.

Sederhananya, alur Wakaf Produktif melalui Sukuk Negara, yaitu: masyarakat Indonesia melalui beberapa badan ZISWAF (selaku pihak yang berwakaf atau wakif) membeli Sukuk Negara dalam tenor tertentu. Selanjutnya dibuat perjanjian bahwa investor Sukuk Negara (selaku Wakif) tidak menerima imbalan dari Sukuk Negara. Imbalan selama tenor Sukuk Negara disalurkan kepada badan ZISWAF yang disepakati untuk digunakan dalam berbagai program pengurangan kemiskinan. Setelah tenor Sukuk Negara berakhir (jatuh tempo) maka dana investasi dari para Wakif akan diterima kembali secara otomatis. Dengan demikian, wakaf produktif melalui Sukuk Negara ini dapat dikategorikan sebagai wakaf temporer selama tenor Sukuk, sedangkan hasil investasinya disedekahkan untuk program pembangunan pelayanan publik.

Selain berorientasi pada keuntungan atas investasi komersil, produk sukuk linked wakaf juga menawarkan kontribusi pada aspek sosial khususnya dalam pengembangan aset wakaf di Indonesia. Jika banyak proyek yang berjalan berdasarkan konsep wakaf linked sukuk, maka produktifitas pelayanan publik akan lebih tinggi dan membawa manfaat lebih untuk umat. Misalnya pembangunan fisik bisa diperuntukkan pada bidang pendidikan, kesehatan, dan berbagai sektor usaha yang mendukung program-program sosial pemerintah.

[15] Lastuti Abubakar & Tri Handayani, Kesiapan Infrastruktur Hukum Dalam Penerbitan Sukuk (Surat Berharga Syariah) Sebagai Instrumen Pembiayaan Dan Investasi Untuk Mendorong Pertumbuhan Pasar Modal Syariah Indonesia, Jurisprudence, Vol. 7 No. 1 Juni 2017.

[16] *Ibid*., hal 10.

Namun, tetap harus memperhatikan ketentuan wakaf berdasarkan Undang-Undang (UU) wakaf yang berlaku.[17]

Potensi wakaf tersebar hampir di seluruh wilayah Indonesia, termasuk di wilayah yang masih minim pembangunan. Untuk itu, perlu upaya dalam mengarahkan pembangunan prioritas ke daerah yang masih tertinggal. Jika ini terwujud, maka sukuk linked wakaf juga berkontribusi dalam pemerataan pembangunan. Selanjutnya juga memberikan efek *multiplier* yang tujuan akhirnya adalah pemberdayaan sosial ekonomi masyarakat.

Untuk mengelola wakaf secara produktif, terdapat beberapa asas yang mendasarinya yaitu:[18]

a. Asas keabadian manfaat;
b. Asas pertanggungjawaban;
c. Asas profesionalitas manajemen; dan
d. Asas keadilan sosial.

V. Kesimpulan

Pemerintah telah melakukan upaya dengan menerbitkan sukuk tabungan yang diharapkan dapat menyasar investor ritel, dan yang terakhir Bank Indonesia bekerja sama dengan Kementerian Keuangan, Badan Wakaf Indonesia (BWI), dan perwakilan BUMN, telah meluncurkan model sukuk linked wakaf yang merupakan inovasi untuk mengoptimalkan pemanfaatan aset wakaf dengan sukuk. Diharapkan dengan memanfaatkan aset wakaf, Indonesia tidak perlu meminjam uang ke negara lain, karena dapat memakai dana sukuk wakaf untuk pembangunan infrastruktur.[19] Dalam hal ini, Penulis berpendapat bahwa dengan turunnya ambang batas minimum penerbitan sukuk berbasis wakaf akan meningkatkan minat masyarakat untuk melakukan investasi dengan mekanisme wakaf linked sukuk. Sehingga, pemanfaatan dana yang terkumpul pada Sukuk Negara untuk pengembangan fungsi pelayanan publik diharapkan semakin maksimal dan banyak masyarakat Indonesia berperan serta dalam wakaf produktif ini serta semakin banyak menciptakan *muwaqif* baru.

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[17] Sukuk linked Wakaf: Ketika Berinvestasi Syariah Memberikan Dampak Sosial, http://www.ibec-febui.com/sukuk-linked-wakaf-ketika-berinvestasi-syariah-memberikan-dampak-sosial/, diakses pada 11 Desember 2019, diakses pada pukul 19.53 WIB.

[18] Direktorat Pemberdayaan Wakaf, Direktorat Jendral Bimbingan Masyarakat Islam, *Paradigma Baru Wakaf di Indonesia* (Jakarta: Kementerian Agama RI, 2006), hlm 117.

[19] Lastuti Abubakar & Tri Handayani, Kesiapan Infrastruktur Hukum Dalam Penerbitan Sukuk (Surat Berharga Syariah) Sebagai Instrumen Pembiayaan Dan Investasi Untuk Mendorong Pertumbuhan Pasar Modal Syariah Indonesia, Jurisprudence, Vol. 7 No. 1 Juni 2017, hal. 12.

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FEMALE CIRCUMCISION: A POWER RELATION BETWEEN CULTURE OR RELIGION

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Abstract

Female circumcision is known as a practice aimed at suppressing female libido as they grow up. Most of this practice is carried out on newborn girls or at the age of 0-40 days. This study aims to show the power relations that control this practice as a cultural or religious order. This research is carried out in three regions in Indonesia: Bangkalan, Situbondo dan Denpasar. Research informants were 15 women who had practiced female circumcision, six midwives, six traditional birth attendants and three community leaders. The method used was indepth interview. The data obtained were analyzed in four stages: data, categorization, presentation, interpretation and conclusion. This study indicate that religious and cultural factors are a medium for reproducing the practice of female circumcision. Interestingly, that women become perpetrators or actors who perpetuate the practice of female circumcision can be caused by 1) Lack of knowledge about the reproductive health of children and women; and 2) 'Pressures' such as the validity and belief of the people, the gossip of the community, the improvement of the culture that is believed and the pressure from parents that causes this practice to be carried out by the community (especially women). This research produces a map of the actors involved, also to map children's rights that are violated in this practice. This mapping is expected to shed light on the extent to which this practice can be lasting and understood as a culture or religious order.

Keyword: Female circumcision, Power relation, Culture, Religion, Children's Rights

I. Introduction

Female circumcision is carried out on newborn girls. The age range from 0-40 days to be the right age for female circumcision. There are several parties who are the perpetrators of female circumcision. When following traditional practices, this practice is carried out by traditional birth attendants. As time progressed, this practice began to spread and was carried out by midwives (who were sometimes also assisted by traditional birth attendants).

Female circumcision is one of the social phenomenon in the world spotlight. Several terms are used to refer to female circumcision. These terms include female genitale cutting, female genitale mutilation, and female circumcision.

Female circumcision in Indonesia can be seen in the results of a study conducted by Nantabah, et al (2015). Based on these results, it can be seen that female circumcision is mostly done in West Java Province (14.7%), North Sumatra Province (8.1%), and East Java (7.3%). Female circumcision **on**

rates in the provinces of West Java and East Java are much influenced by the Kyai and Ulama in the area.

Based on research conducted by Nantabah, et al (2015), it can be seen that female circumcision is mostly done in West Java Province (14.7%), North Sumatra Province (8.1%), and East Java (7.3%). Female circumcision rates in the provinces of West Java and East Java are more or less influenced by Kyai and charismatic Ulama whose delivery method can affect the people in the environment.

Based on some of the descriptions of female circumcision above, it can be seen how the practice of female circumcision continues today even though various negative effects are known. In addition, the polemic about female circumcision from religious and legal review became a national and international topic. Based on this, a research study on how the community responds to the phenomenon of female circumcision which has long been filled with pros and cons in its implementation is considered necessary, especially the perceived occurrence of violence and deprivation of women's rights in its implementation.

II. Objectification

This research is interesting to do because female circumcision intersects with the issue of the interaction of religious and cultural values in the lives of Indonesian people who have the power of spirituality in the diversity of cultural traditions, which is closely related to how religious texts are practiced in the life of local traditions in middle of the life situation of global civilization.

It is at this point that a new approach is needed to uncover or dismantle the phenomenon of female circumcision in the Islamic religious sphere. Because by bringing the name of the religion of Islam, female circumcision becomes lasting. Broadly speaking, the importance of this research is based on several conditions related to children's rights and women's rights that must be fought for. His position is placed as 'not given the opportunity' to do or reject the female circumcision who happened to him.

In this research will explain to dismantle the phenomenon of female circumcision from other approaches. This study aims to show the power relations that control this practice as a cultural or religious order. In the pros and cons, female circumcision raises the assumption of elements of violence and deprivation of children's rights in its implementation. This research seeks to map the actors involved, also to map children's rights and/or women's rights that are violated in this practice. This mapping is expected to be able to answer the extent to which this practice can be lasting and understood as a cultural or religious

order, which is connected with elements of the rights of children and/or women that have been under-attention.

III. Methodology

This study uses qualitative research methods which use a non-positivistic paradigm, specifically the post-structuralist paradigm. This is because in this study explains that a phenomenon that exists regarding the female circumcision. In addition, the methodology of this study also uses the principle of a gender perspective which places gender issues in the female circumcision as the focus of analysis.

This research is based on the results of the Research on Basic Research of the Ministry of Research and Technology in 2017-2019 in three regions in Indonesia: Bangkalan, Situbondo and Denpasar. Research informants were 15 women who had practiced female circumcision, six midwives, six traditional birth attendants and three community leaders. The method used was indepth interview. The data obtained were analyzed in four stages: data, categorization, presentation, interpretation and conclusion.

IV. The Role of Actors of Female Circumcision

Female circumcision is the result of a tradition carried out continuously by the perpetrators of the practice of female circumcision. Actors who contribute to this practice are not only those who practice it. But also other actors who either directly or indirectly 'try' to continue to maintain the tradition of female circumcision is always there. The role of the actor here explains the actors involved and how much influence it has on the female circumcision conducted in Bangkalan and in Situbondo. These actors have made the female circumcision still continue today. Female circumcision in Bangkalan is carried out by midwives and senior midwives. This actor has a role in the continuing practice of female circumcision. Female circumcision performed by a dukun is carried out at the dukun's house. Whereas the midwife who does this practice, does her practice in the clinic that is privately owned by the midwife.

The following is the account of Mrs. IZ who was a victim of circumcision and also circumcised her child in a dukun.

"Anak saya yang disunat, saya dulu juga disunat. Itu setelah lahiran langsung dibersihkan paket lengkap. Dibersihkan, disunat dan tindik telinganya.... ....Ya gak pakai bilang ke saya, soalnya mereka memang kebiasaannya gitu. semua kelahiran anak perempuan ya langsung digitukan semua sama bu dukunnya." (Ibu IZ, 29 tahun, Orang Tua dan Korban Sunat Anak Perempuan, Kabupaten Bangkalan)

Parents do not have a big part in the practice of female circumcision in Bangkalan. But knowing that, parents also consider it normal. Knowledge about the circumcision of girls is already known and is not a common thing for parents. Not lay in the sense that it becomes a normal thing, even if done without their

permission. The practice of female circumcision is considered a tradition around them, including what has happened to their families. Instead of health functions as 'cleansed', the practice of circumcision of these girls continues today.

The desire to circumcise their daughters is an order from parents (grandmother, grandfather or parents). When they do not circumcise their daughters, they will continue to be warned by their parents. Here, parents have a big influence on the practice of circumcision in girls. The obligation to practice female circumcision is a necessity created by elders in the family which requires circumcising their daughter after birth.

The practice of female circumcision is also done not necessarily from encouragement from the family alone. The role of the environment is also an actor in the implementation of circumcision of girls. This can be done by being disseminated when teaching or preaching, also through the influence that ultimately becomes the beliefs themselves carried out by the dukun.

The practice of female circumcision has continued to last until now because of their enormous trust in the Kyai. People 'rely' on their lives from the messages conveyed by their Kyai. Including the practice of circumcision on girls who were there. This was also recognized by Mr. LIM himself as a Kyai who said that the practice of circumcision needs to be done as a form of seeking merit to God.

"Ada hadist yang mengatakan bahwa, laki-laki disunat adalah sebuah kewajiban, sedangkan perempuan yang disunat akan dimuliakan..... Dimuliakan merupakan satu tahap dimana mereka juga menjadi umat Islam yang sah, yang diakui, yang diagungkan oleh Allah. Jadi pelaksanaan praktik tadi bisa dikatakan wajib. Karena kalau sunnah itu posisinya di bawah kata-kata dimuliakan. Dimuliakan itu satu hal yang tinggi loh, berarti kan setara dengan wajib pelaksanaannya." (Pak LIM, 59 tahun, Kyai, Kabupaten Bangkalan)

Then the community's belief in their religious status when performing or not circumcising their daughters is evident from the statement of the dukun. The statement of the dukun is also proof that the kyai has full power in 'determining' the daily life of the community.

Female circumcision in Bangkalan is carried out by traditional birth attendants and senior midwives who still carry elements of their traditions and beliefs in the knowledge taught by their religion (especially Islam). The dukun practiced circumcision on girls who were still in remote Bangkalan. In addition, the senior midwife who did the circumcision practice was still doing it and that too was included in remote areas of Bangkalan. Religious traditions and elements are still the basis of their practice of female circumcision.

Community leaders and religious leaders (Mrs. Nyai, Koran teacher, Kyai) also have an important role where those who teach that practicing female circumcision will be glorified and required. In addition to being recognized for Islam, it is also for the cleanliness of the baby's body. This is then understood by

perpetrators of female circumcision, who are then taught to patients who will or have practiced female circumcision.

Female circumcision in Bangkalan carried out by Midwives is still carried away by the traditions carried by each individual. For practices carried out in recognized institutions such as Puskesmas, it becomes a separate regulation because it carries religious elements. What was inspired by the Puskesmas was cleanliness that resulted from the practice. Whereas the practice carried out in a health clinic depends on the medical personnel doing it. There are still elements of tradition that make the practice still carried out. But midwives who come from outside the area become actors who do not practice circumcision on girls.

The role of the actors in the practice of female circumcision greatly influences the practice's existence. The existence of actors becomes important when the practice becomes one thing that must be implemented or not. Actors have also become very important in Situbondo, which incidentally also practices circumcision of girls.

Female circumcision in Situbondo occurs because there are still actors who play a role in the continuity of this practice. Similar to what is in Bangkalan, that in Situbondo there are also actors who have a stake in the continuation of the practice of female circumcision.

On the other hand, Situbondo is a village that has a very thick cultural value. Although community leaders do not develop much in the community environment, on a hereditary basis it is able to have a large influence on people's daily lives. Female circumcision is a tradition that is believed by the Situbondo community as a tradition carried down from generation to generation since their ancestors.

The tradition of female circumcision in Situbondo is slightly different in packaging it into people's lives. If in Bangkalan utilize the position of religion as the main reference in the practice of female circumcision. Then only make the religion the main reason for the tradition of practice until now. So, if this religion becomes a reason to stop the practice of circumcision, then this practice will stop. While what happened in Situbondo, the practice of female circumcision has become one of the traditions that preserves it using religion as its guidance. Tradition is the main reason for the female circumcision. Religion is used as a shield in its implementation. Although basically for reasons of tradition, they have been able to carry out the practice of circumcision continuously.

The people in Situbondo are people who have high religiosity, but their level of trust in tradition is also as high, even higher. They acknowledged that the people really believed in tradition, along with what they said.

"Masyarakat disini kalau sama tradisi sangat patuh.. Bilang itu sudah tradisi ya terus dilakukan. Meskipun ada ustadz atau orang kesehatan bilang kalau sunat anak perempuan itu tidak bagus, harus ditinggalkan, mereka tidak akan nurutin. Karena mereka akan tetap melakukan praktik itu, karena mereka

percayanya sunat perempuan itu tradisi." (Pak ADI, 58 tahun, Sesepuh Desa, Kabupaten Situbondo)

The tradition of female circumcision is also justified by the practice of circumcision.

"Semua orang itu harus disunat. Itu sudah ajaran agama. Buat mematuhi perintah agama, juga menjaga tradisi yang ada. Agama bilang sunat ya sunat. Laki-laki atau perempuan sama saja. Kalau laki-laki sudah jelas wajib. Kalau perempuan juga wajib, karena biar tidak disebut kafir. Orang kalau beragama Islam ya harus nurut ajaran Islam. Sunat sudah diajarkan sudah lama, mulai mbah buyut saya sudah jadi dukun juga sudah disunat juga laki-laki iya, perempuan juga iya." (Ibu NAD, 66 tahun, Dukun Bayi, Kabupaten Situbondo)

Religion became one of the strong reasons for continuing to practice female circumcision. The term became infidel, was widely discussed by the community when not implementing one of the traditions in the local environment. Dukuns, as implementers, are not the only people who practice female circumcision. But midwives also carry out. And here is shown one more proof that tradition has the power to dominate the people in that environment, and has a great influence. Where midwives in the Situbondo community initially did not do, until finally also practiced circumcision on girls. Female circumcision in Situbondo is a very strong tradition of its existence. Where this tradition is highly favored by the community. The point is, to preserve a tradition in this region can be very entrenched and grow strong. The element of 'inherited ancestors' is one of the keys to the tradition that continues to exist until now. Traditional birth attendants as implementing actors who have a strong role in the female circumcision in Situbondo. Although the implementer is not only a traditional birth attendant, but also a midwife, but the midwife can also carry out the request of parents themselves. But midwives in this area also carry out the female circumcision as practiced by traditional birth attendants. Even the practice of circumcision is carried out after cleaning the baby after birth. The position of parents also does not determine 100% in making the decision to circumcise girls or not. Because they are more obedient to traditional birth attendants who order them to prepare all their needs ahead of the implementation of the female circumcision at the age of seven days after the birth of a baby. But parents do not mean not encouraging the implementation of these practices. For those who give birth at a midwife, parents will usually ask whether the baby girl is circumcised or not.

The same thing happened in Denpasar, where female circumcision was carried out by those who were Moslem. When the female circumcision was asked of the indigenous Balinese, no one knew the culture of this practice. But when asking those who are migrants from Java and are Moslem, they will circumcise their newborn daughter.

"....Iya saya sunatkan anak saya, di bidan Umi dekat kos saya... ...kan ini wajib, semua keluarga saya juga disunat anaknya, laki maupun perempuan, di

agama juga harus sunat kan perintahnya, jadi ya disunat biar sesuai perintah agama..." (Ibu SYI, 44 tahun, Ibu Korban Sunat, Kota Denpasar)

This practice is not only done in Denpasar alone, but those who in fact migrants are also willing to return to their home areas when giving birth so that they can circumcise their children. This is because there are no medical personel who circumcise in Denpasar. In addition, there are also midwives who come from Java, then practice in Denpasar and practice circumcision of newborn girls, whether or not requested by their parents, as long as those who use their services are Islamic.

"....*Saya daridulu ya nyunat laki ya perempuan mbak, kan memang wajib dalam Islam. Budayanya juga sudah biasa gitu. Jadi ya harus dilakukan, kan wajib. Lagian biar bersih juga kok"* (Ibu TRI, 48 tahun, Bidan, Kota Denpasar)

From this it shows that the culture brought by the community is not eroded by geography. Even in the practice of female circumcision, Islam is used as a "wrap" of the culture that is continued by the female circumcision actors.

V. Operations for the Power Relation of Female Circumcision

These practices on female circumcision are then organized and organize the social relations that exist in the community. Where the community will be organized with the discourse that is spread through religious values that are easily trusted by the community, because there is a figure who is 'supervising' (Kyai) and there is also a figure who is the subject of the practice of circumcision practices on girls (dukun). The power of female circumcision is then perpetuated or carried out by the implementing actor (dukun) who is the main actor in the practice of female circumcision.

Foucault explained that the target of power in society is the body. In the practice of female circumcision, the female body is the target of existing power. Not just a woman's body. But the body of a girl who hasn't been able to make decisions about her genitals that are better circumcised or not.

Religion places itself as a guardian of the morality of the people. But religion is also used as a shield to regulate the behavior of people called the tradition and use religion as a reason that has a strong influence in the implementation of these traditions. Prohibiting and rejecting certain traditions or behaviors in terms of sexuality is part of religious duties. But in the practice of female circumcision, religion and tradition become a strong combination to control the female body which is then used as a social body that benefits many parties but does not promise benefits to the female body.

Religion adopted in Bangkalan, Situbondo and Denpasar have the same position but differ in their use. Bangkalan and Denpasar utilize the position of religion as the main reference in the female circumcision. Then only make the religion the main reason for the tradition of practice until now. So, if this religion becomes a reason to stop the practice of circumcision, then this practice will stop. While what happened in Situbondo, the practice of female circumcision has

become one of the traditions that preserves it using religion as its guidance. Tradition is the main reason for the practice of female circumcision. Religion is used as a shield in its implementation. Although basically for reasons of tradition, they have been able to carry out the practice of circumcision continuously.

From Foucault's statement above, it means that everything that contains knowledge will dominate, and everything that has an element of power must be knowledgeable. This also happened to the practice of female circumcision. Where the power relations formed between the implementing actor and the pushing actor have the power to make female circumcision victims to practice circumcision in order to preserve the power of existing traditions. Not a victim of circumcision that changed from not wanting to being willing to carry out the practice of circumcision on women, but women did not have the opportunity to control their own bodies even though they were young.

The above review shows that a woman's body is very weak even shortly after she is born. They are already socially controlled and do not have the power to make other opportunities. It is no longer about opportunity, but they are unable to defend and control themselves due to the practice of female circumcision.

Another hand, the existence of circumcision practices on girls shows a line that is actually not aware of mutual control and mastered which then becomes a unbroken chain. Where women are controlled (victims of circumcision) who control are women too (traditional birth attendants, female parents, grandmothers, and other parties who are also women). How can this happen? The reality is that women who control each other become the motor of power that has been formed in the form of traditional religious authority or tradition in the name of religion in the practice of female circumcision.

Women who behave as implementing actors such as traditional birth attendants and parents of circumcision victims are objects that have become subjects. They are actors who continue the chain of circumcision practices on these girls who indirectly continue to perpetuate the tradition of violence against the female body. They are not without knowledge. The implementing actor must have the knowledge to be able to exercise power for the circumcision victim. But what they did not have was knowledge of health about the effects arising from circumcision, knowledge of the circumcision tradition carried out was a form of violence, knowledge of the pure purpose of female circumcision. What they know is always related to tradition and religion which are then associated with other life values. So that construction emerges carrying the practice of circumcision can control in terms of health to the moral of a woman.

VI. Rights of Children Violated in Female Circumcision

1. Right to Vote (Decision making)

   Whether or not there is a change in the shape of a limb, which is touched by someone else without the consent of the owner of the body itself can be said to be an offense. In the female circumcision, the baby

who is the object of this practice is not given the opportunity to decide whether she will be circumcised or not. There are reasons used to justify this practice is the health condition of infants who recover faster if there are body parts that are injured and the decision to carry out this practice is a mandate from parents for the good of the child. These two things are continuously passed down from generation to generation to perpetuate the female circumcision. In fact what happened was a violation of the right to choose and make a decision whether the baby would be circumcised or not.

2. The right to access health

In the female circumcision, access to health in accordance with medical rules has not been obtained by the baby. Female circumcision which is believed to function for women's reproductive and sexual health has not yet confirmed medical validity. Actors who do are still many of the traditional workers who are not directly involved in the medical world such as traditional birth attendants. In addition, the equipment used for the practice of circumcision is not using the proper medical devices. They use a thin piece of bamboo coated with turmeric. Thus, the right of girls to get access to good health in the practice of female circumcision is not fulfilled.

3. The right to gain access to knowledge

Knowledge of female circumcision is more widely known by word of mouth in the name of culture. The source of knowledge about the basic practice of circumcision, the purpose of circumcision, reference to implementation, how to do it, who does it, diseases detected in the event of malpractice and knowledge about female circumcision is not widely known by the public. This practice is only carried out by those who are perpetrators of female circumcision (traditional birth attendants or medical personnel) and also the parents of the baby. This practice can continue because at every birth of a baby girl, they immediately get a birth package (piercing and circumcision). Some are through the parents' request procedure, and some are not, but are directly carried out by circumcision practitioners. The circumcised woman when she was a baby, did not have the power to refuse and were not given knowledge of the true function of the practice of female circumcision. The existing knowledge process was immediately accepted when she gave birth to a baby girl and was reminded (not even) to circumcise her parents. This process continues in the name of culture wrapped in religion as the biggest reason for the practice of female circumcision.

VII. Conclusion

The actor who practiced female circumcision was divided into three namely implementing actors; pushing and resistance actors.

The role of religious leaders and parents of victims is an actor who has a big influence on the female circumcision. The social reproduction mechanism of female circumcision continues to be reproduced both internally and externally, and continues to be sustainable. The power relations shown are not only those who have knowledge of female circumcision, but also for actors who have practical power relations. Actors supporting female circumcision are parents, religious leaders and community leaders from Madurese cultural backgrounds who believe in the compulsory proposition of female circumcision.

The role of the dukun is important. Because this practice continues because of people's trust in everything that is said to be "tradition". Because female circumcision is believed to be one of the mandatory traditions, this tradition continues. The dukun is the most powerful actor who has the authority to discourage the female circumcision, by instructing parents to prepare circumcision equipment and equipment on the seventh day after the baby is born.

The power relation that is seen in parents and families who continue to order to practice female circumcision. This process demonstrates the power of female circumcision. In practice, this phenomenon continues to be reproduced power. This is because the culture that was brought in was adopted and continues to this day which then is reproduced continuously into a habit that must be carried out by the community. Traditions must always be carried out to avoid disaster. Including the female circumcision which must be done on newborns for the safety of the baby itself and the family.

Apart from religious and cultural factors which are the media to reproduce the female circumcision. This practice is part of a gender issue that deserves further discussion, which places women's rights and children's rights that have been unconsciously violated by actors who have contributed to the practice of circumcision. Although these actors also do are women. But what needs to be underlined is that women become perpetrators or actors who perpetuate the female circumcision can be caused by 1) Lack of knowledge about the health of children and women; and 2) There are 'pressures' such as the validity of the beliefs adopted, community gossip, pressure from parents that causes this practice to be carried out by the community (mainly women).

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IMPLEMENTATION OF *ISTIBDAL* IN SHARE WAQF IN INDONESIA

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Abstract

Waqf in Indonesia nowadays is not always about an immovable property. Since the implementation of Indonesia's Waqf Law Number 41 of 2004 about Waqf (Waqf Law) there have been many new waqf objects, one of them is share. The regulation regarding share waqf is regulated in the Waqf Law, Indonesian Government Regulation Number 42 of 2006 about Implementation of Waqf, and Ministry of Religious Affair Regulation Number 73 of 2013. In articles 40 and 41 paragraph (1) of the Waqf Law, it is stated that the transfer of waqf property which is known as *istibdal* is allowed. *Istibdal* is defined as the substitution of waqf property with other assets, both have the same use or not. This paper will describe the implementation of *istibdal* on waqf shares in Indonesia. Related to *istibdal*, this article will explain the reason behind the restriction on *istibdal* can be excluded. In addition, this paper will also review the comparison of the application share waqf *istibdal* in Indonesia with Malaysia.
Keyword(s): Share Waqf, Istibdal, Indonesia, Malaysia.

Abstrak

Wakaf di Indonesia kini tidak lagi identik dengan benda tidak bergerak saja. Sejak diterapkannya Undang-Undang Nomor 42 Tahun 2004 tentang Wakaf (UU Wakaf) muncul banyak objek wakaf (*mauquf bih*) baru, salah satunya saham. Pengaturan mengenai wakaf saham diatur dalam UU Wakaf, Peraturan Pemerintah Nomor 42 Tahun 2006 tentang Pelaksanaan Wakaf, dan Peraturan Menteri Agama Nomor 73 Tahun 2013. Pasal 40 dan 41 ayat (1) UU Wakaf mengatur mengenai pengalihan harta benda wakaf atau yang dikenal sebagai *istibdal*. *Istibdal* diartikan sebagai penggantian harta benda wakaf dengan harta benda lainnya, baik yang sama kegunaannya maupun tidak. Tulisan ini akan memaparkan implementasi *istibdal* pada wakaf saham di Indonesia. Terkait *istibdal*, tulisan ini akan memaparkan mengapa larangan *istibdal* dapat dikecualikan. Disamping itu, tulisan ini juga akan mengulas mengenai perbandingan penerapan *istibdal* wakaf saham di Indonesia dengan Malaysia.
Kata Kunci: Wakaf Saham, *Istibdal*, Indonesia, Malaysia

I. INTRODUCTION

1. Issue Background

Based on the latest data up to the first quarter of 2019, the value of the capitalization of sharia share has grown to more than 3 trillion. Based on this

number, the market share of sharia shares has reached more than half of the total value of the capitalization of shares in the capital market. Along with the growth of sharia share in Indonesia, it is visible to collaborate sharia investment and social aspect with share waqf to enhance the value of the money. It can be said that a share waqf is a form of cash waqf which is invested in Islamic shares with the aim of increasing the value of the waqf money.

Since the Indonesian Waqf Law is enacted in 2004 along with the Government Regulation concerning the Implementation of Waqf Law, waqf properties have been expanded to movable properties, movable properties which is money and movable properties aside from money, one of which is shares. These regulations open the opportunity to do waqf in shares.

However, the regulation regarding share waqf is not specifically regulated, the regulations are still contained in general waqf arrangements. As in the Waqf Law and Indonesian Government Regulations about Implementing the Waqf Law. In Waqf Law, it is stated that waqf property consists of immovable and movable objects. Then, Indonesian Government about the Implementation Waqf Law explains that movable objects except for money because of legislation that can be represented as long as it does not conflict with Islamic principles, one of them is shares. Furthermore, in Ministry of Religious Affairs Regulation about Procedures for Waqf of Immovable Objects and Moving Objects except for Money, explains that the sharia shares/shares waqf here comprise sharia shares/shares at Private Company and sharia shares/shares at Public Company.

Regardless of the minimum of regulations about share waqf, there will always be problems surrounding the waqf properties, such as waqf properties no longer have benefits or the management cost is bigger than the benefit. To answer this problem, the emergence of the *istibdal* as waqf exchange agency is one of the solutions to the problem. Basically, exchanging waqf properties is prohibited by all four schools (Syafi'iyah, Malikiyah, Hambali, and Hanifiyah) with an exception. Along with that, there has been changing in waqf paradigm from "holding the origin/essence of the property" to "preservation and improvement of the benefits of waqf properties" so that the Indonesian Waqf Law also make an exception on exchanging the waqf property/*istibdal*.

However, the regulation concerning *istibdal* is still general and mostly around the *istibdal* of land waqf. But there are some points that we should obey regarding the *istibdal* of waqf in general, such as the requirement and the procedures to carried out *istibdal* in general. The most important thing to carried out an *istibdal* in Indonesia is the written permission from the MInistry of Religious Affair with consideration of Indonesian Waqf Body. However, to get the consideration from Indoensian Waqf Body, the request on the *istibdal* must comply with their rule. Those rules are applied to any kind of *istibdal* including the share waqf.

Islamic jurists (*fukaha*) have different views about the concept of *istibdal* due no direct references to Islamic sources about *istibdal*. In Malaysia, three

states have enacted a specific enactment about waqf matters, with *istibdal* waqf was also provided in the enactment. Meanwhile in Indonesia, *istibdal* regulation generally is unified by the Indoesian Waqf Law and the Government regulation regardless of which school that they follow.

Based on the above background, it brings the question about the permissibility of *istibdal*. With the concept of waqf linked by the existence of *istibdal*, had shown confliction of ideas. Thus the concept and regulation of *istibdal* in Indonesia will be compared to *istibdal* in Malaysia.

2. Research Method and Research Limitation

This research focuses on discussing waqf shares and *istibdal* in Indonesia and will be compared to the practice of *istibdal* in Malaysia. The initial problem that popped up is how different the regulation about waqf share and *istibdal* in Indonesia and Malaysia. The conduct of this research is based on literature and press-based sources research. This research aims to provide an alternative perspective by providing a comparative analysis of the two legal traditions: Indonesian Law and Malaysian Law.

3. Benefit

This research will provide an explanation of general waqf shares, the implementation of *istibdal* practices, and particularly in the case of waqf shares. This research also provides a comparison of *istibdal* regulation and implementation between Indonesia and Malaysia. It is hoped that this research can be used as a reference for making regulations regarding share waqf that are still incomplete.

II. DISCUSSION

1. Share Waqf Regulation in Indonesia

The development of waqf in Indonesia can be said to be very rapid. Before the 21st century, waqf was only identifiable with waqf of immovable property, in this case, land and buildings. After the formation of Law Number 41 of 2004 about Waqf, several new waqf objects (*mauquf bih*) emerged, such as cash waqf, sukuk waqf, copyright waqf, insurance waqf, share waqf, and others. Share waqf has very good potential to be developed. So then, a number of rules were formed that governed how the implementation of share waqf in Indonesia.

The legal basis for implementing shares waqf is Article 16 paragraph (1) of Law Number 41 of 2004 about Waqf, it is stated that waqf property consists of immovable and movable objects. Furthermore, Article 21 letter a of Indonesian Government Regulation Number 42 of 2006 about the Implementation of Law Number 41 of 2004 about Waqf explains that movable objects except money because of legislation that can be represented as long as it does not conflict with Islamic principles, namely shares, Government Debt Instruments, bonds in general, and/or other securities that can be valued in money.

Further arrangements are outlined in Ministry of Religious Affairs Regulation Number 73 of 2013 about Procedures for Waqf of Immovable Objects and Moving Objects except for Money. Similar to Indonesian Government Regulation Number 42 of 2006, Article 12 of Ministry of Religious Affair Regulation Number 73 of 2013 states that movable objects in the form of securities include:

(1) Sharia shares/shares
(2) Government Debt Instruments/Government Sharia Debt Instruments
(3) Bonds in general/Sharia debt securities; and
(4) Other Sharia securities can be valued in money.

Then, Article 13 Ministry of Religious Affairs Regulation Number 73 of 2013 explains that the sharia shares/shares waqf here comprise sharia shares/shares at Private Company and sharia shares/shares at Public Company. Which for Waqf Pledge Deed (AIW) or Submission for Waqf Pledge Deed (APAIW) sharia shares/shares of Private Company must be submitted to the company concerned to be recorded as a waqf on behalf of *Nazhir*. Meanwhile, AIW or APAIW sharia shares/shares of Public Company must be submitted to securities companies as a sub-registry that performs custodian activities and administers sharia shares/shares to be recorded as a waqf on behalf of *Nazhir*.

The existence of several laws and regulations governing the shares waqf as mentioned above is Indonesian *fiqh* as a result of *ijtihad* of Indonesian *ulemas* by adjusting the needs and social situation at the moment. Because basically law is the articulation of human thought and activities in his day. While the dynamics of human life are always changing (Havita & Hakim, 2017).

Of the three laws and regulations mentioned above namely Law Number 41 of 2004 about Waqf, Indonesian Government Regulation Number 42 of 2006 about the Implementation of Law Number 41 of 2004 about Waqf, and Ministry of Religious Affair Regulation Number 73 of 2013 about Procedures for Waqf of Immovable Objects and Moving Objects except Money, it can be analyzed that there are two types of shares that can be used as waqf objects, namely:

(1) Sharia shares
(2) Conventional shares from *halal/mubah* companies.

2, Sharia Share

In Article 4 number 2 *Fatwa* National Sharia Council (DSN) Number 40/DSNMUI/X/2003 about the Application of Sharia Principles in the Capital Market Sector, the definition of sharia shares is proof of ownership of a company that meets the criteria as listed in article 3 and does not include shares that have special rights.

What is meant by the criteria as listed in article 3 are as follows:

(1) The type of business, products, services and contract and the way the company is managed by Issuers or Public Companies that issue Sharia Securities must not conflict with Sharia Principles.

(2) Types of business activities that are contrary to Sharia Principles as referred to in Article 3 number 1 above include:
   (a) gambling and games which are classified as gambling or trading which are prohibited;
   (b) conventional financial institutions (*ribawi*), including conventional banking and insurance;
   (c) illicit producers, distributors, and traders of food and beverage;
   (d) producers, distributors, and/or providers of properties or services that are morally damaging and harmful; and
   (e) investing in the Issuer (company) which at the time of the transaction (ratio) level of the company's debt to a financial institution (*ribawi*) is more dominant than the capital.

(3) Issuers or Public Companies intending to issue Sharia Securities are obliged to sign and fulfill the provisions of the contract in accordance with sharia for Sharia Securities issued.

(4) Issuers or Public Companies that issue Sharia Securities must guarantee that their business activities meet the Sharia Principles and have a Shariah Compliance Officer.

(5) In the event that an Issuer or Public Company that issues Sharia Securities at any time does not meet the above requirements, the Securities issued by themselves are no longer Sharia Securities.

Whereas what is meant by shares that have special rights that are prohibited according to sharia include preferred shares (special shares) and blank shares.

Sharia shares listed on the exchange can be accessed on the Jakarta Islamic Index (JII) and Indeks Saham Syariah Indonesia (ISSI) groups. JII is an index board for 30 shares that are categorized as shariah compliance or not in conflict with sharia. Because JII only holds 30 of the best shares that are sharia compliant, it does not mean that other shares outside JII are not in accordance with sharia principles. That is why on May 12, 2011, the Indonesia Stock Exchange launched a new stock price index called the Indeks Saham Syariah Indonesia (ISSI) which holds more sharia shares (Bursa Efek Indonesia, 2018).

3. Conventional Shares from *Halal/Mubah* Companies

The provisions of the Ministry of Religious Affairs Regulation Number 73 of 2013 about Procedures for Waqf of Immovable Objects and Moving Objects except for Money, allow non-sharia shares or conventional shares for waqf. However, there is no further explanation in the Ministry of Religious Affairs Regulation Number 73 of 2013 regarding non-sharia share criteria such as what can be used as a waqf object. Conventional shares originating from companies engaged in *halal* business, such as transportation, telecommunications, textiles. Some *fuqaha* state that it is permissible to invest in companies like this.

This is also in accordance with the decision of the *Majlis Al-Majma 'al-Fiqhy* meeting under Rabithah Alam Islami (World Muslim League) at the 14th conference, held in the city of Mecca on January 21, 1995. So it can be concluded that not all conventional shares comes from companies that are prohibited in the business sector. There are several types of shares that are not labeled sharia but are from *halal/mubah* companies, and this is permitted by some jurists (*fukaha*). However, related to shares of *halal/mubah* companies, there is still a risk of sharia violations that may occur. This is because in analyzing a stock that qualifies as a sharia share or not, not only the financial or production approach is used. But also other approaches such as income approach, capital structure approach and other approaches. Therefore, according to Havita and Hakim, the conventional shares referred to as waqf objects according to the laws and regulations after the enactment of Law Number 41 of 2004 about Waqf are conventional shares of *halal/mubah* companies (Havita & Hakim, 2017).

However, there are differences in the provisions of shares as waqf objects in Indonesian Government Regulation No. 42 of 2006 and Ministry of Religious Affairs Regulation Number 73 of 2013. Article 21 Indonesian Government Regulation No. 42 of 2006 stipulates that shares can be represented as long as they do not conflict with Islamic principles, in the sense that shares that can be used as waqf objects are sharia shares. While the Ministry of Religious Affairs Regulation Number 73 of 2013 stipulates that sharia shares and conventional shares can be transferred for the benefit of waqf.

Meanwhile, related to differences in the provisions of the types of shares that can be used as waqf objects according to Indonesian Government Regulation No. 42 of 2006 and Ministry of Religious Affair Regulation Number 73 of 2013. Indonesian Government Regulation No. 42 of 2006 has a higher position and is even a statutory regulation that instructs the establishment of the Ministry of Religious Affair Regulation, the provisions of the type of shares as an object of waqf in Indonesian Government Regulation No. 42 of 2006 is stronger than Ministry of Religious Affair Regulation Number 73 of 2013. So that the government, in this case, the Ministry of Religion Affair, must review the provision.

4. Implementation of *Istibdal* in Share Waqf in Indonesia

In the practice of waqf, sometimes problems occur in waqf properties, such as waqf properties due to age or are damaged by usage or natural disaster is no longer have benefits. The question arises whether these waqf properties can be sold and bought new or exchanged for other properties that can have benefits as a waqf property. To answer this problem, the emergence of the *istibdal* as waqf exchange agency is one of the solutions to the problem. But this could be dilemmatic since, waqf has two principles, namely externality and expediency. There are several definitions of *istibdal*. Some interpret the term as the sale of waqf properties to buy other properties as a replacement. The other interpretation

of istibdal as removing an item from the status of waqf and replacing it with other properties whether they have the same purpose or not. (Hasan, 2009)

5. Discussion from by the four schools of law surrounding *Istibdal*

The discussion of permissibility is already discussed by the four schools of law (Hanafiyah, Malikiyah, Syafiiyah, and Hambali) which in principle prohibit *istibdal* except in situations that excluded the prohibition. According to the school of Hanafiyah, *istibdal* is permissible for two reasons, namely: the condition of the waqf at the time of pledge (*ikrar*) that the object being represented can be replaced by also mentioning the criteria for exchanging waqf objects and *istibdal* in an emergency namely the endowment object cannot provide any benefit or if the outcome is of waqf properties have shrunk to the point that maintenance or management costs are insufficient so they can be exchanged without the requirement of a pledge from the wakif. According to the school of Malikiyah *istibdal*, it should not be done in the case of a waqf object in the form of a mosque although it is exchanged with other mosques and waqf properties in the form of producing land unless there is an emergency for public benefit. In the case of replacing a movable object into an immovable object or vice versa school of Malikiyah allows it. The School of Syafi'iyah believes that *istibdal* practice should be narrowed/made difficult to maintain the principle of eternity and in the case of the mosque the school of Syafi'iyah has the same opinion as to the school of Malikiyah. However, it has a different opinion than the condition of replacing immovable objects becomes movable or vice versa is prohibited. The most common discussion on the school of Syafi'iyah revolves around sick animals, dried date palms, broken tree trunks and falling on mosques until they are destroyed so that the waqf properties are no longer useful or beneficial. According to the school of Hambali, *istibdal* is permissible and there is not any distinction between movable and immovable objects. Also, according to the school of Hambali, if waqf items are forbidden to be sold while there is a strong reason to sell it, they have wasted the waqf purpose so that there are no benefits of waqf properties. The school of Hambali pointed out that the permissibility of *istibdal* as long as it keeps the continuance and promotes waqf purpose. (Ibrahim, 2009)

6. *Istibdal* in Indonesia's Regulation

Changes in the paradigm of waqf which was previously "holding the origin/essence of the property" to "preservation and improvement of the benefits of waqf properties" is the reason behind the exception law in the Indonesian Waqf Law. According to Art 40 Indonesian Waqf Law, it is stated that waqf properties may not be exchanged or transferred in the form of other transfer of rights. Furthermore, art 41 subsection (1) explains that waqf properties exchange prohibition can be excluded if the waqf properties will be used for the public interest consistent with the general spatial plan (Rencana Umum Tata Ruang)

based on applicable law as long as it is in line with sharia. This exception, based on art 41 of Indonesian Waqf Law subsection (2) and (3) can only be carried out after getting written permission by the Ministry of Religious Affair with Indonesian Waqf Body's consideration with substitute waqf properties that have at least have the same value.

Furthermore, the Government Regulation concerning Waqf stated specifically on art 21 that waqf properties could be immovable properties besides money one of which is share. Regarding the *istibdal*, Government Regulation concerning Waqf explained on art 49 subsection (1) that waqf properties status exchange in *istibdal* should get written permission from the Ministry of Religious Affair with Indonesian Waqf Body's consideration. The scope of the *istibdal*/exchange in Government Regulation concerning Waqf is broader than the Indonesian Waqf Law, among other things: changes in waqf property because these are used for different purposes in accordance with the General Spatial Plan (RUTR) based on statutory provisions and not in accordance with Syariah, waqf properties cannot be used in accordance with the pledge waqf; or exchanged to be carried out for direct and urgent religious purposes.

It is explained in Government Regulation concerning Waqf, on art 49 subsection (3) the requirement to get permission for *istibdal*, such as:

- the waqf properties must be certified or have legal evidence of ownership based on applicable law;and
- the new waqf properties value and benefits have at least the same or more than the waqf property that is exchanged.

Further, about the *istibdal* of waqf properties is as follows:

(1) *Nazhir* file an exchange or *istibdal* request by explaining reasons to the exchange or the waqf properties status change to the Ministry of Religious Affair through the office of Religious Affair;

(2) The head of the office of Religious Affair proceeded the request to the district or mayor office of religious affair;

(3) The head of district or mayor's office of religious affairs received the request and proceed to make a team to appraise the value of the waqf properties and the mayor/regent make a decree;

(4) The head of district or mayor's office of religious affairs proceed the request by attaching the waqf properties value from the appraisal team to Head of the Provincial Department of Religious Affairs Regional Office and then forward the request to the Minister; and

(5) After obtaining written permission from the Minister, the exchange of change can be carried out and the results must be reported by *Nazhir* to the land office and/or related institutions for further registration.

Besides the regulation from the government that regulates the *istibdal*, the *istibdal* request needed to be carried out accordingly to the Indonesian Waqf Body's regulation number 1 Of 2008 concerning Procedures For Preparation Of Recommendations On Applications For Exchange/Change in Waqf Property

Status specifically about the requirements for change in waqf property status. The requirement based on this regulation basically are the same with the government regulations concerning implementation of Indonesian Waqf Law.

However, until now, there are no specific regulations regarding the *istibdal* of share waqf in Indonesia. As long as it is comply to the Government Rules concerning Implementation of Indonesian Waqf Law and the Indoensian Waqf Body, the implementation of *istibdal* in share waqf could be carried out accordingly to the law.

7. Comparison to Malaysia

The issue of *istibdal* and its administrative cases raised as an attractive discussion among Muslim scholars since the permission for exchanging (*istibdal*) is against the principle of Islamic endowment itself, which functions under the concept of perpetuity and everlasting. The action of altering or exchanging of the waqf property is contrary to the concept of waqf, which should exist forever, perpetual and cannot be changed or amended. In fact, a waqf property was no longer owned by man as the owner, but the ownership was transferred to the God (Sulong, 2013). Islamic jurists have different views on the concept of *istibdal*. It was since that there is no direct reference of Islamic source pertaining to *istibdal*. Therefore, Islamic jurists are not in unanimous opinion pertaining to the permissibility of *istibdal*. Some scholars prohibited *istibdal* except in an isolated case whereas others permit *istibdal* with mild conditions (Sulong, 2013).

Recently in Malaysia, three states have enacted a specific enactment about waqf matters, which are Selangor, Malacca, and Negri Sembilan. The provision of *istibdal* waqf was also provided in the enactment (Sulong, 2013). Meanwhile, for the rest of the states in Malaysia, the rule to apply *istibdal* was provided through fatwa. Therefore, State Committee of Fatwa has issued several rules and regulations to monitor the implementation of *istibdal* (Mat Rani, 2008). Thus, *istibdal* waqf has already been implemented in Malaysia. However, it was not as smooth as exchanging other things when a study showed that some *istibdal* was not completed in a short time (Sulong, 2013).

The provision of *istibdal* waqf was also provided in the enactment. in Section 2 of the Enactment of Waqf (State of Selangor) of 1999 and Section 2 of the Enactment of Waqf (State of Malacca) of 2005, the meaning of *istibdal* is to substitute a waqf property with another property or with money which is of the same or higher value than it either by substituting, purchasing, selling or any other means in accordance to Shariah law. While Section 19 of the Selangor Waqf Enactment of 1999, as well as the Malacca Waqf Enactment of 2005, provides the existence of *maslahat* and its requirement in implementing *istibdal*. It was provided that the Council may *istibdal* any waqf property (*mawquf*) in some circumstances, which is (1) *the mawquf* has been acquired by any public authority in accordance with the provisions of any written law, (2) the *mawquf* does not yield any usufruct or benefit as intended by the *waqif* or, (3) if the use of the

mawquf does not comply with the purpose of the waqf. In Section 12 of the Negeri Sembilan Waqf Enactment of 2005, the law has provided more jurisdictions to the Council in applying *istibdal*. The Council can apply *istibdal* on any *mawquf*, other than the mosque, in the following circumstances, which are (1) If any of waqf conditions are inconsistent with any written law, (2) If *mawquf* was taken away by any authority under any written law, (3) If the use of *mawquf* has no longer provided any benefit, advantage or profit as required by *waqif*, (4) If the use of *mawquf* are not to conform to waqf purposes, (5) If the elapsed time or changes occurrence, resulting to any conditions set by *waqif* is not feasible.

For the states in Malaysia where the *istibdal* rules through fatwa and not Enactment, according to the 4th Fatwa Committee Conference held from April 13th until 14th year 1982, Malaysia Department of Islamic Development (JAKIM), the committee stated the approval of *istibdal*. The fatwa committee also agreed on *istibdal* implementation through buying or purchasing or other means for the purpose of keeping the waqf property and it is permissible following (*taqlid*) the opinion of Imam Abu Hanifah (S. Hisham, 2013). The *istibdal* application could also be traced directly from the Committee because any *istibdal* should get approval from the State Fatwa Committee.

In general the application of Islamic law including waqf in Malaysia is mostly echoing the principles of the School of Syafi'iyah, which believes that *istibdal* practice should be narrowed/made difficult to maintain the principle of eternity (Mahamood, 2002). However, on the provision shows that some flexible in referral law, the rule of *istibdal* has adapted some of the views of Hanafiyah and Hanbali's School (Abdullah, 2010). For instance, the Malaysian National Fatwa Council has given its ruling on the 4th discussion of 1982 that the element of *maslahat* is an important point that should be achieved in determining the permissibility of *istibdal*, which followed the Hanafi and Hanbali's views. Without a convincing *maslahat*, the Government will not consider any application to do *istibdal*. The jurists have agreed on questions concerning the permissibility of *istibdal*, which is to preserve benefits from the *mawquf* (waqf property). By preserving the benefits, it will go in line with the function and meet the purpose that was intended by the *waqif*. Thus in order to retain benefits, the need to exchange waqf property could be permissible and legal (Sulong, 2013).

III. FINAL

1. Conclusion

In the laws and regulations in Indonesia, it is very possible for someone to conduct share waqf, even though there is no specific regulation about waqf shares. For now the regulation that can be used as a reference for share waqf are Law Number 41 of 2004 about Waqf, Indonesian Government Regulation Number 42 of 2006 about Implementation of the Waqf Law, and Ministry of Religious Affair Regulation Number 73 of 2013, and supported by *Fatwa*

National Sharia Council (DSN) Number 40/DSNMUI/X/2003. There are two types of shares that can be used as waqf objects (*mauquf bih*), namely, sharia shares and conventional shares from *halal/mubah* companies.

Regardless kind of properties for waqf, the emergence of the *istibdal* as waqf exchange agency is one of the solutions to the waqf property that no longer beneficial or financially inefficient. Basically, exchanging waqf property is prohibited by all four schools (Syafi'iyah, Malikiyah, Hambali, and Hanifiyah) with an exception. Along with that, there has been changing in waqf paradigm from "holding the origin/essence of the property" to "preservation and improvement of the benefits of waqf properties" so that the Indonesian Waqf Law also make an exception on exchanging the waqf propery/*istibdal*.

In Indonesia, *istibdal* could be carried out as long as it is complied with the Indonesian Waqf Law, Government Regulations concerning Implementation of Indonesian Waqf Law and the Indonesian Waqf Body's rule. The most important thing to carried out an *istibdal* specifically share waqf in Indonesia is the written permission from the Ministry of Religious Affair with consideration of Indonesian Waqf Body. However, to get the consideration from Indoensian Waqf Body, the request on the *istibdal* must comply with their rule. Those rules are applied to any kind of *istibdal* including the share waqf.

Istibdal waqf has already been implemented in Malaysia although it was not as smooth as exchanging other things. *Istibdal* in Malaysia is regulated through specific enactment for three states (Selangor, Malacca, and Negri Sembilan) while the rest of the states regulated through fatwa.

2. Advice

The problem of istibdal is in the realm of the "law of exclusion". There are precautionary steps in the exchange of waqf property and is still preferred to maintain the permanence of waqf property as long as the property can still be can beused/beneficial. But if the property is no longer beneficial, it is permissible to be exchange the waqf property (istibdal), as long as it is not classified as tasahul (simplifying problems). Looking at the development of waqf shares that have good potential in the development of waqf in Indonesia, it seems necessary for the government to establish legislation that specifically regulates waqf shares and how the exhange procedure if the shares represented are no longer fit the criteria of waqf objects.

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BATASAN PEMBERIAN WASIAT WAJIBAH DALAM PERKEMBANGAN PENERIMA WASIAT WAJIBAH DI INDONESIA (Studi Terhadap Putusan Hakim Di Lingkungan Peradilan Agama)

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Asbtrak

Putusan Pengadilan dalam lingkungan peradilan agama, dalam perkembangannya telah memberikan pembaruan hukum kewarisan Islam di Indonesia, salah satunya adalah ketentuan penerima wasiat wajibah. Kompilasi Hukum Islam (KHI) awalnya menentukan hanya anak angkat dan orang tua angkat sebagai penerima wasiat wajibah, namun dalam perkembangan, kerabat yang beragama selain Islam, anak tiri, serta anak yang lahir di luar perkawinan, melalui putusan hakim ditetapkan pula sebagai penerima wasiat wajibah. Penulisan ini bertujuan untuk melakukan analisis terhadap putusan pengadilan yang memberikan wasiat wajibah kepada para penerima wasiat wajibah, apakah memiliki batasan-batasan yang sama dalam memberikan jumlah dan syarat bagi penerima wasiat wajibah untuk selanjutnya diusulkan kaidah-kaidah yang harus diperhatikan hakim guna mewujudkan keadilan berdasarkan Pancasila. Kajian dilakukan melalui pendekatan konseptual dan kasus dalam putusan pengadilan yang memberikan wasiat wajibah bagi anak angkat, orang tua angkat, kerabat yang beragama selain Islam, anak tiri serta anak luar kawin, untuk selanjutnya disajikan dan dianalisis secara diskriptif kualitatif. Hasil analisis menunjukkan bahwa batasan wasiat maksimal 1/3 harta waris sebagaimana ketentuan hadits, diterapkan dalam menetapkan besaran wasiat wajibah bagi anak angkat, orang tua angkat, kerabat yang beragama selain Islam, anak tiri, dan anak luar kawin, namun terdapat pula batasan-batasan tambahan yang berbeda di antara para penerima wasiat wajibah. Batasan-batasan tersebut perlu diformulasikan dengan memperhatikan prinsip kasih sayang, kemaslahatan, dan hak asasi manusia.
Kata kunci: wasiat wajibah, kewarisan, hukum Islam

Abstract

The Court's Ruling in the religious court, in its development has caused reformation to Islamic Hereditary Law in Indonesia, one of which is the provision of The Obligatory Bequest. The Islamic Law Compilation (KHI) initially determined only adopted children and adoptive parents as recipients of compulsory testaments, but in development, non-moslem relatives, stepchildren, as well as illegitimate children, through the judge's ruling also determined as The Obligatory Bequest Beneficiary. The purpose of this research is to conduct an analysis of court ruling that provide mandatory wills to recipients of mandatory wills, whether they have the same limitations in providing the number and conditions for recipients of mandatory wills, and then proposed rules that

shall be considered by judges in order to bring justice based on Pancasila. The research is carried out through a conceptual approach and cases in court decisions that provide compulsory testaments for adopted children, adoptive parents, relatives of religions other than Islam, stepchildren and out-of-marriage children, to be presented and analyzed descriptive qualitative. The analysis results show that the maximum limit of wills is 1/3 of inheritance as stipulated in the hadith, applied in determining the sum of The Obligatory Bequest for step children, step parents, relatives of religions other than Islam, step children, and extramarital children, but there are also limitations different additions between The Obligatory Bequest Beneficiary. These boundaries are required to be reformulated by paying attention to the principles of compassion, benefit, and human rights.
Keywords : obligatory bequest, inheritance, Islamic law

I. Pendahuluan

Hukum materiil dibidang waris Islam penting untuk diketahui karena mayoritas penduduk Indonesia beragama Islam dan agama pewaris menentukan hukum yang berlaku dalam pembagian harta warisnya. UU Nomor 3 Tahun 2006 tentang Perubahan Atas Undang-Undang Nomor 7 Tahun 1989 tentang Peradilan Agama menghapus hak opsi, yaitu hak bagi para pihak sebelum berperkara, untuk memilih hukum apa yang akan dipergunakan dalam pembagian warisan. Ditegaskan lebih lanjut dalam Surat Edaran Ketua Mahkamah Agung Republik Indonesia Nomor 7 Tahun 2012 tentang Rumusan Hasil Rapat Pleno Kamar Mahkamah Agung Republik Indonesia sebagai Pedoman Pelaksanaan Tugas bagi Pengadilan, bahwa agama Pewaris menentukan pengadilan yang berwenang, sehingga apabila pewaris beragama Islam, maka pembagian warisnya seharusnya dilakukan menurut ketentuan hukum waris Islam dan menjadi kewenangan peradilan agama dalam menyelesaikannya.

Pada tahun 2006, melalui Keputusan Ketua Mahkamah Agung RI Nomor: KMA/032/SK/IV/2006 tentang Pemberlakuan Buku II Pedoman Pelaksanaan Tugas dan Administrasi Peradilan Agama (selanjutnya disebut Buku II MA) disebutkan, bahwa hukum materiil Peradilan Agama/Mahkamah Syari'ah dibidang waris adalah hukum kewarisan dalam Kompilasi Hukum Islam (KHI) dan yurisprudensi yang bersumber dari alquran, hadis dan ijtihad. Berdasarkan hal tersebut, maka dalam penulisan ini, yang dimaksud dengan hukum kewarisan Islam di Indonesia adalah hukum kewarisan Islam sebagaimana terdapat dalam Buku II KHI tentang kewarisan serta perkembangannya yang tercermin melalui yurisprudensi. Melalui penyusunan KHI, hukum terapan kewarisan Islam di Indonesia memiliki pedoman yang jelas sehingga dapat dijadikan landasan bagi Hakim di lingkungan Peradilan Agama dalam menyelesaikan perkara-perkara yang diajukan kepadanya. Beberapa asas baru dalam hukum kewarisan Islam di Indonesia, mendasarkan pada ketentuan KHI, seperti asas ahli waris pengganti dan asas wasiat wajibah yang sebelumnya tidak dikenal dalam pembahasan fikih

faraidh. Asas wasiat wajibah lahir dari ketentuan Pasal 209 KHI yang dalam Buku II MA dirumuskan bahwa anak angkat dan orang tua angkat secara timbal balik dapat melakukan wasiat tentang harta masing-masing, namun bila tidak ada wasiat dari anak angkat kepada orang tua angkat atau sebaliknya, maka orang tua angkat dan/atau anak angkat dapat diberi wasiat wajibah oleh Pengadilan Agama/Mahkamah Syar'iyah secara *ex officio* maksimal 1/3 bagian dari harta warisan (Mahkamah Agung RI Direktorat Jenderal Badan Peradilan Agama, 2013: 73). Hakim di lingkungan peradilan agama dalam beberapa putusannya telah memberikan wasiat wajibah kepada anak angkat, yang tidak menerima wasiat dari pewaris.

Dalam perkembangannya, terdapat putusan Lembaga Peradilan Agama yang memberikan kontribusi terhadap perkembangan pembaruan hukum waris Islam di Indonesia, sebagai hasil ijtihad hakim. Pembaruan yang dimaksudkan, salah satunya adalah pemberian wasiat wajibah dalam dua putusan Mahkamah Agung, yang ditujukan kepada kerabat yang memeluk agama selain Islam. Dalam Putusan Mahkamah Agung Nomor: 368 K/AG/1995 tanggal 16 Juli 1998 dan Nomor: 51 K/AG/1999 tanggal 29 September 1999, dinyatakan bahwa ahli waris non-muslim mendapatkan bagian dari harta peninggalan pewaris muslim berdasarkan wasiat wajibah sebesar bagian ahli waris muslim. Atas dasar putusan tersebut, terdapat satu asas yang ditambahkan dalam Buku II MA, sebagai asas dalam hukum kewarisan Islam di Indonesia, yaitu asas egaliter.

Wasiat wajibah sebagai salah satu pembaruan substansi hukum kewarisan Islam di Indonesia, selanjutnya tidak hanya diberikan kepada anak angkat, orang tua angkat, serta kerabat yang beragama selain Islam. Rumusan Hasil Rapat Pleno Kamar Agama Mahkamah Agung Republik Indonesia juga menetapkan anak tiri dan anak luar kawin yang telah diakui secara keperdataan oleh ayah biologisnya, sebagai penerima wasiat wajibah. Contoh penetapan wasiat wajibah bagi anak luar kawin adalah Penetapan Nomor 0156/Pdt.P/2013/PA.JS, sedangkan contoh putusan pemberian wasiat wajibah bagi anak tiri adalah Putusan Mahkamah Agung Nomor 489 K/AG/2011 tanggal 23 Desember 2011.

KHI menentukan batasan bahwa wasiat hanya diperbolehkan sebanyak-banyaknya sepertiga dari harta warisan kecuali apabila semua ahli waris menyetujui. Apabila wasiat melebihi sepertiga dari harta warisan, sedangkan ahli waris ada yang tidak menyetujuinya, maka wasiat hanya dilaksanakan sampai batas sepertiga harta warisan. Batasan lain ditemukan dalam rumusan asas egaliter pada Buku II MA yang menegaskan bahwa kerabat karena hubungan darah yang memeluk agama selain Islam mendapat wasiat wajibah maksimal 1/3 bagian dan tidak boleh melebihi bagian ahli waris yang sederajat dengannya. Rumusan asas egaliter menambahkan tambahan batasan wasiat wajibah kepada kerabat yang beragama selain Islam, yaitu selain maksimal 1/3 bagian, juga tidak boleh melebihi bagian ahli waris yang sederajat.

Pasal 1 Undang-Undang Nomor 48 Tahun 2009 tentang Kekuasaan Kehakiman, menyebutkan bahwa kekuasaan kehakiman adalah kekuasaan

negara yang merdeka untuk menyelenggarakan peradilan guna menegakkan hukum dan keadilan berdasarkan Pancasila dan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, demi terselenggaranya Negara Hukum Republik Indonesia. Tujuan hukum berdasarkan cita hukum Pancasila menurut Bernard Arief Sidharta (2000: 83) adalah untuk pengayoman manusia. Pemahaman terhadap konsep keadilan harus diterjemahkan dalam hubungannya dengan Pancasila, kemudian baru dikaitkan dengan kepentingan bangsa Indonesia sebagai bangsa yang harus merasakan keadilan itu. Karakteristik keadilan berdasarkan Pancasila sebagai falsafah dan ideologi bangsa meliputi beberapa prinsip yaitu: (1) Prinsip keadilan Pancasila berdasar atas Ketuhanan Yang Maha Esa. Menjunjung tinggi keadilan dengan berlandaskan keadilan dari Tuhan. Oleh sebab itu, keadilan berdasarkan Pancasila mengakui adanya agama dan kepercayaan pada masing-masing individu warga Negara; (2) Prinsip keadilan Pancasila mengedepankan hak asasi manusia serta memanusiakan manusia sebagai mahkluk sosial yang wajib dilindungi keadilannya; (3) Prinsip keadilan Pancasila menjunjung tinggi nilai persatuan dan kesatuan demi terciptanya suasana kondusif bangsa yang memberikan keadilan bagi warga negara Indonesia; (4) Prinsip keadilan Pancasila menganut asas demokrasi demi terciptanya keadilan bagi warga Negara dalam menyatakan pendapatnya masing-masing berdasar atas musyawarah untuk mufakat; (5) Prinsip keadilan Pancasila memberikan keadilan bagi seluruh warga negaranya tanpa kecuali sesuai dengan hak-haknya. Berdasarkan hal tersebut maka batasan pemberian wasiat wajibah selanjutnya perlu dianalisis dalam ranah tujuan penegakan hukum yaitu keadilan berdasarkan Pancasila.

II. Metode Penelitian

Penelitian ini adalah penelitian yuridis normatif dengan menggunakan pendekatan konseptual dan kasus. Pendekatan konseptual (*conceptual approach*) berawal dari pandangan-pandangan dan doktrin-doktrin yang berkembang dalam ilmu hukum dan dengan mempelajarinya maka akan ditemukan ide yang melahirkan pengertian-pengertian hukum, konsep-konsep hukum dan asas-asas hukum (Mukti Fadjar dan Yulianto Ahmad, 2010: 185-186). Peneliti dalam studi ini hanya menemukan rumusan asas yang bersifat umum dari asas wasiat wajibah dan asas egaliter dalam Buku II MA, oleh karenanya perlu dilakukan kajian atau penelaahan terhadap pandangan-pandangan atau doktrin yang menyangkut hukum waris Islam, sehingga dapat diperoleh ide atau gagasan tentang batasan dalam pemberian wasiat wajibah bagi anak angkat, kerabat yang beragama selain Islam, anak tiri, dan anak luar kawin yang diakui secara keperdataan oleh ayah biologisnya.

Pendekatan kasus (*case approach*) dilakukan dengan cara menelaah kasus-kasus yang berkaitan dengan isu yang dihadapi yang telah menjadi putusan pengadilan dan mempunyai kekuatan hukum tetap (Peter Mahmud Marzuki, 2015: 177) Putusan yang dikaji adalah putusan pemberian wasiat wajibah bagi

anak angkat, kerabat yang beragama selain Islam, anak tiri dan anak luar kawin. Kajian pokok dalam pendekatan kasus adalah dasar pertimbangan dan amar putusan besaran wasiat wajibah yang diberikan.

Cara dan alat pengumpulan data adalah melalui studi kepustakaan dengan menggunakan alat tulis untuk mencatat dan mendokumentasikan data. Hasil penelusuran selanjutnya disajikan dan dianalis secara deskriptif kualitatif.

III. Hasil Penelitian dan Pembahasan

1. Tinjauan tentang Wasiat Wajibah

Hasil penelitian Ahmad Junaidi (2013: 1) menyebutkan bahwa istilah wasiat wajibah pertama kali diperkenalkan oleh Ibn Hazm yang menyatakan wajib bagi tiap-tiap orang yang akan meninggal dan memiliki harta kekayaan, berwasiat kepada kerabat yang tidak memperoleh bagian warisan, karena kedudukan sebagai hamba, kekafirannya, atau ada hal yang menghalangi mereka dari hak kewarisan atau karena memang tidak berhak atas warisan. Rofik (1995: 462) berpendapat bahwa wasiat wajibah adalah tindakan yang dilakukan oleh penguasa atau hakim sebagai aparat negara yang memaksa atau memberi putusan wajib wasiat bagi orang yang telah meninggal yang diberikan kepada orang tertentu, sedangkan menurut Abdurrahman (1992: 164) yang dimaksud dengan wasiat wajibah adalah wasiat yang pelaksanaannya tidak dipengaruhi atau tidak bergantung kepada kemauan atau kehendak yang meninggal dunia. Jadi pelaksanaan wasiat tersebut tidak memerlukan bukti bahwa wasiat tersebut diucapkan atau ditulis atau dikehendaki, tetapi pelaksanaannya didasarkan kepada alasan-alasan hukum yang membenarkan bahwa wasiat tersebut harus dilaksanakan.

Sebagaimana dasar hukum wasiat yaitu Alquran Surat Al-Baqarah ayat 180, para ulama juga menggunakan dasar hukum yang sama untuk membenarkan ketentuan tentang wasiat wajibah. Powers (2001: 203) dalam penelitiannya tentang hukum waris Islam menyebutkan bahwa terdapat perbedaan pandangan di antara para ulama tentang pemaknaan Alquran Surat Al-Baqarah: 180 yang dikaitkan dengan ayat-ayat kewarisan. Ketentuan dalam Alquran Surat Al-Baqarah ayat 180, mewajibkan pemberian wasiat bagi ayah, ibu, dan kerabat, sedangkan dalam Alquran Surat An-Nisa ayat 11 sudah menegaskan bagian waris bagi ayah dan ibu termasuk anak-anak pewaris. Selain itu terdapat hadis dari Abu Umamah al-Bahily Radliyallaahu 'anhu bahwa Rosulullah bersabda: "Sesungguhnya Allah telah memberi hak kepada tiap-tiap yang berhak dan tidak ada wasiat untuk ahli waris." Secara umum, terdapat ulama yang berpandangan bahwa ayat tentang wasiat dalam Alquran Surat Al-Baqarah bertentangan dengan ayat-ayat tentang kewarisan, sehingga tidak berlaku, sedangkan ulama lain berpendapat tidak demikian. Ayat tentang wasiat merupakan landasan bahwa wasiat dapat diberikan bagi mereka-mereka yang terhalang mewaris.

Amir Syarifuddin (2004: 284) dalam bukunya menuliskan bahwa dengan menyatukan pengertian dalam hadis tidak ada wasiat untuk ahli waris dan

maksud dalam Alquran Surat Al-Baqarah ayat 180, dapat dipahami bahwa orang tua dan karib kerabat berhak menerima wasiat bila orang tua dan karib kerabat itu, oleh sesuatu hal tertentu tidak berhak menerima warisan karena terhalang atau tertutup oleh ahli waris yang lebih berhak. Dalam keadaan demikian, maka yang diperolehnya adalah wasiat, sedangkan saat tidak terhalang maka yang diperolehnya adalah warisan. Mereka tidak dapat menerima keduanya sekaligus.

Pandangan Ibnu Katsir menegaskan bahwa sunah hukumnya memberikan wasiat untuk ayah, ibu, dan kerabat yang tidak menerima bagian waris, namun tidak menyinggung mengenai wasiat wajibah. Hal ini berbeda dengan pendapat sebagian ulama fikih seperti Ibnu Hazm, azh Zhahiri, ath Thabari, dan Abu Bakr bin Abdul Aziz dari golongan Hambali yang memegang prinsip sebagaimana ketentuan dalam Alquran Surat Al-Baqarah ayat 180. Menurut pendapat mereka, wasiat tetap dihukumi wajib untuk kedua orang tua dan kerabat yang tidak bisa mewaris atau karena ada sesuatu yang menghalangi mereka mewaris seperti perbedaan agama. Apabila mayit tidak mewasiatkan sesuatu untuk orang tua atau kerabat yang terhalang mewaris, maka ahli waris harus memberikan sesuatu yang diambilkan dari harta peninggalan mayit untuk diberikan kepada orang tua atau kerabat yang terhalang mewaris.(Wahbah Az Zuhaili, 2010: 245).

Ketentuan wasiat wajibah yang ditungkan dalam Pasal 209 KHI adalah sebagai berikut:

(1) Harta peninggalan anak angkat dibagi berdasarkan Pasal 176 sampai dengan Pasal 193 tersebut di atas, sedangkan terhadap orang tua angkat yang tidak menerima wasiat diberi wasiat wajibah sebanyak-banyaknya 1/3 dari harta wasiat anak angkatnya.

(2) Terhadap anak angkat yang tidak menerima wasiat diberi wasiat wajibah sebanyak-banyaknya 1/3 dari harta warisan orang tua angkatnya.

Berdasarkan ketentuan tersebut, maka KHI mengatur limitasi tentang pemberi, penerima, dan jumlah wasiat wajibah yang bisa ditetapkan oleh hakim. Pembaruan hukum kewarisan Islam salah satunya adalah menambahkan penerima wasiat wajibah, tidak hanya anak angkat atau orang tua angkat, melainkan juga ditujukan kepada kerabat yang beragama selain Islam, anak tiri dan anak luar kawin yang telah diakui secara keperdataan oleh ayah biologisnya. Pasal 1 UU Perlindungan Anak menegaskan bahwa anak Angkat adalah anak yang haknya dialihkan dari lingkungan kekuasaan Keluarga Orang Tua, Wali yang sah, atau orang lain yang bertanggung jawab atas perawatan, pendidikan, dan membesarkan anak tersebut, ke dalam lingkungan Keluarga Orang Tua angkatnya berdasarkan putusan atau penetapan pengadilan. Anak tiri berdasarkan Pasal 39 KHI ditempatkan dalam hubungan semenda yang dilarang untuk dinikahi, sedangkan anak luar kawin yang diakui secara keperdataan oleh ayah biologisnya, dipandang mempunyai hubungan darah dengan ayahnya, namun bukan hubungan nasab. Pemberian wasiat wajibah kepada anak angkat, orang tua angkat, anak tiri, anak luar kawin, termasuk kerabat yang beragama selain Islam tentu memiliki makna, serta didasarkan pada suatu pemikiran, sehingga rasa

keadilan kepada orang-orang yang dekat dengan pewaris tetapi secara syariat tidak memperoleh bagian waris, serta ahli waris yang memiliki hak atas harta waris, dapat diwujudkan.

Dasar hukum dan pertimbangan yang digunakan hakim dalam pemberian wasiat wajibah berdasarkan penelusuran penulis, tetap mendasarkan pada ketentuan alquran, hadis, serta KHI. Penggunaan dasar hukum disesuaikan dengan perkara yang diajukan para pihak, antara lain:

a. Alquran Surat Al Baqarah ayat 180 "diwajibkan bagi kamu, apabila seorang di antara kamu kedatangan tanda-tanda maut, jika ia meninggalkan harta yang banyak, berwasiat untuk ibu bapak dan karib kerabatnya secara ma'ruf, (ini adalah) kewajiban atas orang-orang yang bertaqwa", digunakan hakim dalam memutus pemberian wasiat wajibah untuk anak angkat serta kerabat yang beragama selain Islam
b. Alquran Surat Al Maidah ayat 32 "… Barangsiapa memelihara kehidupan seorang manusia, maka seakan-akan dia telah memelihara kehidupan semua manusia…", digunakan dalam pemberian wasiat wajibah untuk anak angkat yang masih kecil ketika pewaris meninggal dunia.
c. Hadis Shahiih Muslim kitab wasiat, nomor hadis 3078 tentang maksimal wasiat 1/3 harta peninggalan: Dan telah menceritakan kepadaku Al Qasim bin Zakaria telah menceritakan kepada kami Hunain bin Ali dari Zaidah dari Abdul Malik bin 'Umair dari Mush'ab bin Sa'ad dari Ayahnya dia berkata, "Nabi shallallahu 'alaihi wasallam datang menjengukku, maka saya pun berkata, "Saya telah mewasiatkan hartaku semuanya." Beliau bersabda: "Jangan." Saya berkata lagi, "Bagaimana jika setengahnya?" beliau bersabda: "Jangan." Saya berkata lagi, "Bagaimana jika sepertiganya?" beliau menjawab: "Ya, tidak mengapa. Sepertiga itu sudah banyak." Hadis tersebut digunakan hampir di semua putusan pemberian wasiat wajibah bagi anak angkat, kerabat yang beragama selain Islam, anak tiri, dan anak luar kawin, untuk menegaskan batasan wasiat wajibah yang dapat diperoleh.
d. Ketentuan hukum waris dalam Buku II KHI termasuk Pasal 209 KHI tentang pemberian wasiat wajibah bagi anak angkat atau orang tua angkat yang belum mendapatkan wasiat
e. Buku II MA, Pedoman Pelaksanaan Tugas dan Administrasi Peradilan Agama Buku II Edisi Revisi 2013; khususnya tentang asas egaliter dan asas wasiat wajibah.
f. Kitab Undang Undang Warisan Mesir, digunakan sebagai salah satu pembanding bahwa wasiat wajibah juga dikenal dalam praktik pembagian harta waris di salah satu Negara Islam kontemporer.
g. Fatwa MUI Nomor 11 Tahun 2012 tentang Kedudukan Anak Hasil Zina dan Perlakuan Terhadapnya, digunakan oleh hakim sebagai dasar pemberian wasiat wajibah bagi anak luar kawin yang diakui oleh ayah biologisnya

h. Fatwa MUI No. 5/MUNAS VII/ MUI/9/2005 tentang Kewarisan Beda Agama, menjadi salah satu dasar hukum pemberian wasiat wajibah bagi kerabat yang beragama selain Islam.

Selain dasar hukum yang disebutkan secara tegas dalam dasar pertimbangan putusan, hakim pun melakukan penemuan hukum, baik melalui metode interpretasi maupun analogi, guna mewujudkan keadilan dan kemaslahatan bagi para pihak.

2. Analisis Putusan Pemberian Wasiat Wajibah

a. Pemberian Wasiat Wajibah untuk Anak Luar Kawin

Putusan pemberian wasiat wajibah bagi anak luar kawin yang diakui oleh ayah biologisnya adalah Penetapan Pengadilan Agama Jakarta Selatan No. 0156/Pdt.P/2013/PA JS. Para pemohon adalah pasangan suami istri yang menikah pada tanggal 31 Maret 2013. Maksud permohonan para pemohon adalah untuk memperoleh kepastian hukum terhadap anak kandung mereka yang lahir pada tanggal 2 Maret 2013 (sebelum pernikahan) sebagai anak dari PARA PEMOHON dan karenanya memiliki hubungan keperdataan dengan PARA PEMOHON sebagai orang tua kandung atau biologis dari Anak.

PARA POMOHON pada dasarnya menyatakan mengakui bahwa ANAK DARI PARA PEMOHON adalah benar anak kandung atau anak biologis dari PARA PEMOHON dan berjanji akan melaksanakan kewajibannya sebagai orang tua untuk memelihara, merawat, memberikan kasih sayang dan membesarkan serta memenuhi hak-hak Anak lahir dan batin berdasarkan peraturan perundangan-undangan yang berlaku;

PARA PEMOHON mendalilkan bahwa anak perempuannya telah memperoleh Kutipan Akta Kelahiran No. 171/KLU/DINAS/2013 tertanggal 19 Juli 2013 dari Dinas Kependudukan dan Pencatatan Sipil Provinsi DKI Jakarta, yang mana pada pokoknya menyatakan bahwa anak tersebut adalah anak hanya dari seorang ibu. Mendasarkan pada Putusan Mahakamah Konstitusi Republik Indonesia No. 46/PUU-VIII/2010 tanggal 13 Februari 2012 serta Pasal 3 Undang-Undang No. 23 Tahun 2002 tentang Perlindungan Anak yang berbunyi: "Perlindungan anak bertujuan untuk menjamin terpenuhinya hak-hak anak agar dapat hidup, tumbuh, berkembang, dan berpartisipasi secara optimal sesuai dengan harkat dan martabat kemanusiaan, serta mendapat perlindungan dari kekerasan dan diskriminasi, demi terwujudnya anak Indonesia yang berkualitas, berakhlak mulia, dan sejahtera.", maka PARA PEMOHON memohon agar PA menetapkan anak perempuannya, yang lahir 2 Maret 2013 adalah ANAK DARI PEMOHON dan karenanya memiliki hubungan keperdataan dengan ayah dan ibunya. Selain itu petitum yang dimohonkan adalah memerintahkan kepada Dinas Kependudukan dan Pencatatan Sipil Provinsi DKI Jakarta agar penetapan ini dicatat di Kutipan Akta Kelahiran No. 171/KLU/DINAS/2013 tertanggal 19 Juli 2013 sebagaimana mestinya.

Dalam dasar pertimbangannya, hakim sependapat dengan dalil yang disampaikan oleh PARA PEMOHON bahwa dengan adanya Putusan Mahkamah Konstitusi, maka anak luar kawin memiliki hubungan keperdataan dengan ayahnya dan belum ada penjelasan lebih lanjut tentang pengertian hubungan keperdataan. Namun demikian, hakim menegaskan bahwa dengan adanya Putusan Mahkamah Konstitusi tidak menyebabkan bolehnya hukum Islam dilanggar atau diabaikan. Oleh karenanya, dengan mendasarkan pada Putusan Mahkamah Konstitusi Nomor 46/PUU- VIII/2010, Fatwa Majelis Ulama Indonesia Nomor: 11 Tahun 2012 Tentang Kedudukan Anak Hasil Zina Dan Perlakuan Terhadapnya, Undang-Undang Nomor 39 Tahun 1999 tentang Hak Azasi Manusia, Undang-Undang Nomor 4 Tahun 1979 tentang Kesejahteraan Anak, Undang-Undang Nomor 23 Tahun 2002 tentang Perlindungan Anak, serta peraturan-peraturan lainnya, yang semuanya mempunyai tujuan untuk melindungi anak, kepentingan dan kesejahteraan anak, tidak terkecuali anak luar kawin, maka hakim menetapkan:

1) Menyatakan anak yang bernama ANAK PARA PEMOHON yang lahir pada tanggal 02 Maret 2013 adalah sebagai anak dari hasil hubungan diluar nikah Pemohon I dengan Pemohon II;
2) Menetapkan anak tersebut (ANAK DARI PEMOHON I DAN PEMOHON II) memiliki hubungan keperdataan yang sempurna dengan ibunya;
3) Menetapkan anak pemohon memiliki hubungan keperdataan dengan Pemohon I sebatas kewajiban mencukupi kebutuhan hidup anak tersebut sampai dewasa atau berdiri sendiri dan washiat wajibah maksimal 1/3 bagian;
4) Memerintahkan kepada Para Pemohon untuk menyampaikan penetapan ini kepada Dinas Kependudukan dan Pencatatan Sipil Provinsi DKI Jakarta, untuk dicatat dalam register yang tersedia untuk itu;

Para pemohon dalam permohonannya menghendaki agar anak yang lahir sebelum perkawinan dapat ditetapkan sebagai anak dari para Pemohon dan memiliki hubungan keperdataan dengan ayahnya. Hakim dalam penetapannya memunculkan istilah hubungan keperdataan yang sempurna dan hubungan keperdataan terbatas yang mewajibkan ayah biologis mencukupi kebutuhan hidup anak hingga dewasa serta pemberian wasiat wajibah maksimal 1/3 bagian. Hal tersebut memang sesuai dengan isi Fatwa Majelis Ulama Indonesia Nomor: 11 Tahun 2012 tentang Kedudukan Anak Hasil Zina Dan Perlakuan Terhadapnya, yang menjadi salah satu dasar penetapan hakim.

b. Putusan tentang pemberian wasiat wajibah bagi kerabat yang beragama selain Islam

Terkait dengan besarnya wasiat wajibah, KHI menegaskan bahwa besarnya wasiat wajibah untuk anak angkat adalah maksimal 1/3 dari harta orang tua angkatnya, demikian halnya dengan besarnya wasiat wajibah untuk anak luar

kawin. Hal tersebut berbeda dengan besarnya wasiat wajibah bagi kerabat karena hubungan darah yang memeluk agama selain Islam, yang dalam Buku II MA ditambahkan batasan, bahwa wasiat wajibah tersebut tidak boleh melebihi bagian ahli waris yang sederajat dengannya. Beberapa putusan wasiat wajibah tersebut adalah:

1) Putusan Mahkamah Agung Nomor 16 K/AG/2010 tentang pemberian wasiat wajibah bagi janda pewaris yang beragama selain Islam;
2) Putusan Pengadilan Agama Kabanjahe Nomor 2/Pdt.G/2011/PA.Kbj tentang pemberian wasiat wajibah bagi anak laki-laki pewaris yang beragama selain Islam;
3) Putusan Mahkamah Agung Nomor 402 K/AG/2013 tentang pemberian wasiat wajibah bagi orang tua dan saudara pewaris yang beragama selain Islam;
4) Putusan Mahkamah Agung Nomor 197K/AG/2015 tentang pemberian wasiat wajibah bagi saudara perempuan pewaris yang beragama selain Islam
5) Putusan Mahkamah Agung Nomor 218K/AG/2016 tentang pemberian wasiat wajibah bagi janda dan anak yang beragama selain Islam

Berdasarkan kajian penulis, wasiat wajibah yang diberikan kepada kerabat yang beragama selain Islam, dalam putusan-putusan di atas, adalah sebagai berikut:

1) Wasiat wajibah diberikan kepada mereka yang memiliki hubungan perkawinan atau hubungan darah dengan pewaris namun beragama selain Islam;
2) Penerima wasiat wajibah sebagaimana tersebut dalam ketentuan angka 1) adalah mereka yang berhak mewaris apabila beragama Islam;
3) Wasiat wajibah dapat diberikan apabila belum ada pemberian dari pewaris, baik dalam bentuk hibah atau wasiat;
4) Jumlah maksimal wasiat wajibah adalah 1/3 harta peninggalan setelah dikurangi biaya pengurusan jenazah dan hutang-hutang yang menjadi kewajiban pewaris serta dibatasi dengan bagian waris kerabat tersebut apabila beragama Islam.

Asas egaliter dalam Buku II MA telah memberikan kesetaraan antara ahli waris yang berhak mewaris, dengan kerabat pewaris karena hubungan perkawinan maupun hubungan darah yang beragama selain Islam, dalam memperoleh harta peninggalan pewaris. Ahli waris yang berhak mewaris mendapatkan bagiannya sebagaimana ketentuan *faraidl*, sedangkan kerabat pewaris yang beragama selain Islam mendapatkan wasiat wajibah sebesar bagiannya apabila menjadi ahli waris (beragama Islam) serta tidak melebihi 1/3 bagian.

d. Putusan tentang pemberian wasiat wajibah bagi anak angkat

Putusan pemberian wasiat wajibah kepada anak angkat, lebih banyak

dibandingkan pemberian wasiat wajibah bagi kerabat yang beragama selain Islam. Hal ini wajar, karena pemberian wasiat wajibah bagi anak angkat menjadi salah satu pembaruan hukum kewarisan Islam di Indonesia sejak lahirnya Kompilasi Hukum Islam pada tahun 1991. Beberapa putusan tentang pemberian wasiat wajibah bagi anak angkat antara lain:

1) Putusan Nomor 149/Pdt.G/2009/PTA.Sby tentang pemberian wasiat wajibah sebesar 1/3 harta bagi dua orang anak angkat;
2) Putusan Nomor 0518/Pdt.G/2010/PA.Plg tentang pemberian wasiat wajibah sebesar 1/3 tirkah kepada anak angkat pewaris. Pada putusan ini, selain anak angkat juga terdapat janda, ayah, dan ibu pewaris sebagai ahli waris;
3) Putusan Nomor 485K/AG/2013 tentang pemberian wasiat wajibah bagi anak angkat dan ahli waris pengganti yang beragama selain Islam. Pada putusan ini, pewaris tidak memiliki keturunan, namun meninggalkan dua orang anak angkat. Ahli waris dari pewaris adalah saudara-saudara pewaris yang juga telah meninggal dan meninggalkan keturunan. Sebagian keturunan tersebut beragama Islam dan sebagian lagi beragama selain Islam. Semuanya ditetapkan menerima wasiat wajibah dengan jumlah total wasiat wajibah adalah 1/3 dari harta waris.
4) Putusan Nomor 029/Pdt.G/2014/PTA.Smg tentang pemberian wasiat wajibah sebesar 1/3 harta kepada dua orang anak angkat pewaris
5) Putusan Nomor 26/Pdt.G/2015/PTA.Plg tentang pemberian wasiat wajibah sebesar 1/3 harta kepada anak angkat pewaris
6) Putusan Nomor 44/Pdt.G/2015/PTA.Smg tentang pemberian wasiat wajibah sebesar 1/10 harta kepada dua orang anak angkat pewaris
7) Putusan Nomor 03/Pdt.G/2016/PTA.Jb tentang pemberian wasiat wajibah sebesar 32,55% harta kepada seorang anak angkat pewaris

Anak angkat yang diberikan wasiat wajibah dalam putusan di atas, tidak hanya anak angkat yang diangkat melalui penetapan pengadilan, namun juga pengangkatan anak yang dilakukan berdasarkan *urf* atau adat istiadat. Pada saat pewaris meninggal dunia atau saat terjadinya gugatan pembagian harta waris, terdapat anak angkat yang masih kecil (kurang dari 13 tahun) namun mayoritas anak angkat telah dewasa. Terdapat pula satu putusan yang terdapat dua penerima wasiat wajibah yaitu anak angkat dan keturunan ahli waris yang beragama selain Islam. Dalam putusan ini, hakim tetap konsisten bahwa berapa pun jumlah dan pihak penerima wasiat wajibah, maka wasiat wajibah tetap maksimal 1/3 dari tirkah pewaris.

e. Putusan pemberian wasiat wajibah kepada anak tiri pewaris

Terdapat satu putusan tentang pemberian wasiat wajibah bagi anak tiri yang bahkan diajukan peninjauan kembali. Dalam Putusan Nomor 02/PK/Pdt/2013 hakim menolak peninjauan kembali yang diajukan para pemohon peninjauan kembali yang dulunya adalah para pemohon kasasi/para

tergugat/pembanding. Melalui Putusan Nomor 489K/AG/2011 Mahkamah Agung telah menetapkan pemberian sisa harta pewaris untuk anak tiri (anak bawaan dari istrinya) yang berjumlah 4 orang serta seorang anak angkat. Pada kasus tersebut, awalnya pewaris menikah dengan seorang janda yang memiliki 4 orang anak. Setelah istrinya meninggal. Pewaris kemudian menikah lagi dan mengangkat seorang anak angkat. Hakim menetapkan bahwa pembagian waris secara bertingkat dengan sebelumnya menetapkan bahwa harta yang disengketakan adalah hak dari pewaris, istri pertamanya yang telah meninggal serta istri selanjutnya. Harta waris istri pertama merupakan hak dari pewaris serta 4 orang anaknya, selanjutnya dibagi harta warisan pewaris. Anak tiri serta anak angkat pewaris mendapatkan sisa harta setelah dikurangi bagian janda (istri berikutnya dari pewaris) dengan pembagian sama besar yaitu 1/5 dari sisa harta setelah dikurangi bagian janda. Pada putusan MA tersebut memang tidak disebut tentang wasiat wajibah, namun apabila dikalkulasi jumlah keseluruhan harta yang diterima oleh anak tiri dan anak angkat melebihi 1/3 harta waris pewaris.

Perkembangan penerima wasiat wajibah menunjukkan bahwa hakim telah berupaya menegakkan hukum dan keadilan berdasarkan Pancasila. Keadilan yang berlandaskan pada Ketuhanan Yang Maha Esa, dengan tidak meninggalkan ketentuan syariat, mengedepankan hak asasi manusia, serta memberikan hak dan kesetaraan bagi masing-masing individu, nampak pada perkembangan pihak-pihak yang dapat menerima wasiat wajibah. Hakim telah melakukan upaya penggalian hukum yang bertumpu pada prinsip-prinsip kemaslahatan yang disimpulkan dari alquran dan sunnah. Perbedaan agama tidak lagi menjadi penghalang seseorang mendapatkan harta peninggalan karena kebebasan beragama merupakan salah satu hak asasi yang dijunjung tinggi serta tidak ada paksaan masuk dalam agama Islam pun ditegaskan dalam ayat alquran. Anak tiri yang dipelihara sejak kecil, anak angkat serta anak luar kawin mendapatkan hak sebagaimana anak yang memiliki hubungan nasab dengan pewaris. Para penerima wasiat wajibah adalah mereka yang memiliki hubungan baik dan memiliki hubungan emosional (kasih sayang) dengan pewaris.

IV. Kesimpulan

Perkembangan penerima wasiat wajibah, dalam putusan hakim tetap mengindahkan batasan-batasan wasiat dan wasiat wajibah sebagaimana ketentuan alquran, hadis, dan KHI, yaitu:

1. Jumlah maksimal wasiat wajibah adalah 1/3 harta peninggalan setelah dikurangi biaya pengurusan jenazah dan hutang-hutang yang menjadi kewajiban pewaris;
2. Jumlah tersebut adalah jumlah maksimal wasiat wajibah, yang dapat diterima oleh para penerima wasiat wajibah secara sendiri maupun bersama-sama;
3. Wasiat wajibah dapat diberikan kepada anak angkat, kerabat yang beragama selain Islam (yang berhak mewaris apabila beragama Islam),

anak luar kawin serta anak tiri yang dalam pertimbangan hakim adil atau layak diberikan wasiat wajibah;

4. Khusus untuk kerabat yang beragama Islam, terdapat batasan besarnya wasiat wajibah yaitu sebagaimana bagian warisnya apabila beragama Islam;
5. Wasiat wajibah dapat diberikan apabila belum ada pemberian dari pewaris, baik dalam bentuk hibah atau wasiat.

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QUO VADIS PERATURAN DAERAH BERMUATAN KEAGAMAAN DALAM KEBINEKAAN DAERAH DI INDONESIA

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Abstract

Based on the Law of the Republic of Indonesia Number 23 of 2014 concerning Regional Government, autonomous regions can regulate and manage their own regional government affairs through Regional Regulations based on the aspirations of the people in the Republic of Indonesia. Approaching religious matters, this has become one of the absolute authorities of the central government. The central government can implement itself or delegate authority to vertical agencies in the region through the principle of deconcentration. In carrying out this principle, many regions have implemented Sharia Regional Regulations (Perda) to regulate and manage religious matters in their area. In some regions, Sharia Regional Regulations have been implemented to regulate matters concerning the regional administration which tend to have Islamic nuances even though these regions do not have specific uses of Islamic law. With the diversity of nations and religions or beliefs in each region in Indonesia, the policy is assumed by non-Islamic groups as a discriminatory policy towards other faiths or religions, for example regarding the obligation of women to wear headscarves, the prohibition of going out at night. So, with the existence of these policies, it is feared that it will disrupt the unity in which Indonesia is a country promotes Bhinneka Tunggal Ika and upholds the values of tolerance among religious communities. Therefore, this article will discuss regional sharia regulations and their connection to regional diversity in Indonesia.
Keyword(s): Sharia Regional Regulations, Majority, Minority, Tolerance, Diversity

Abstrak

Berdasarkan Undang-Undang Republik Indonesia Nomor 23 Tahun 2014 Tentang Pemerintahan Daerah, daerah otonomi dapat mengatur dan mengurus urusan pemerintahan daerahnya sendiri melalui Peraturan Daerah berdasarkan aspirasi masyarakat dalam sistem Negara Republik Indonesia. Namun untuk urusan agama, hal ini menjadi salah satu kewenangan absolut Pemerintah pusat. Pemerintah pusat dapat melaksanakan sendiri atau melimpahkan wewenang kepada instansi vertikal yang ada di daerah melalui asas dekonsentrasi. Dalam menjalankan asas tersebut, banyak daerah yang menerapkan Peraturan Daerah (Perda) yang bersifat keagamaan untuk mengatur dan mengurus hal-hal

mengenai keagamaan di daerahnya. Di beberapa daerah, Perda Syariah telah diterapkan guna mengatur urusan mengenai pemerintahan daerah tersebut yang cenderung bernuansa Islami meski daerah tersebut tidak memiliki kekhususan penggunaan hukum Islam. Dengan keberagaman bangsa dan agama atau kepercayaan pada setiap daerah di Indonesia, kebijakan tersebut dirasakan oleh golongan non-Islam sebagai kebijakan yang bersifat diskriminatif terhadap kepercayaan atau agama lain, misalnya mengenai kewajiban perempuan mengenakan jilbab, larangan keluar malam. Sehingga, dengan adanya kebijakan-kebijakan tersebut dikhawatirkan akan memicu terganggunya persatuan dan kesatuan dimana Indonesia adalah negara yang mengedepankan Bhineka Tunggal Ika dan menjunjung tinggi nilai-nilai toleransi antar umat beragama. Oleh karena itu, tulisan ini akan membahas mengenai peraturan daerah yang bersifat Islami serta kaitannya dengan kebinekaan daerah di Indonesia.
Kata Kunci: Peraturan Daerah Syariah, Mayoritas, Minoritas, Toleransi, Bhineka

I. Pendahuluan

1. Latar Belakang

Pasal 18B ayat (1) UUD 1945 menegaskan bahwasanya Negara mengakui dan menghormati satuan-satuan pemerintahan daerah yang bersifat istimewa yang diatur dengan Undang-Undang.[1] Aturan tersebut diimplementasikan ke dalam pembagian wilayah negara Indonesia yang dibagi menjadi beberapa bagian, yang kemudian disebut sebagai Daerah. Daerah tersebut terbagi atas daerah besar dan kecil dengan bentuk dan susunan pemerintahannya ditetapkan dengan Undang-Undang, dengan memandang dan mengingati dasar permusyawaratan dalam sistem pemerintahan negara, dan hak-hak asal-usul dalam daerah-daerah yang bersifat istimewa. Sehingga muncullah daerah-daerah besar dan kecil yang bersifat otonom (*streek* dan *locale rechtsgemeenschappen*) yang dapat mengatur (*regelend*) dan mengurus (*bestuur*) untuk urusan yang telah diberikan kewenangan otonom dan urusan yang merupakan tugas pembantuan dari Pusat atau pemerintah daerah di atasnya.

Prinsip otonomi ini pada awalnya diatur dalam Undang-Undang Desentralisasi Tahun 1903 pada masa kolonial yang membentuk dewan-dewan daerah yang bertanggung jawab atas pengelolaan dan penggunaan anggaran dari pemerintah pusat yang terdiri dari 338 anggota dewan. Sebanyak 223 merupakan pegawai pemerintahan dan 115 orang non-pemerintahan. Rendahnya perwakilan pribumi dalam kursi pemerintahan menyebabkan aturan ini diamendemen dan dibentuklah Undang-Undang Pembaruan Pemerintah Tahun 1922 (*Bestuurshervormingswet* 1922) dengan tujuan agar partisipasi pribumi yang menjadi wakil daerah dapat meningkat. Aturan ini kemudian melahirkan Ordonansi Provinsi Nomor 78 Tahun 1924, Ordonansi Kabupaten Nomor 79

[1] Indonesia, UUD 1945, Undang-Undang Dasar 1945, Pasal 18B ayat (1)

Tahun 1924, dan Ordonansi Kotapraja Nomor 365 Tahun 1926 yang menyebabkan lahirnya tiga Provinsi baru yakni Jawa Barat pada tanggal 1 Januari 1926, Jawa Timur pada tanggal 1 Januari 1929, dan Jawa Tengah pada tanggal 1 Januari 1930. Provinsi-provinsi yang baru dibentuk tersebut masing-masing memiliki Dewan Provinsi yang membawahi kabupaten (*regentschaps*) yang diwakili oleh seorang Dewan Kabupaten yang bertugas untuk memimpin serta mengelola daerahnya di bawah pengawasan seorang Dewan Provinsi.

Sayangnya prinsip ini pupus pada masa-masa menjelang kemerdekaan (1942-1945) saat Indonesia dijajah oleh Jepang di mana desentralisasi dihapuskan yang kemudian tugas dan amanat harus sesuai dengan garis komando pusat dari perwakilan Kekaisaran Jepang yang berada di Indonesia. Desentralisasi hidup kembali di mana pemerintah daerah berhak memiliki kewenangan untuk mengurus daerahnya melalui Undang-Undang Pokok Nomor 22 Tahun 1948 Tentang Pemerintahan Daerah. Undang-Undang ini pertama kalinya mengatur mengenai susunan dan kedudukan pemerintah daerah di Indonesia. Daerah terbagi atas daerah otonom biasa dan daerah otonom khusus (daerah istimewa). Daerah istimewa adalah daerah kerajaan/kesultanan dengan kedudukan sebagai daerah swapraja yang telah ada sebelum Indonesia merdeka (*zelfbesturende landschappen*) yang memiliki kekuasaan dalam dinasti pemerintahannya. Selanjutnya aturan mengenai desentralisasi diatur dalam Undang-Undang Nomor 1 Tahun 1957 tentang Pokok-Pokok Pemerintahan Daerah dimana pemerintah daerah memiliki tugas dan wewenang yang tidak menjadi urusan pemerintah pusat. Pemerintah daerah terbagi atas legislatif (Dewan Perwakilan Rakyat Daerah) dan eksekutif (Dewan Pemerintah Daerah). Pada periode ini lahirlah Daerah Swapraja yang merupakan kelanjutan dari sistem pemerintahan daerah pada masa Hindia Belanda dan Pemerintahan Negara Federal RIS. Namun, aturan ini tidak sempat diterapkan karena lahirnya Dekrit Presiden Tahun 1959. Untuk mengisi kekosongan dalam pemerintahan daerah, Presiden Ir. Soekarno mengeluarkan Penetapan Presiden Nomor 6 Tahun 1959 dan Nomor 5 Tahun 1960 dimana pemerintah daerah diberi kewenangan sebagai penguasa tunggal. Sebelum masa akhir jabatannya, Ir. Soekarno mengesahkan Undang-Undang Nomor 18 Tahun 1965 yang memiliki prinsip otonomi daerah adalah otonomi riil dan seluas-luasnya.

Tonggak kekuasaan berpindah dari era orde lama menuju orde baru. Ketetapan MPRS No. XXI/MPRS/1966 yang dibuat menganggap bahwa Undang-Undang sebelumnya yakni Undang-Undang Nomor 18 Tahun 1965 perlu ditinjau kembali sebab memberikan otonomi yang seluas-luasnya kepada daerah yang dikhawatirkan akan membuat kondisi politik menjadi tidak stabil. Dengan demikian, pada era ini prinsip desentralisasi dijalankan dengan kurang maksimal meskipun ada. Dalam mengatur Undang-Undang Pemerintah Daerah, secara umum Indonesia terbagi atas satu macam Daerah Otonom sebagai pelaksanaan asas desentralisasi dan Wilayah Administrasi sebagai pelaksanaan asas dekonsentrasi.

Angin segar datang pada tahun 1995 saat pemerintah mengeluarkan kebijakan yang menjadi tonggak dalam pelaksanaan otonomi daerah yakni Peraturan Pemerintah Nomor 8 Tahun 1995 dimana Pemerintah menyerahkan sebagian urusan kepada 26 Daerah Tingkat II Percontohan. Tonggak ini terus dilanjutkan pada masa setelah orde baru dengan dikeluarkannya Undang-Undang Nomor 22 Tahun 1999 yang menganut asas desentralisasi di mana Pemerintah Pusat memegang penuh 6 (enam) hal atas daerah yakni:

a. Politik luar negeri;
b. Pertahanan
c. Keamanan;
d. Peradilan;
e. Moneter dan fiskal;
f. Agama;

Seiring dengan pergantian kekuasaan, aturan mengenai desentralisasi diubah menjadi Undang-Undang Nomor 32 Tahun 2004 dimana desentralisasi yang diatur dalam aturan ini adalah penyerahan wewenang pemerintahan oleh Pemerintah kepada daerah otonom untuk mengatur dan mengurus urusan pemerintahan dalam sistem Negara Kesatuan Republik Indonesia.[2]

Selanjutnya aturan diperbarui ke dalam Undang-Undang Nomor 23 Tahun 2014 Tentang Pemerintahan Daerah. Urusan pemerintahan dalam regulasi ini menyatakan bahwa urusan pemerintahan terdiri atas 1) absolut; 2) konkuren; dan 3) umum. Absolut adalah urusan pemerintahan yang sepenuhnya menjadi kewenangan Pemerintah Pusat. Terdiri atas kewenangan atas pertahanan, keamanan, agama, yustisi, politik luar negeri, dan kebijakan moneter & fiskal. Dalam penyelenggaraan urusan pemerintahan absolut, pemerintah pusat dapat melaksanakan sendiri atau melimpahkan wewenang kepada Instansi Vertikal yang ada di Daerah atau Gubernur sebagai wakil Pemerintah Pusat berdasarkan asas dekonsentrasi. Urusan Konkuren adalah Urusan Pemerintahan yang dibagi antara Pemerintah Pusat dan Daerah Provinsi dan Kab/Kota. Urusan pemerintahan konkuren yang diserahkan ke daerah menjadi dasar pelaksanaan Otonomi Daerah. Sedangkan untuk urusan Umum adalah Urusan Pemerintahan yang menjadi kewenangan Presiden sebagai kepala pemerintahan. Berdasarkan uraian tersebut, bahan diskusi dalam paper ini adalah urusan pemerintahan absolut yang dimiliki oleh Pemerintah Pusat yang dilimpahkan kepada pemerintah daerah yakni dalam urusan agama.

Agama menjadi salah satu dari enam urusan pemerintah yang absolut yang diatur dalam Undang-Undang Nomor 23 Tahun 2014. Dalam urusan absolut tersebut Pemerintah pusat dapat melaksanakan sendiri atau melimpahkan wewenang kepada instansi vertikal yang ada di daerah melalui asas dekonsentrasi. Dalam menjalankan asas tersebut, dengan adanya lembaga

[2] Indonesia, UU No. 32 Tahun 2004, Undang-Undang Tentang Administrasi Pemerintahan, Pasal 1 angka 7

eksekutif (Bupati) dan legislatif (DPRD), banyak daerah yang menerapkan Peraturan Daerah (Perda) yang bersifat keagamaan untuk mengatur dan mengurus hal-hal mengenai keagamaan di daerahnya. Misalnya Perda Syariah yang diatur di daerah yang mayoritas beragama Islam, Perda Injil yang dibuat di daerah yang mayoritas penduduknya beragama Kristen, dan Perda Nyepi yang ada di Bali. Hal ini menarik perhatian kami sebagai Penulis dalam menelisik Perda Syariah yang mengatur mengenai keagamaan di mana itu merupakan kewenangan absolut Pemerintah Pusat namun dengan asas dekonsentrasi, daerah berwenang dalam membentuk Peraturan Daerah khusus keagamaan.

2. Identifikasi Masalah dan Batasan Penelitian

Keberadaan beberapa peraturan daerah yang menonjolkan suasana kebatinan suatu agama tertentu, meskipun sporadis, tetapi cukup kuat untuk membentuk opini publik bahwa suatu agama tertentu tengah diarusutamakan. Dampak dari opini publik yang demikian adalah timbulnya perasaan akan perlakuan yang tidak setara di antara umat beragama, terjadi opini bipolaritas antara kelompok agama mayoritas dan minoritas. Dalam interaksi kebangsaan dan kenegaraan yang dibalut Bhinneka Tunggal Ika, pola perilaku sosial yang sarat akan kecemburuan sosial seperti itu berpotensi memupuk disintegrasi kebangsaan yang telah lama dirajut oleh keberagaman bangsa Indonesia.

Sehubungan dengan keberadaan Islam sebagai agama yang paling banyak dianut oleh bangsa Indonesia, fokus penelitian ini akan tertuju pada bagaimana keberadaan perda bernuansa syariah berdampak terhadap pola interaksi kebangsaan Indonesia dan bagaimana seharusnya perda bernuansa keagamaan secara umum yang ideal yang tidak mencederai semangat Bhinneka Tunggal Ika yang menjadi salah satu dari Empat Konsensus Kebangsaan Indonesia.

3. Metode dan Manfaat Penelitian

Penelitian ini sepenuhnya diselenggarakan dengan pendekatan yuridis-normatif. Metode yang digunakan dalam penelitian ini adalah studi literatur yang meliputi sumber primer berupa peraturan perundang-undangan dan sumber sekunder berupa baik pendapat-pendapat ahli yang dikutip dari buku dan berbagai sumber lainnya. Penelitian ini juga berbasis kepada penelusuran media untuk menggali pengayaan fakta empiris terhadap substansi yang akan dieksplorasi melalui penelitian ini. Penelusuran media dilakukan dengan penuh kehati-hatian dengan hanya mengutip sumber media yang dapat divalidasi secara faktual demi menjamin nilai validitas penelitian.

Penelitian ini akan berdampak terhadap pengayaan gagasan mengenai bagaimana kekhasan daerah tetap dapat diakomodasi dengan memperhatikan dan mengarusutamakan prinsip Bhinneka Tunggal Ika. Hasil penelitian ini, meski butuh pengembangan lanjutan, juga dapat menjadi kerangka teknis awal untuk bagaimana agar peraturan daerah dapat disusun secara ideal dan seimbang antara menjamin kekhasan daerah dan persatuan nasional.

II. Pembahasan

1. Peraturan Daerah Bernuansa Syariah

Peraturan daerah yang bersifat syariah dapat didefinisikan sebagai aturan yang berhubungan dengan norma-norma agama Islam, baik langsung dan tidak langsung yang dibuat oleh Pemerintah Daerah. Pemerintah Daerah memiliki kewenangan untuk mengatur tingkah laku masyarakat melalui aturan yang dibuat. Peraturan tersebut memiliki standar ideal berdasarkan nilai-nilai yang dianut di masyarakat. Beberapa golongan pemerintah berpendapat bahwa tingkah laku yang buruk di masyarakat dapat diminimalisasi dengan menggunakan Perda Syariah seperti ketidakpatuhan dan ketidakjelasan. Sejak mengalami perubahan, Undang-Undang nomor 5 Tahun 1974 memiliki pengaturan mengenai desentralisasi dan dekonsentrasi selain adanya hal yang mengatur mengenai tugas pembantuan yang diberikan oleh Pemerintah Pusat kepada Pemerintah Daerah.

Dekonsentrasi menjadi penghubung antara hubungan Pemerintah Pusat dengan daerah. Berdasarkan Pasal 1 huruf f Undang-Undang nomor 5 Tahun 1974, dekonsentrasi memiliki definisi "…pelimpahan wewenang dari Pemerintah atau Kepala Wilayah atau Kepala Instansi Vertikal tingkat atasnya kepada pejabat-pejabat di daerah." Jadi, hubungan antara Pemerintah Pusat dengan daerah masih ada dan dapat terkontrol. Hal ini dikarenakan pejabat-pejabat daerah hanya dapat menjalankan berdasarkan wewenang yang diberikan. Frasa pejabat-pejabat daerah ini juga mengartikan bahwa yang diberikan kewenangan meliputi pejabat pada seluruh tingkatan daerah. Sehingga, walaupun ada otonomi daerah yang dilimpahkan kepada daerah, namun bukan berarti pelaksanaan otonomi daerah dapat dilaksanakan seluas-luasnya tanpa adanya pengawasan. Sebab bagaimana pun juga, kewenangan yang dimiliki melalui asas ini diberikan berdasarkan pelimpahan bukan pemberian.

Perubahan undang-undang ini menjadi Undang-Undang Nomor 22 Tahun 1999 tentang Pemerintahan Daerah menjadi awal hilangnya kewenangan Pemerintah Pusat untuk mengontrol tindakan pelaksanaan otonomi daerah pada tingkat kabupaten dan kota. Sebab, otonomi daerah tetap diberikan oleh Pemerintah Pusat kepada daerah seluas-luasnya. Sementara, hal yang menjembatani antara Pemerintah Pusat dengan daerah hanyalah asas dekonsentrasi. Mulai dengan diberlakukannya asas ini, dekonsentrasi hanya diberikan Pemerintah Pusat kepada Pemerintah Daerah Provinsi kepada Gubernur. Hal ini berdasarkan Pasal 8 undang-undang tersebut. Akibatnya, hubungan Pemerintah Pusat dengan Pemerintah Daerah Kabupaten dan Kota menjadi terputus.

Berubahnya pengaturan mengenai Pemerintah Daerah ini menjadi awal berkembangnya peraturan daerah yang bersifat syariah. Peraturan daerah yang bersifat syariah dapat dikategorikan ke dalam 7 (tujuh) jenis, yaitu[3]:

1. Peraturan Daerah terkait moralitas, larangan melakukan tindakan yang diharamkan dalam Islam. Seperti perzinahan, larangan meminum minuman keras, dan sebagainya;
2. Peraturan Daerah terkait zakat, infaq, dan shadaqah;
3. Peraturan Daerah terkait pendidikan Islam, seperti madrasah diniyah;
4. Peraturan Daerah terkait pengembangan ekonomi Islam, seperti Baitul Mal wat Tamwil;
5. Peraturan Daerah terkait keimanan muslim, peraturan ini mengatur larangan adanya sekte-sekte dalam agama Islam;
6. Peraturan Daerah terkait busana muslim, seperti kewajiban mengenakan hijab dan atribut pakaian Islam lainnya;
7. Peraturan Daerah lain-lain, seperti penyambutan ramadan, pelayanan haji, dan sebagainya.

Peraturan Daerah bersifat syariah di Indonesia dibentuk berdasarkan keinginan untuk membentuk adanya masyarakat yang dianggap baik secara sosial masyarakat daerah tersebut. Meskipun pada kenyataannya, Peraturan Daerah yang ada dapat mendiskriminasi golongan agama lain. Sehingga, pada penerapan otonomi daerah seluas-luasnya yang diberikan oleh Undang-Undang Nomor 22 Tahun 1999 tentang Pemerintahan Daerah menjadikan dasar legitimasi bagi pemerintahan daerah untuk membentuk peraturan daerah yang bersifat primordial.

Indonesia memiliki 422 Peraturan Daerah yang bersifat syariah[4]. Kesemuanya dapat dikategorikan sebagai Peraturan Daerah yang dikeluarkan oleh eksekutif dan legislatif di daerah tersebut dan juga peraturan lain yang diterapkan di daerah tersebut. Seperti Peraturan Bupati/Walikota dan Instruksi Kepala Daerah. Peraturan Daerah yang tersebar di Indonesia lebih banyak mengatur mengenai moralitas. Bukan hanya dibentuk oleh Bupati atau Walikota, Peraturan Daerah bersifat syariah juga didapati pada aturan setingkat Kecamatan. Pada Kecamatan Hulu Gurung, Kabupaten Kapuas Hulu, Kalimantan Barat, juga didapati adanya peraturan yang melarang untuk menjual dan mengonsumsi minuman keras[5]. Terhadap pihak yang melanggar akan dikenakan sanksi berupa denda. Adanya kebijakan tersebut bukan menjadi suatu hal yang ditentang oleh kepala adat di daerah tersebut. Kebijakan tersebut didukung oleh para kepala adat.

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[3] Dani Muhtada, "Perda Syariah di Indonesia: Penyebaran, Problem, dan Tantangannya," (disampaikan dalam orasi ilmiah Dies Natalis VII Fakultas Hukum Universitas Negeri Semarang, Semarang, 2014), hal. 2

[4] *Ibid.*

[5] Muhammad Alim, "Perda Bernuansa Syariah dan Hubungannya dengan Konstitusi," *Jurnal Hukum 1,* (Januari 2010), hal. 134

Setelah adanya peraturan-peraturan tersebut, tentu bukan suatu hal mudah untuk menerapkan Peraturan Daerah yang bersifat syariah di tengah keberagaman masyarakat Indonesia. Tentu akan ada konflik agama yang terjadi dalam penerapan aturan tersebut. Permasalahan yang terjadi di masyarakat dapat digolongkan ke dalam tiga kategori[6], yaitu diskriminasi, kualitas aturan yang rendah, dan sulitnya penerapan di masyarakat.

Peraturan Daerah yang bersifat diskriminatif dapat dilihat dari adanya tendensi dalam menyudutkan pihak tertentu. Umumnya, pihak yang didiskriminasi adalah pihak minoritas pada daerah tersebut. Diskriminasi bukan berarti dialami oleh golongan masyarakat tertentu. Diskriminasi juga dapat terjadi pada gender tertentu seperti perempuan. Contoh yang terjadi adalah pada Peraturan Daerah Provinsi Gorontalo Nomor 10 Tahun 2003[7] yang pada Pasal 6 ayat (1) pada intinya melarang perempuan untuk keluar pada jam 12 malam sampai jam 4 pagi tanpa adanya mahram. Pada ayat selanjutnya juga terdapat keharusan bagi perempuan untuk mengenakan pakaian yang sopan. Pasal tersebut menyudutkan perempuan walaupun pada dasarnya hal tersebut dimaksudkan untuk menjaga perempuan dari pelecehan seksual. Hal ini juga dapat membatasi perempuan dalam beraktivitas, seperti apabila seorang perempuan mendapat bagian kerja pada malam hari. Dengan adanya pelarangan perempuan keluar malam tanpa mahram ini dapat menghambat pekerjaan orang tersebut.

Polemik lain yang terjadi adalah kualitas aturan yang rendah. Kualitas yang rendah ini bisa dicontohkan dengan beberapa fakta. Peraturan Daerah bersifat syariah yang dimiliki suatu daerah bisa dijiplak oleh daerah lain apabila memiliki perihal yang sama[8]. Misalnya dalam Pasal 2 Peraturan Daerah tentang Zakat Nomor 2 Tahun 2010 untuk Kota Padang, Peraturan Daerah Kabupaten Purwakarta Nomor 3 Tahun 2007, dan Peraturan Daerah Kota Cimahi Nomor 2 Tahun 2008. Persoalan lain misalnya ketika peraturan tersebut hanya unsur-unsur simbolik dalam Islam dan bukan substansi. Seperti adanya mobil-mobil angkutan umum dengan tulisan di kaca belakang "*Laa Ilaha Illallah*" untuk menandakan bahwa mobil tersebut berasal dari Bulukumba. Hal-hal tersebut menandakan pembuat aturan belum memahami bagaimana pembuatan peraturan yang baik dan benar serta rendahnya kualitas peraturan daerah yang ada.

Hal terakhir yang menjadi permasalahan adalah sulitnya penerapan di masyarakat. Polemik ini bukan hanya dipengaruhi oleh masyarakatnya, tetapi juga penegak aturannya. Pemerintah Daerah tidak serius dalam menerapkan aturan yang sudah ada di daerahnya[9]. Peraturan Daerah yang ada juga belum

[6] Dani Muhtada, *Ibid,* hal.
[7] *Ibid,* hal. 7
[8] *Ibid,*
[9] Ihsan Ali-Fauzi dan Saiful Mujani, *eds.*, *Gerakan Kebebasan Sipil: Studi dan Advokasi Kritis atas Perda Syari'ah* (Jakarta: Nalar, 2009), hal. 98

memiliki laporan atas efektivitas pelaksanaan aturan tersebut. Akhirnya, Peraturan Daerah yang bersifat syariah hanya menjadi dokumen pemerintahan daerah.

Tabel 1. Beberapa Perda Syariah di Indonesia

No	Jenis Perda	Daerah Pelaksana	Kategori Syariah yang Diejawantahkan
1	Perda 24/2004 Tentang Pencegahan, Penindakan, dan Pemberantasan Maksiat	Padang Pariaman	Akhlak dengan manifestasi hokum ta'zir
2	Perda 10/2001 Tentang Wajib Baca Quran Untuk Siswa dan Pengantin	Solok	Akhlak
3	Perda 6/2002 Tentang Wajib Berbusana Muslim	Solok	Akhlak
4	Peda 11/2001 Tentang Pemberantasan dan Pencegahan Maksiat	Sumatera Barat	Akhlak
5	Instruksi Walikota Tentang Pemakaian Busana Muslim	Kota Padang	Akhlak
6	Peraturan Wajib Busana Muslim	Pasaman Barat	Akhlak
7	Perda 24/2000 Tentang Pelarangan Pelacuran	Kota Bengkulu	Akhlak
8	Instruksi Walikota 3/2004 Tentang Program Peningkatan Keimanan	Kota Bengkulu	Akhlak

9	Perda 8/2005 Tentang Pemberantasan Maksiat	Kota Tangerang	Akhlak
10	Perda 13/2002 Tentang Pemberantasan Maksiat	Sumatera Selatan	Akhlak
11	Perda 2/2004 Tentang Pemberantasan Maksiat	Kota Palembang	Akhlak
12	Edaran Walikota Tanggal 29 Agustus 2003 Tentang Wajib Jilbab Untuk Siswa	Kota Cianjur	Akhlak
13	Program Gerakan Pemberdayaan Masyarakat Berakhlaqul Kharimah	Kabupaten Cianjur	Penerapan Syariah Islam secara utuh dengan pendekatan akhlaq
14	Perda 6/2000 Tentang Kesusilaan. Sedang dibentuk tim kajian Perda Penerapan Syariah Islam	Garut	Penerapan Syariah Islam secara utuh dengan pendekatan akhlak
15	Surat Edaran Bupati Tahun 2001 Tentang Peningkatan Kualitas Keimanan dan Ketakwaan	Tasikmalaya	Akhlaq
16	Surat Edaran Bupati Nomor 450/2002 Tentang Pemberlakuan Syariat Islam	Pamekasan	Penerapan Syariat Islam secara utuh
17	Perda 14/2001 Tentang	Jember	Akhlak dengan manifestasi hokum ta'zir

	Penanganan Pelacuran		
18	Perda 7/1999 Tentang Prostitusi	Indramayu	Akhlak
19	Surat Edaran Bupati Tentang Wajib Busana Muslim dan Baca Quran untuk Siswa	Indramayu	Akhlak
20	Perda 6/2002 Tentang Ketertiban Sosial, Pemberantasan Pelacuran, Pengaturan Pakaian, dan Pemberantasan Kumpul Kebo	Kepulauan Riau	Akhlak
21	Perda 10/2003 Tentang Pencegahan Maksiat	Gorontalo	Akhlak
22	Perda 12/2003 Jilbab bagi PNS dan Penambahan Jam Pelajaran Agama Islam	Gowa	Akhlak
23	Perda 4/2003 Tentang Busana Muslim dan Baca Al-Quran Untuk Siswa dan Calon Pengantin	Bulukumba	Akhlak
24	Gerakan Bebas Buta Aksara Quran	Kabupaten Maros	Akhlak
25	Peraturan Desa Padang, Bukukumba Tentang Penganiayaan	Kabupaten Bulukumba	Pidana Qishash
26	Peraturan Desa Mengenai Zina,	Idem	Pidana Hudud

	Qadraf, Khamr, dan Judi		
27	Perda Zakat, Sedekah, dan Infaq	Lombok Timur	Fiqih Ibadah

Sumber: Gatra No. 25/2006; Tempo 14 Mei 2006; Retno Hanani 2006.

2. Pemaknaan Syariah Berdasarkan Hukum Islam

Kata syariat di dalam Al-Quran dapat ditemukan di dalam empat surat yakni "*syara'a"* yaitu di dalam Surat al-Syura ayat 13 dan 21 dan "*syir'atan*" dan "*syari'ah*" yang terdapat di dalam Surat Al-Maidah ayat 48 dan Surat Al-Jatsiyah ayat 18. Kata syariat memiliki makna sumber air yang merupakan Pelepas dahaga. Namun, para ahli Bahasa mengemukakan makna lain yakni *hadyulahhi* (hidayah atau petunjuk Allah). Berdasarkan hal tersebut maka empat ayat di atas mengandung dua prinsip universal yaitu menegakkan eksistensi agama dan tidak ada pembedaan di dalamnya. Pemaknaan ini sangat jelas terdapat pada ayat 48 Surat Al-Maidah yang menegaskan bahwa Tuhan menjadikan *syir'ah* dan *Minhaj* bagi setiap umat. Pemaknaan ini terkandung dalam Surat Al-Jatsiyah ayat 18 yang menetapkan bahwa syariat merupakan lawan dari hawa nafsu.

Artinya syariat adalah kaidan dan prinsip-prinsip yang bertentangan dengan hawa nafsu dan *al-nazwah*. Kedua, syariat sebagai hokum yang disimpulkan dari sederet *nas* melalui proses ijtihad. Ijtihad dilakukan dengan mengidentifikasi makna linguistik yang terkandung dalam *nas*, menunjukkan sebab-sebab hukum (*al-'ilal*) yang menghubungkan antara realitas dengan hukum yang terkandung di dalam *nas*. Misalnya, melalui proses nalar terhadap ayat-ayat di dalam Surat Al-Baqarah ayat 173, Al-Maidah ayat 3, dan Al-Anam ayat 119. Ketiga, syariat sebagai sekumpulan hukum rinci yang termuat di dalam fiqh dan disimpulkan berdasarkan prinsip dan kaidah umum, *qiyas*, pertimbangan *al-'urf*, dan *al-maslahah.* Syariat dalam kelompok ini berlaku secara temporal dan dalam ruang lingkup waktu yang terbatas.[10]

3. Prinsip Perda Syariah yang Baik

Perda Syariah yang baik harus memiliki prinsip-prinsip sebagai berikut:

i. Non-Discriminative

Perda Syariah yang diterapkan di suatu wilayah harus memegang prinsip *non-discriminative* dimana sebaiknya hanya mengatur kepada umat

[10] Asmuni Mth, *Menimbang Signifikansi Perda Syariat Islam (Sebuah Tinjauan Perspektif Fikih*), Al-Mawarid Edisi XVI Tahun 2006, hal. 184.

muslim saja dan tidak dikenai terhadap non-muslim. Seperti misalnya pada Perda Provinsi Gorontalo Nomor 10 Tahun 2003 Tentang Pencegahan Maksiat yang mendiskriminasi perempuan sebagai obyek peraturan. Dalam Pasal 6 Perda mengatur bahwa perempun dilarang berada di luar rumah tanpa muhrim pada jam 12 malam hingga 4 pagi. Selain itu pasal tersebut juga mewajibkan perempuan untuk berpakaian sopan di tempat umum. Aturan ini hanya berlaku bagi perempuan dan terdapat sebagian perempuan yang merasa dirugikan dengan adanya Peraturan ini sebab beberapa dari mereka ada yang pulang kerja pada saat jam tersebut. Seharusnya Perda diberlakukan kepada semua tanpa melihat status dan gender seseorang. Pembuat kebijakan perlu menghindari peraturan-peraturan daerah yang bersifat diskriminatif sebab dikhawatirkan akan menumbuhkan potensi konflik dan ketegangan di tengah-tengah masyarakat.

ii. *Depth Research*

Perda Syariah harus dibuat dan disusun melalui kajian yang mendalam untuk melihat kebutuhan masyarakat akan adanya aturan tersebut dan efektifitas yang terjadi dalam lingkungan masyarakat apabila peraturan tersebut diterapkan. Masyarakat harus diberikan kesempatan yang cukup untuk memberikan gagasan, saran, aspirasi, ide, dan sebagainya sebelum Perda Syariah tersebut disahkan. Kajian ini juga meliputi efektivitas dan efisiensi aturan tersebut. Kajian ini harus dilakukan agar Perda Syariah dapat diimplementasikan secara efektif dan masyarakat dapat memperoleh manfaat dari keberlakuan aturan tersebut.

iii. *Participation from Public*

Partisipasi dari masyarakat sangat penting guna mengetahui isi dari aturan tersebut, mengoreksi, memberi saran, gagasan, ide, dan aspirasi agar aturan yang dibuat dapat sejalan dan tidak terhambat dalam pelaksanannya karena hakikatnya aturan yang dibuat tersebut merupakan keinginan yang berasal dari masyarakat sehingga aturan tersebut dapat berjalan secara efektif karena masyarakat menilai bahwa aturan tersebut sesuai dengan dirinya dan tidak mengurangi hak-hak yang seharusnya ia miliki.

iv. *Know the Impact*

Perda Syariah yang dibuat harus memuat aspek filosofis, sosiologis, dan yuridis dari adanya pemberlakuan sebuah aturan. Pembentukan peraturan perundang-undangan harus dilakukan berdasarkan pada asas Pembentukan Peraturan Perundang-undangan yang baik, yang meliputi: [11]

[11] Indonesia, UU No. 12 Tahun 2011, UU Tentang Pembentukan Peraturan, Pasal 5

a. kejelasan tujuan;
b. kelembagaan atau pejabat pembentuk yang tepat;
c. kesesuaian antara jenis, hierarki, dan materi muatan;
d. dapat dilaksanakan;
e. kedayagunaan dan kehasilgunaan;
f. kejelasan rumusan; dan
g. keterbukaan

Salah satu asas di atas yaitu **asas dapat dilaksanakan** yang memiliki arti bahwa setiap Pembentukan Peraturan Perundang-undangan harus memperhitungkan efektivitas Peraturan Perundang-undangan tersebut di dalam masyarakat, baik secara **filosofis, sosiologis, maupun yuridis.**[12] Landasan filosofis merupakan pertimbangan atau alasan yang menggambarkan bahwa peraturan yang dibentuk mempertimbangkan pandangan hidup, kesadaran, dan cita hukum yang meliputi suasana kebatinan serta falsafah bangsa Indonesia yang bersumber dari Pancasila dan Pembukaan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945. Landasan sosiologis merupakan pertimbangan atau alasan yang menggambarkan bahwa peraturan yang dibentuk untuk memenuhi kebutuhan masyarakat dalam berbagai aspek. Landasan sosiologis sesungguhnya menyangkut fakta empiris mengenai perkembangan masalah dan kebutuhan masyarakat dan negara. Sedangkan landasan yuridis merupakan pertimbangan atau alasan yang menggambarkan bahwa peraturan yang dibentuk untuk mengatasi permasalahan hukum atau mengisi kekosongan hukum dengan mempertimbangkan aturan yang telah ada, yang akan diubah, atau yang akan dicabut guna menjamin kepastian hukum dan rasa keadilan masyarakat.

v. Implementation Readiness by Government

Pemberlakuan Perda Syariah tidak akan berjalan dengan baik jika tidak didukung dengan infrastruktur yang baik, anggaran yang cukup, serta dukungan penuh dari *stakeholders* terkait. Dengan demikian, Pemerintah harus siap sebelum aturan tersebut disahkan n agar peraturan tersebut dapat berlaku secara efektif.

III. Penutup

1. Kesimpulan

Indonesia merupakan negara yang besar yang diisi oleh berbagai ragam kelompok masyarakat. Kelompok masyarakat itu disusun oleh kelompok-kelompok agama, kelompok-kelompok etnis, hingga kelompok-kelompok ras yang berbeda. Beragam kelompok masyarakat tersebut yang tersebar dari Sabang sampai Merauke memiliki konsekuensi logis yang fundamental terhadap sistem

[12] Indonesia, UU No. 12 Tahun 2011, UU Tentang Pembentukan Peraturan, Penjelasan Pasal 5

hukum nasional, yakni bahwa keberadaan sistem hukum nasional yang terpusat dan seragam tidak mampu mengakomodasi kebutuhan kelompok-kelompok tersebut yang tidak seragam. Ihwal aspek geografis pun sering kali menentukan khasnya kebutuhan daerah atas suatu produk hukum sebagai dasar dari setiap tindakan pemerintahan, termasuk pemerintahan daerah. Pemerintah daerah dan pemerintah pusat pada akhirnya perlu berbagi wewenang guna menciptakan suatu kerangka hukum yang mampu mengakomodasi kekhasan daerah.

Namun, di sisi lain, pemerintah pusat juga harus memegang teguh kedudukannya sebagai representasi tertinggi dari negara yang secara langsung bertanggung jawab atas eksistensi negara. Eksistensi negara Indonesia hari ini diwujudkan melalui simbol-simbol negara yang jamak dikenal sebagai Empat Konsensus Dasar Kebangsaan Indonesia: Pancasila, UUD NRI 1945, NKRI, dan Bhinneka Tunggal Ika. Artinya, kekhasan daerah yang diwujudkan melalui pembagian wewenang hukum antara pemerintah pusat dan daerah harus dikawal sedemikian rupa konsensus dasar kebangsaan dasar tersebut tetap dan terus diarusutamakan, salah satunya ialah Bhinneka Tunggal Ika atau Persatuan dalam Keberagaman. Secara sederhana, kekhasan daerah yang beragam tersebut harus dibingkai sedemikian rupa agar tetap mencerminkan persatuan nasional.

Realitas historis kebangsaan Indonesia dalam upaya menyejajarkan akomodasi terhadap kekhasan daerah dan persatuan nasional sejatinya sudah berjalan begitu panjang sejak Era Kolonial hingga Era Reformasi hari-hari ini. Salah satu tonggak penting dari upaya tersebut ialah Undang-Undang Nomor 22 Tahun 1999 yang secara tegas membuat suatu garis demarkasi antara kewenangan pusat dan daerah. Kewenangan pemerintah pusat dengan terang jelas disebutkan meliputi enam bidang: Politik Luar Negeri, Pertahanan, Keamanan, Peradilan, Moneter dan Fiskal, serta Agama. Kewenangan ihwal agama pada hari-hari ini mulai kabur dan sering menjadi titik berangkat perdebatan ihwal integrasi kebangsaan.

Pasalnya, ada suatu kesan yang menggejala di publik bahwa negara melakukan pembiaran terhadap pengarusutamaan agama tertentu, dalam hal ini Islam sebagai agama yang mayoritas dianut di Indonesia. Pembiaran tersebut terjadi dalam bentuk tidak adanya evaluasi dari pemerintah pusat terhadap peraturan-peraturan daerah yang bernuansa syariah dan tampak diskriminasi terhadap kelompok selain Islam. Hal ini kemudian menjadi ancaman yang nyata terhadap integrasi kebangsaan negara Indonesia. Pada pokoknya, keberadaan peraturan daerah yang bernuansa keagamaan tidak salah sepanjang juga tidak bersifat memaksa dan diskriminatif terhadap kalangan selain Islam. Setidaknya ada lima prasyarat yang harus dilalui oleh suatu rancangan peraturan daerah bernuansa keagamaan agar dapat mengakomodasi kekhasan daerah sekaligus menjaga persatuan nasional: menegaskan prinsip anti diskriminasi, penelitian dan penggalian nilai secara mendalam, pengikutsertaan publik dalam penyusunan rancangan peraturan, terdapat ukuran dampak yang jelas, serta studi kelayakan dan kesiapan aparatur daerah dalam penerapan peraturan tersebut.

2. Saran

Kementerian Dalam Negeri perlu membuat suatu peraturan khusus yang memuat substansi dan prosedur pembentukan rancangan peraturan daerah yang memuat substansi ihwal Suku, Agama, dan Ras. Setiap rancangan peraturan daerah yang memuat substansi tersebut wajib mengikutsertakan kelompok-kelompok yang berkepentingan dan mendapatkan persetujuan dari kelompok-kelompok tersebut sebagai bagian syarat yang melekat dari pengesahan rancangan peraturan daerah. Sebagai contoh, apabila suatu rancangan peraturan daerah akan memuat substansi ihwal keagamaan, maka pemerintah daerah wajib mendapat persetujuan Forum Kerukunan Umat Beragama di wilayah setempat. Apabila suatu rancangan peraturan daerah akan memuat substansi ihwal kesukuan, maka pemerintah daerah wajib mendapat persetujuan Forum Kerukunan Antar Suku atau yang setingkat di wilayah setempat. Sehingga, potensi diskriminasi dan fasisme kelompok tertentu dapat dicegah sedari dini.

Dengan demikian, aturan yang telah disetujui bersama diharapkan mampu mengakomodasi kekhasan daerah sejalan dengan mempromosikan persatuan nasional.

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DUE TO PREGNANT MARRIED LAWS BY PRESIDENTIAL INSTRUCTION NO. 1 OF 1991 CONCERNING ISLAMIC LAW COMPILATION

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Abstrac

The relationship of love, affection and happiness is realized through marriage which is a means for the creation of harmony. In the view of Islam, besides marriage as an act of worship, it is also the Sunnah of the Prophet. Under Article 2 of the Compilation of Islamic Law, "marriage according to Islamic law is a very strong covenant marriage or mitsaqan ghalizhan to obey Allah's commands and carry out them is a Worship". Article 3 KHI, "marriage aims to realize a domestic life that is sakinah, mawaddah, and rahmah. The influence of the times, where two people of the opposite sex are no longer embarrassed to sit together, arm in arm. This association sometimes results in intercourse outside of marriage that results in pregnancy. Even though pregnancy outside of marriage is a disgrace that must be covered up. Pregnant marriage is marriage to a woman who is pregnant out of wedlock, both married by the man who impregnated her and by men who did not impregnate her". In article 53 KHI has explained that pregnant women may be married. Pregnant women out of wedlock are strictly prohibited by religion, norms, ethics and state legislation, aside from the existence of promiscuity, also because of weak faith on each side. To anticipate such forbidden acts, religious education is needed and deep legal awareness. Article 53 KHI does not provide sanctions or penalties for adultery, but instead provides a solution for someone who is pregnant as a result of adultery. The issue raised is what is the status of children born from marriage to Pregnant Mating. This research is a normative research, a study of the very basic legal principles in the law that can be guided. The nature of the research conducted is descriptive research that describes and explains in clear and detailed sentences. The conclusion obtained from this study is the beginning of adultery, but finally it is marriage, which is forbidden not forbidding the lawful. Adultery is an unlawful act, while marriage is a lawful act, so adultery (adultery) cannot forbid lawful acts (marriage). Thus, the prohibition of adultery can't forbid the implementation of marriage. The status of the child who is born will give birth to the man who marries her. "If a woman and man marry, then give birth to a child in a state of life and perfect shape before six months of gestation, then the child can be associated (nasab)

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with her husband, but if the man who marries the woman after six months of pregnancy is not advised to the man earlier." This applies to men who impregnate and men who don't impregnate.

Keywords: Compilation of Islamic Law, Legal Impacts, Pregnant Mating

I. Preliminary

1. Background

Today, human life is characterized by social problems, one of which is the phenomenon of pregnancy outside marriage. Pregnancies that lead to the birth of a child, some also lead to acts of abortion or even to commit suicide because they are not strong enough to face the consequences of pregnancy, both family responsibility, and moral responsibility towards society. This incident is inseparable from the influence of increasingly sophisticated culture and technology that results in more open promiscuity, so that the occurrence of pregnancy outside of marriage is no longer a strange thing to hear.[2] Pregnancy outside marriage is a disgrace that must be covered up, so one way is to marry the pregnant woman with the man who impregnated her.

Since 1974 a law on marriage has been promulgated known as Law Number 1 of 1974 concerning Marriage, which has been successfully adopted by the Indonesian national legal system from normative law to written law and positive law that has binding and coercive power to all Indonesian people, including Indonesian Muslims.[3] Marriage is an agreement entered into by two people, in this case an agreement between a man and a woman with a material goal, namely to form a happy and eternal family (household) that must be based on the Godhead, as the first principle in Pancasila, so raises the rights and obligations between the two.[4]

Law Number 1 of 1974 concerning Marriage does not regulate and explain the pregnancy of marriage that occurs in the life of Indonesian society at this time. Therefore, many people are guided by Islamic law. Based on the phenomenon of a pregnant woman out of wedlock in terms of the negative aspects that arise if a pregnant marriage is not regulated with certainty, it is necessary to have a separate regulation regarding pregnant marriage which is regulated based on Presidential Instruction of the Republic of Indonesia Number 1 of 1991 concerning Compilation of Islamic Law, hereinafter referred to as Compilation of Islamic Law. The Compilation of Islamic Law which is the consensus of the ulamas in Indonesia regarding Islamic law states that the ability of pregnant women to marry men who impregnate them is contained in Article 53 of the Compilation of Islamic Law, which states that:

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[2] Kartini Kartono, *Kenakalan Remaja*, PT. Raja Grafindo Persada, Jakarta: 2008, p. 7.

[3] M. Anshary MK, *Hukum Perkawinan di Indonesia*, Pusaka Pelajar, Yogyakarta: 2012, p.12.

[4] Soedharyo Soimin, *Hukum Orang dan Keluarga*, Sinar Grafika, Jakarta: 2004, p. 6.

A woman who is pregnant outside the legal marriages can be married to a man who impregnates her without waiting for the birth of a child in her womb. The marriage continues to be valid as long as there is no divorce so that the marriage that was carried out does not need to be repeated even after the birth of her child.

Many differences of opinion are found in the implementation of pregnant marriages that occur in Indonesian society, this is because Indonesia does not only adhere to one law, namely national law. Indonesia also adheres to and recognizes customary law and Islamic law in force, as long as everything does not conflict with the public interest, Pancasila and the 1945 Constitution.

The differences of opinion of the scholars regarding marital problems due to pregnancy, including Imam Muhammad bin Idris ash-Shafi'i and scholars of the Syafi'iyyah school of thought argue that such marriage is permissible and considers the marriage valid. Abu Hanifah also thought so, but by adding the permissibility requirements for pregnant women to be married but not to have intercourse before the woman gave birth. The opposite opinion was expressed by Imam Malik bin Anas and Imam Ahmad bin Hanbal who argued forbidding the implementation of marriage due to pregnancy first, marriage is considered valid if the baby is born[5] between national law and Islamic law. Where can be seen in Article 53 of the Compilation of Islamic Law and according to the four Muslim scholars (Hanafi, Maliki, Shafi'i and Hambali), the marriage is both valid and may be mixed as husband and wife, so that the marriage that has been carried out does not need to be repeated even though after the birth of his child.[6]

2. The problem is what is the legal effect on children born as a result of carrying out a married marriage ?

II. Discussion

The principle of marriage or marriage is a contract to justify the relationship and limit the rights and obligations, to help between men and women who are not non-Muslim. When viewed from a legal standpoint, marriage is clearly a sacred and sublime contract between men and women whose legal status as husband and wife and sexual relations are permissible with the aim of reaching a sakinah, loving and benevolent family and caring for each other.[7]

The definition of marriage in Article 1 of Law Number 1 of 1974 concerning Marriage is detailed as follows:[8]

a. Marriage is a physical bond between a man and a woman as husband and

[5] A. Zuhdi Muhdlor, *Memahami Hukum Islam*, Al-Bayan, Bandung: 1995, p. 58.

[6] M. Ali Hasan, *Masail Fiqhhiyah al-Haditsah*, PT. Raja Grafindo Persada, Jakarta: 1995, p.96.

[7] Sudarsono, *Hukum Perkawinan Nasional*, PT. Rinekacipta, Jakarta: 2006, p. 1.

[8] Djoko Prakoso dan I Ketut Murtika, *Asas-Asas Hukum Perkawinan di Indonesia*, Bina Aksara, Jakarta: 1987, p. 3.

wife.

b. The inner and outer bonds are shown to form happy, eternal, and prosperous families.

c. Birth bonds and eternal happy goals are based on the Almighty God.

Based on Law Number 1 of 1974 Concerning Marriage, marriage has a meaning that is a contract or agreement to bind oneself between a man and a woman as husband and wife, which is to form a happy and eternal family (household) to realize a happiness in life that is encompassed compassion and peace based on the Godhead of the Almighty, giving rise to rights and obligations between the two.

The definition of marriage itself in the Compilation of Islamic Law has been stated,[9] in Article 2 and Article 3 of the Compilation of Islamic Law (KHI) states:

Marriage is marriage, which is a very strong contract or *mitssaqan qhalidzan* to obey Allah's commands and carry out it is a worship that aims to realize domestic life that is *sakinah, mawaddah*, and *rahmah*.

Sakinah family is a group consisting of father, mother, and children or husband and wife and children, *sakinah* means calm, peaceful, and not restless. *Mawaddah* means full of love and *rahmah* means affection, so mawaddah and rahmah are loving and loving one another.

Various opinions expressed by legal experts regarding the meaning of marriage, including:

a) According to Wiryono Prodjodikororo stated that marriage is a life together of a man and a woman who meet certain conditions.[10]

b) According to Tahir Mahmood defines marriage as a physical and spiritual bond between a man and woman each husband and wife in order to obtain the happiness of life and build a family in Divine light.[11]

c) According to Imam Shafi'i, the meaning of marriage is a contract that makes it possible to have intercourse. The contract in question is the handover between the prospective bride's parents or guardians. With the existence of the contract, it is already lawful for a pair of people to have intimate relations and avoid unwanted conduct.[12]

1. The Purpose of Marriage

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[9] Rachmadi Usman, *Aspek-Aspek Hukum Perorangan dan Kekeluargaan di Indonesia*, Sinar Grafika, Jakarta: 2006, p. 268.

[10] Wiryono Prodjodikoro, *Hukum Perkawinan di Indonesia*, Sumur Bandung, Bandung: 1984, p. 7.

[11] Amiur Nuruddin dan Azhari Akmal Tarigan, *Hukum Perdata Islam di Indonesia; Studi Kritis Perkembangan Hukum Islam dari Fikih, UU No. 1/1974 sampai KHI*, Kencana, Jakarta: 2004, p. 42.

[12] Budi Handrianto, *Perkawinan Beda Agama dalam Syariat Islam*, Khairul Bayan, Jakarta: 2003, p. 20

The purpose of marriage is regulated in Article 1 of Law Number 1 of 1974 Concerning Marriage, it is stated that the purpose of marriage is to form a happy and eternal family (household) based on the Godhead. Ahmad Azhar Basyir's explanation in his book Islamic Marriage Law regarding the purpose of marriage is to fulfill the demands of the instincts of human life, to relate between men and women in order to bring about family happiness in accordance with the teachings of Allah Almighty and His Messenger.[13] Another opinion expressed the purpose of marriage is to shape domestic life and create a sakinah family on the basis of a religious guidance policy.[14]

2. Principles

Related to the marriage pillar as regulated in Article 14 of the Compilation of Islamic Law, where to conduct a marriage there must be:

a. Future husband
b. Marriage Guardian
c. Two witnesses
d. Ijab and Kabul

Based on the Compilation of Islamic Law, dowry is regulated in Article 30 through Article 38. In Article 30 it is stated[15]: "Prospective bridegroom must pay dowry to prospective brides whose number, form and type are agreed by both parties". An article that is also very important to note is that Article 31 reads: "Determination of the Mahar based on the principle of simplicity and ease recommended by the teachings of Islam".

3. Terms of Marriage Legality

The legal condition for a marriage is regulated in Article 2 of Law Number 1 of 1974 concerning Marriage. Marriage is valid if the formal and material requirements have been met. The formal requirements for marriage are regulated in Article 3 through Article 9 of the Republic of Indonesia Government Regulation Number 9 of 1975 concerning the Implementation of Law Number 1 of 1974 concerning Marriage, and the material conditions of a marriage are regulated in Article 6 through Article 12 of the Law Law No. 1 of 1974 concerning Marriage. Marriage can only be done if all the pillars and legal requirements are met, so that the harmonious marriage and legal requirements are not fulfilled but the marriage is still carried out, then it can be canceled as regulated in Article 22 of Law Number 1 of 1974 concerning Marriage.

[13] Ahmad Azhar Basyir, *Hukum Perkawinan Islam*, UII Press, Yogyakarta: 2000, p. 14.
[14] Sudarsono, *Hukum Kekeluargaan Nasional*, Rineka Cipta, Jakarta: 1991, p. 68.
[15] Amiur Nuruddin dan Azhari Akmal Tarigan, *Hukum Perdata Islam di Indonesia*, Kencana, Jakarta : 2006, p. 66.

4. Pregnant Mating

Pregnant marriage is a woman who is pregnant before entering into a marriage contract, then married by the man who impregnated her or other than the man who impregnated her.[16] Compilation of Islamic Law states the ability of pregnant women to marry adultery friends as contained in Article 53 of the Compilation of Islamic Law. In full, the contents of Article 53 of the Compilation of Islamic Law are as follows:

1) A pregnant woman out of wedlock can be married to the man who impregnates her.
2) Marriage with a pregnant woman referred to in paragraph (1) can take place without waiting before the birth of her child.
3) With the marriage taking place when the woman is pregnant, no remarriage is needed after the child is born.

The ability to marry a pregnant woman according to the above provisions is limited to men who understand her. This is based on the letter An-Nur paragraph (3) which means:

Men who commit adultery do not marry but women who commit adultery, or women who are polytheists, and women who commit adultery are not married, but by men who commit adultery or men who are polytheists, and such are forbidden to those who are you ' min (Q.S. An-Nur: 3)

The verses of the Qur'an above, show that the ability of pregnant women to marry the men who impregnate them. Therefore, it is the man who impregnates the right husband. In addition, identification with polytheistic men shows that the prohibition of pregnant women is intended to be a prohibition against good men to marry them. This requirement is reinforced by the closing sentence in the Al-Qur'an verse in the Al-Baqarah (2) verse 221 (*wahurrima dzalika 'ala almu'minin*) that besides men who impregnate pregnant women are forbidden by Allah to marry them.[17]

The differences of opinion among the scholars regarding marital problems with women who are pregnant out of wedlock, are as follows:[18]

1) The four Muslim scholars (Hanafi, Maliki, Shafi'i and Hambali) argue that marriage is both legal and may be mixed as husband and wife, with the stipulation, if the man is to marry her and then he marries her.
2) Ibn Hazm (Zhahiriyah) argues that both of them may (legally) be married and may also be mixed, with the provisions, if they have repented and served the punishment of flogging, because both of them have committed adultery.

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[16] http://tammimsyafii.blogspot.co.id/2013/10/hukum-perkawinan-wanita-hamil-zina, accessed at October 3rd, 2015.

[17] Zainuddin Ali, *Hukum Perdata Islam di Indonesia*, Sinar Grafika, Jakarta: 2006, p. 46.

[18] M. Ali Hasan, *Loc.cit*

Furthermore, regarding men who are married to women who are impregnated by others, there is a difference of opinion among the scholars:[19]

1) Imam Abu Yusuf said that the two must not be married. Because if the marriage is nullified (fasid). Ibn Qudamah agreed with Imam Abu Yusuf and added that a man must not marry a woman he knew had committed adultery with another person, except for two conditions:
   a) The woman has given birth when she is pregnant. So when she is pregnant she cannot marry.
   b) The woman has been sentenced to whipping, whether she is pregnant or not.
2) Imam Muhammad bin Al-Hasan Al-Syaibani said that his marriage was legal, but it was forbidden for him to mix, as long as the baby he was born with was not yet born.
3) Imam Abu Hanifah and Imam Shafi'i argue that marriage is considered legitimate, because it is not bound to the marriage of others (there is no iddah period). The woman may also be interfered with, because it is not possible nasab (offspring) of the conceived baby was tainted by her husband's sperm[20]. While the baby is not a descendant of the person who married his mother (child out of wedlock).

Textually, the Qur'an At-Thalaq verse 4 states that pregnant women must wait until they give birth when they want to get married. This provision is supported by a verse that prohibits marrying an adulterer, namely in the Q.S. Al-Nur verse (3). When the two verses are combined, a conclusion can be drawn that a believer is prohibited from marrying an adulterer, and a fellow adulterer can only marry after the woman gives birth to the baby she is carrying, so that the child's status remains an extramarital child whose consequence is to become an illegitimate child.

In accordance with the hadith narrated by Aisyah r.a. that the Prophet was once asked by a man who committed adultery with a woman or with his child, then he wanted to marry her. The Prophet said: “Haram does not forbid halal, only forbidden by marriage, and not forbidden because of the adultery of his mother or child”. This does not mean that someone who impregnates a woman and then marries the problem is over, no. Not at all, because they have sinned in violating God's law, they must repent, that is, the repentance of the nation.[21]

The marital status of pregnant women in the Compilation of Islamic Law in Indonesia is mentioned in Chapter VIII Article 53 paragraphs (1), (2) and (3), namely:

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[19] *Ibid*, p. 98

[20] Warastra Karebet Amrullah, “Pandangan Hukum Islam Terhadap Anak Hasil Zina yang Dilahirkan di Dalam Perkawinan”, *Jurnal Hukum*, Faculty of Law Universitas Islam Indonesia, Vol. XVII, No. 1 January 2010, p. 145.

[21] Agus Salim Nst, “Menikahi Wanita Hamil Karena Zina Ditinjau dari Hukum Islam”, *Jurnal Ushuluddin*, Vol. XVII, No. 2 July 2011, p. 138.

a. A pregnant woman out of wedlock can be married to a man impregnating her.
b. Marriage to a pregnant woman mentioned in paragraph (1) can take place without waiting before the birth of her child.
c. With a marriage going on when a pregnant woman is not needed remarriage after the child is born.

Article 53 Paragraph (2) of the Compilation of Islamic Law states that the marriage of a pregnant woman actually takes place when the woman is pregnant, while the birth of a baby in her womb does not need to be awaited. Compilation of Islamic Laws on marriages of pregnant women due to adultery do not recognize iddah, but the marriage of pregnant women such as article 53 paragraph (1), may only be married to the men who impregnate them. The way to find out who the man who impregnated the woman was very difficult, especially related to proof according to Islamic law must be witnessed by four witnesses. Proof is more difficult if there is a deliberate effort to cover up, or someone who has committed adultery several people.

Article 53 paragraph (1) and (2) there is a kind of inconsistent attitude. It is said so, because if guided by Article 53 paragraph (2) Compilation of Islamic Law, it turns out that it is only guided by its formality, namely because the pregnant woman has never been married, then then the provisions applicable to her are the rights of girls, even though the woman is already pregnant. Then Article 53 Paragraph (3) states that by having a marriage when a woman is pregnant, there is no need for remarriage after the child is born. The provision that the marriage does not need to be repeated anymore, then it becomes a signal that the previous marriage has been declared valid.

Article 53 Compilation of Islamic Law does not provide sanctions or penalties for adultery, but instead provides a solution for someone who is pregnant as a result of adultery to immediately get married. Whereas in fiqh it has been explained about the punishment of adultery, including: if the perpetrator of adultery is already married (adultery muhsan) the punishment is to be beaten a hundred times and then stoned. For unmarried adulterers (zina ghairu muhsan) the penalty is to be beaten a hundred times and then exiled to another place for one year.[22]

Regarding children who have been married, the Law No. 1 of 1974 concerning Marriage does not regulate this. Law Number 1 of 1974 concerning Marriage only provides provisions regarding legal children and out-of-marriage children as stated in Article 42 and Article 43. Formulated in Article 42: "Legitimate children are children born in or as a result of a legal marriage", in Article 43 as follows:

[22] Nurul Huda, "Kawin Hamil Dalam Kompilasi Hukum Islam (Tinjauan Maqashid Syariah)", *Ishraqi*, Faculty of Moslem Religion Universitas Muhammadiyah Surakarta, Vol. V, No. 1 January - June 2009, p. 40.

a. Children born out of wedlock only have a civil relationship with their mother and mother's family.
b. The position of the child referred to in paragraph (1) above will then be regulated in a government regulation.

Referring to the concept of a legitimate child according to Article 42 of Law Number 1 of 1974 concerning Marriage that a legitimate child is a child born in or as a result of a legal marriage, the child born to a pregnant marriage born in a marriage is not an out-of-wedlock because the child was born at the time of marriage between his parents. So that the child remains a legitimate child who has the legal status and position and the same rights as a legitimate child.

Ulama give the opinion about the status of a child due to a pregnant marriage, if the child is born less than a grace period of six months for a minimum period of pregnancy, then the child cannot be counseled with his father. This is based on the concept of a legitimate child that is valid in Islam, that is, a legitimate child is a child of a legal marriage and his age in the womb is a minimum of six months as mentioned in Q.S Al Ahqaaf verses 15 and Q.S. Luqman verse 14: "... containing it until weaning is thirty months" (QS. Al-Ahqaaf Verse 15). Another verse states: "... conceived in a weak state which grew weaker and weaned it in two years". (Surah Luqman verse 14).

When the two verses are combined, an understanding can be obtained that the shortest pregnancy period is six months. Therefore, in a medical review, if the fetus was born after a period of six months from the mother's father's marriage, then the child is seen as a legitimate child, so that children who do not comply with the concept of calculating the age of the fetus in the womb are seen as illegitimate children, also known as adultery.[23]

Judging from the Compilation of Islamic Law, although it does not regulate the child of a pregnant marriage. Compilation of Islamic Law only provides provisions on legitimate children stated in Article 99. Formulated in Article 99 of Compilation of Islamic Law as follows:

Legitimate children are:

1. Children born in or due to legal marriage.
2. Results of legal acts of husband and wife outside the womb and born by the wife.

So, referring to the concept of a legitimate child according to Article 99 paragraph (2) Compilation of Islamic Law that a legitimate child is a child born in or as a result of a legal marriage, the child born to a pregnant marriage born in a marriage is not an out-of-wedlock due to the child was born during the marriage of his parents. So that the child remains a legitimate child who has the legal status and position and the same rights as a legitimate child. Therefore, between the child and his father inherit each other and have a relationship nasab.

According to Article 99 paragraph (2) of the Compilation of Islamic Law

[23] Warastra Karebet Amrullah, *Op.cit.*,p. 154.

that a legitimate child is a child born in or as a result of a legal marriage, the child born to a marriage born into a marriage is not an out-of-wedlock child because the child was born at the time of the marriage of both parents. So that the child remains a legitimate child who has the legal status and position and the same rights as a legitimate child. Therefore, between the child and his father inherit each other and have a relationship nasab.

Closing

The legal consequence burdened on children born as a result of carrying out a pregnant marriage is that the child has a nasab relationship with his father.

Even though marriage to pregnant women outside marriage is permitted and is considered legal in Indonesia, but it should not then be used as a justification for marital relations outside of marriage because if later the act results in pregnancy, the couple are allowed to marry and the child the result of the act is considered as a legitimate child. It would be better to mobilize efforts to prevent marital relations outside of marriage by providing understanding and proper sex education to teens about the dangers of promiscuity.

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ANALYSIS OF MAQASHID SHARI'AH ON TA'LIK TALAK AGREEMENT IN MARRIAGE

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Abstrack

In Indonesian Marriage Laws there are arrangements regarding marriage agreements. For example in article 46 paragraph (3) KHI which states that the divorce ta'lik talak agreement is not an agreement that must be entered into in every marriage. Ta'lik talak is divorce which falls on a particular case or agreed upon. However, once the divorce agreement has been promised, it cannot be revoked. if the husband violates the divorce ta'lik talak, the wife can file a divorce claim on the grounds that the violation ta'lik talak divorce goes to court The Religious Court makes the ta'lik talak as the reason for determining the termination of marriage based on the fact of the trial in the Religious Court that the ta'lik talak is the reason for the termination of marriage. Unlike the case with a marriage agreement that is regulated in Law No.1 of 1974 concerning Marriage containing maqashid " *hifzh al-nafs wa al-mal li ikhtiyati wa al-amanah wa al-kitabah li al-mashlahah* " take care of themselves, treasure for caution so that they keep their promises in writing for the benefit of both parties. However, it is different from ta'lik talak if it is seen as substantially it does not contain a very urgent meaning, because besides its unclear legal basis, it also turns out that talak ta'lik is an ordinary agreement, the talaq taklik case is likened to procedure with divorce. This research is based on normative legal research with a statutory approach and approach maqashid syari'ah

Keywords: *Maqashid Shari'ah, Ta'lik Talak*

بِسْمِ اللَّهِ الرَّحْمَٰنِ الرَّحِيمِ

I. Introduction

The break-up of divorce, in Indonesia generally uses the institution of Taklik Talak (divorced). But not a few who broke out because of the court verdict, among them is the defendant to divorce the reason of the violation of the Talak. The institution of Taklik Talak in Indonesia has existed since ancient times. The fact that there is to date also shows almost every marriage in Indonesia that is implemented according to Islamic religion always followed by the pronunciation of Sighat Ta'lik Thalak by husband. Despite his voluntary nature, but in this country, reading Talak Taklik seemed to be the obligation to be performed by the husband. Marriage is sacred. It is in accordance with the word of Allah SWT in Qs. An-Nisa: 19

يَٰٓأَيُّهَا ٱلَّذِينَ ءَامَنُواْ لَا يَحِلُّ لَكُمۡ أَن تَرِثُواْ ٱلنِّسَآءَ كَرۡهٗاۖ وَلَا تَعۡضُلُوهُنَّ لِتَذۡهَبُواْ
بِبَعۡضِ مَآ ءَاتَيۡتُمُوهُنَّ إِلَّآ أَن يَأۡتِينَ بِفَٰحِشَةٖ مُّبَيِّنَةٖۚ وَعَاشِرُوهُنَّ بِٱلۡمَعۡرُوفِۚ فَإِن
كَرِهۡتُمُوهُنَّ فَعَسَىٰٓ أَن تَكۡرَهُواْ شَيۡـٔٗا وَيَجۡعَلَ ٱللَّهُ فِيهِ خَيۡرٗا كَثِيرٗا ١٩

Translate: "O people of faith, not lawful for you to have women with a forced path and do not trouble them for taking back some of what you have given him, unless they do A real vile job. And come with them appropriately. Then if you do not like them, (then be patient) because maybe you do not like something, when God makes him a lot of goodness. *(mu'asyarah bil ma'ruf)"*. [1]

Allah SWT in this order commanded his servant to do good to his wife and his family. The spouse must know their rights and obligations. For the sake of binding and emphasizing the promise to the aforementioned Ma'ruf, there must be an expression of an appointment by one of the parties in which the pledge is not only a promise for his spouse, but also between himself and Allah ALMIGHTY. Witnessed by Angels when the contract is pronounced.

The essence of marriage is not an everlasting and lasting relationship, because the marriage Mahligai can still be dissolved if it contains principles and greater benefits. It is in line with the provisions of Article 19 of government regulation No. 9 year 1975 on the implementation of Law No. 1 year 1974 on marriage. The number of divorce that occurred today has described that the similarity of perception to the purpose of marriage between husband and wife is not much realized.

It was formulated in such a way that it was intended to protect the wives from being treated arbitrarily by the husband. If the wife is not ridha over the treatment of the husband, then the wife can file a divorce suit based on the embodied terms of Ta'lik mentioned in Ta'lik.

[1] Qs. An-Nisa' : 19 https://islamedia.web.id/quran/an-nisa-ayat-19/

There is therefore a rule that allows the holding of a marriage agreement called the Taklik Talak as set out in the compilation of Islamic Law (KHI), with the intention of championing the rights of the generally unknown wife, with To some conditions that have been formulated. It is also aimed at reducing the likelihood of possession of excessive wives, especially reducing domestic violence.

The Taklik Talak apparently gave birth to a contoversion, both among Fuqaha ' and the observers of Islamic law. In the meantime, this problem is necessary and relevant to be discussed so that the application is completely compliant with legislation and can fully fulfill and provide legal certainty for the Seekers of justice.

In Indonesia, the marriage broke out of divorce in court, both husband divorced his wife (divorced) and wife sued her husband (divorce) and not a few who broke down to divorce due to violation of Talak Taklik. The existence of Talak Taklik in Indonesia has existed since the first time, it is proven that almost all the Indonesian marriage that is carried out according to Islamic religion always followed the pronunciation of Taklik Talak shigat by husband. Although the Shigat must be willingly, but it becomes as if the obligation has to be done by the husband Shigat taklik.

Formulated in such a way that the wife obtains an unarbitrary treatment from her husband, if the wife is treated Sewenangwenang by her husband and with certain circumstances, the wife is not Ridha, then she can file a lawsuit Divorce to the religious court by reason husband has violated the Taklik Talak. The discussion of the Talak Taklik as the reason for divorce, has been talked about by Fuqaha in various books of fiqh, and it turns out they are different opinions about it. The difference is still coloring the development of Islamic law. Among other things, there are two opinions, namely one that allows absolute and also allows with certain conditions.

However, whether at this time the rule is still urgent if it is still implemented and how it is relevant to the many cases of divorce in the religious court. Then what is in the direction of the Treaty of Ta'lik Talak in marriage, in other words whether it contains benefits. Therefore, researchers want to research further with a statutory and philosophical approach.

II. Problem formulation

Based on the background that has been outlined, it can be taken a formula of the following problems:

1. Does Ta'lik Talak include a marriage treaty ?
2. How is the Ta'lik Talak in juridical ?
3. How does Maqashid Syari'ah in Ta'lik Talak's setting ?

III. Research methods

Based on the formulation of the problem, then the type of research used

is normative legal research (doctrinal-legal research). Normative legal research is a process to find the rule of law, principles of law and the doctrines of the law to answer the issue of the law faced so that the argument is obtained, a theory or a new concept as a prescription in Solve the problem.[2]

In this study there are 2 (two) methods of approach used, namely of approach and conceptual approach. The of approach is the study of legal products. A conceptual approach is an approach used to gain clarity and scientific justification based on concepts of law sourced from the principles of the Law.[3]

The way of processing a legal material is inductive is to draw conclusions from a concrete problem that is specific to the abstract problems that are common. Furthermore, the existing legal materials are analyzed deskrptif which begins by grouping the same legal materials according to sub-aspects and subsequent conducting interpretations to give meaning to each sub-aspect and relation to each other.[4]

Data collection is very closely related to the data source, because through the collection of this data will be obtained data needed to be further analyzed as expected. The data collection techniques used in this research are library research.

The literature research aims to examine, research, and trace secondary data including primary materials, binding materials; Secondary materials that provide explanations on primary legal materials; Materials that provide instruction and explanation to primary and secondary legal materials.[5]

Analysis of data is done qualitative normative IE analysis used without using the number or formula of statistics and mathematics means presented in the form of a description. Then after that analysis of the whole aspect to understand the meaning of the relationship between the other aspects and with the whole aspect that is the subject of the research problems conducted inductive so as to give an overview Results in full.[6]

IV. Results And Discussion

A. Ta'lik Talak Marriage Treaty

To measure whether the Taklik is a treaty or not, we must see article 1320 of the civil law that contains the terms of the agreement that is (1) agreed to the binding of himself, (2) the capable of those who bind themselves, (3) a certain matter, and (4) A cause or a lawful reason. The terms of the agreement as mentioned above may be categorized into two categories, which are subjective

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[2] Peter Mahmud Marzuki, *Penelitian Hukum*, Kencana, Jakarta, 2005, hlm. 35.

[3] *Ibid*, hlm. 138

[4] Bahder Johan Nasution, *Metode Penelitian Ilmu Hukum*, Mandar Maju, Bandung, 2008, hlm. 166.

[5] Soerjono Soekanto, *Pengantar Penelitian Hukum*, (Jakarta: UI Press, cetakan 3, 1998) hlm. 52

[6] Bahder Johan Nasution, *Op.cit*., hlm. 166.

terms and categories of objective terms. The subjective terms, namely the condition agreed to those who bind themselves and the proficiency requirement to make an agreement. If a subjective condition cannot be fulfilled then the agreement may be cancelled (Vernieitigbaar). The objective is the condition of a certain thing and the condition of a lawful cause. If in an objective agreement is not met, the agreement is null and void.

The word of agreement for those who bind themselves is a free will as the first requirement for a legitimate agreement. In the Taklik Talak, husband and wife have agreed without compulsion to sign the mutual agreement contained in the concept of the Talac, because Taklak is not a necessity for the continuity of a marriage.

Proficient means that both parties must be legally competent to act alone. In the law of marriage, a person may be able to conduct a marriage if he is 19 years old and 16 years old for women, meaning that the wife is mature and legally competent to do legal action.

A certain point of intent is promised in a covenant must be a thing or an item that is quite clear or certain. In the Taklik of the Talak, the promised is clear that is drawn from the content of the Talak.

A cause or a halal reason means that the Treaty is not prohibited or not contrary to statutory regulations. Because the existence of the Talak Taklik to protect the wife from the husband Deeds, the existence of the Taklik Talak is not contrary to legislation. Pursuant to article 1320 of the civil law, the divorce is a treaty.

According to Az-Zaqra, the Agreement (AKAD) in jurisprudence terminology is a legally binding conducted by two or more parties who alike desire to bind themselves.[7]

Ali Al-Sayis further commented that the Treaty in Islam was not only a party treaty, but also a unilateral agreement, even including a promise to God. In relation to the scope of this agreement Ibn Araby expressed his opinion, there are 5 (five) things that belong to the category of agreement, namely;

a. Agreement in general.
b. Oath.
c. The obligation that God has charged to his servant.
d. Marriage contract, partnership (Syirkah), buying and selling, oath and pledge to Allah.
e. Alliance on the basis of mutual trust.[8]

Sayid Sabiq elaborates in the Sunnah of fiqh that the marriage treaty referred to as TA ‟ lik Talak is two kinds of forms:

[7] Abdul Aziz Dahlan (Ed), *Ensiklopedi Hukum Islam Jilid I*, PT. Ichtiar Baru van Hoeve, Jakarta, 2000, hlm. 63.

[8] Abu Zakariya Muhammad ibn Abdullah Ibn Araby, *Ahkam al-Qu'an Juz II*, Dar al-Ma'rifah, Beriut, hlm. 524-525.

a. Ta'lik referred to as a promise, because it contains a sense of doing work or leaving an act or strengthening a word.
b. And Ta'lik Talak like this is called Ta'liq Qasam i.

Ta'lik was meant to drop the Talak when the Ta'liq fulfilled the terms. Ta'liq as this is called Ta'liq Syarti.

Of the two forms of Ta'lik talak above can be distinguished by the words spoken by the husband. At Ta'liq Qasamy, the husband vows for himself. Meanwhile, in the case of the husband and the Talak, he submitted the condition with the intention if the condition is present, the husband's Talak on his wife.

The religious court as a judicial institution for people who are Muslims have given a legal view by justifying the reasons for divorce outside the legislation can be formulated several things:

First, a divorce in its essence as an agreement passed on to the terms with the main purpose of protecting the wife from the act of arbitrary husband, having a strong legal basis, which is the evidence of the book Holy Qur'an and Hadith.

Secondly, as the reason for divorce has been in the Islamic law for a long time, since the time of Sahabat. Most scholars agree on the validity and until now practiced by the Muslims in various parts of the world, especially in Malaysia and Indonesia.

Thirdly, the substance of the talak that has been established by the Minister of Religious AFFAIRS, is deemed adequate enough, viewed from the principle of Islamic law or the soul of the marriage ACT.

Fourth, in Indonesia, a formal juridical Taklik institution has been valid since the Dutch colonial era, based on the Staatblaad 1882 No. 152 until now after independence before the establishment of the marriage ACT even before the retreat UU No. 7 year 1989. Notwithstanding the Staatblad 1882 No. 152 which gives a juridical basis the validity of the law of the Taklik has been revoked by LAW No. 7 year 1989 at present with the enactment of Islamic Law compilation through INPRES No. 1 year 1991 which among others also On the Taklik of Talak, the Taklik Talak can be categorized as written law.

In practice in the religious court either as a treaty or a divorce reason, the judge expressly reconsider it in its verdict. The judges should sharpen efforts to confine, qualify, and classidate the matter, so that the tendency for this to lead or direct the case of divorce is a matter of deductible talak.

Based on the aforementioned matters, the provisions of the event law may be executed correctly, and the provisions as required by article 62 paragraph (1) of LAW No. 7 year 1989, Jo. UU No. 3 year 2006 on religious court namely: any determination and judgment, after containing the reasons or the basics, must also contain certain articles of the relevant regulations, can be fulfilled.

On this basis also the author argues that Taklik Talak as the reason for divorce is relevant and justifiable according to law.9

Divorce is the right of a man, provided he applies reasonably to his wife. The reasonable behaviour of a man against his wife was that when he wanted to live with his wife, then he had to properly place it, respecting the rights of his wife, and applying compassion to him. When there was no way for him to continue his life with his wife, he had to politely and kindly divorce him.

In practice in the religious court either he as a marital agreement or as the reason for divorce the judge must expressly recount it in the verdict. So that the tendency to lead or cause the case of divorce is a matter of Taklik Talak can be reduced. Therefore, according to the benefits for both husband and wife, the position of the Talak Taklik in the bonds of matrimony is very important. The opinion of Murtadha Muthahhari, that a normal and normal divorce is like a normal birth, which itself is normally normal, but a divorce from a husband who does not want to fulfill his obligations and neither will divorce His wife was an unnatural and abnormal birth, which required a physician or surgeon (judge). The majority of Islamic scholars Based on. God's Word QS. An-Nisa': 128

وَإِنِ ٱمۡرَأَةٌ خَافَتۡ مِنۢ بَعۡلِهَا نُشُوزًا أَوۡ إِعۡرَاضٗا فَلَا جُنَاحَ عَلَيۡهِمَآ أَن يُصۡلِحَا بَيۡنَهُمَا صُلۡحٗاۚ وَٱلصُّلۡحُ خَيۡرٞۗ وَأُحۡضِرَتِ ٱلۡأَنفُسُ ٱلشُّحَّۚ وَإِن تُحۡسِنُواْ وَتَتَّقُواْ فَإِنَّ ٱللَّهَ كَانَ بِمَا تَعۡمَلُونَ خَبِيرٗا ١٢٨

translate : *"And if a woman is worried about nusyuz or the indifferent attitude of her husband, then it is not why for both of them to hold a truth peace, and the peace is better (for them) even though the man is in the habit of filer. And if you get along with your wife well and nourish you (from Nusyuz and indifferent attitudes), then indeed Allah is omniscient of what you do".*

In the Qur'an it is said that Nusyuz can be done by the wife as well as by the husband. Therefore, understanding that says Nusyuz only about the wife is distorting and violate the verse. Actually nusyuz it is disobedience to God, but Nusyuz is often understood as disobedience to wife on husband. If we return to Q.S. al-Nisa (4): 128 above, Nusyuz precisely imposed on the husband. A husband must fear Allah SWT. So also the wife must fear Allah SWT, not afraid of the husband. Reflection of the fear of Allah SWT is to do good against his spouse. Husbands do well against his wife, as well as vice versa. Both strive to optimally put forward the best attitude to the partner with the belief that it is the command of Allah SWT to man in marital life. The meaning of Nusyuz here is

[9]Pada Pasal 116 (g) Bab VI dalam Kompilasi Hukum Islam dikatakan bahwa alasan perceraian adalah suami melanggar taklik talak. Lihat Mohd. Idris Ramulyo, *Hukum Islam Perkawinan (Suatu Analisis Dari Undang-Undang No.1 Tahun 1974 dan Kompilasi Hukum Islam)*, Bumi Aksara, Jakarta, 1996, hal. 153.

to abandon the obligation of a husband or wife. In the broad sense nusy....[10]

B. The foundation of the juridical Talak

Normatively, a man who is married has also promised to God SWT to treat his wife well, keeping the glory Sertatidak persecute it. The power that can be played from a Talak Taklik in securing the rights of the wife and protecting them from the discriminatory and arbitrary treatment of the husband can briefly be described the following. **First**, it is to make a marriage agreement between the prospective husband and the wife when doing the marriage contract so that the two do not do anything that could be a source of unfulfilled women's Rights (wife) and likely to be a source of discriminatory and/or arbitrary treatment. **Second,** certainly in line with the first, listed in the Talak Taklik that can be the reason for separation (divorced) what can be the cause of the wife's rights and/or any treatment that can be the source of treatment Discriminatory and arbitrariness against the wife.[11]

In the marriage LAW No 1 year 1974 no article is found specifically and governs the taklik of the Talak in its capacity as a marital agreement as well as the reason of divorce. Article 29 This law has been allowed for both brides to enter into a written agreement before marriage. In his explanation in article (29) emphasized that the marriage agreement in question does not include the Taklik Talak in it. The Sound of article (29) is as follows; 1) The time before the marriage held both parties to the Joint Agreement may enter into a written agreement ratified by the Marriage Registrar's officer. After which the content is applicable to third parties as long as the third party is snagged; 2) Such agreement cannot be confirmed when it violates the boundaries of law, religion and morality; 3) The agreement is effective since the marriage is established; and 4) during the marriage...

As for the reasons for divorce LAW No. 1 year 1974 also does not mention the Taklik Talak as the reason of divorce. The reason for divorce according to this act in the explanation of Article 39 paragraph (2) is: one of the parties to commit adultery or to be a drunkard, a divitor, gambler and so forth and difficult to heal. One of the parties left the other two consecutive years without the permission of the other party and for no legitimate reason or because of the matter beyond its terms. One of the parties received a five-year sentence or a more severe punishment after the marriage took place. One of the parties commits an atrocities or severe abuses that harm the other party. Either party got disability or illness that resulted in unable to carry out obligations as husband and wife. Between husband and wife there is a constant and quarrel and there is no more hope in the household.

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[10] *Ibid*

[11] Hasanuddin, Kedudukan Hukum Taklik Talak dalam Perkawinan Ditinjau dari Hukum Islam dan Hukum Positif, http://jurnal.radenfatah.ac.id/index.php/medinate

In the fatwa signed by the chairman of MUI: Hasan Basri, the secretary of MUI: H. A. Nazri Adlani, and the chairman of Ibrahim Hosen's Fatwa commission, said that "*the mention of Sighat Ta'liq Talaq, which historically to protect the rights of women (wives) That is when there is no legislation about it, now this talaq sighat Ta'liq pronunciation is no longer needed. For the construction towards the establishment of a happy family already in the form of BP4 from the central level up to the subdistrict level*".

In the compilation of the Islamic Law (KHI) Taklik Talak is governed by article 45 as follows: Both prospective brides may enter into a marriage agreement in the form of: (1) Taklik Talak, and (2) Other agreements not contrary to Islamic law. Then in article 46 states: (1) The contents of the Talak shall not be contrary to Islamic law. (2) When the conditions required in the Talak Taklik actually occur later, not in itself the Talak falls. In order to seriously fall, the wife must submit her issue to the religious court. (3) The Treaty of divorce is not an agreement that must be held in every marriage, but once the taklik of the Talak has been promised can not be revoked.

According to KHI, the Treaty of Talak is not a necessity in any marriage. This we can read in section 46 of clause (3), "*The Treaty of divorce is not an agreement that must be held on every marriage, but once the Taklik of the Talak was promised to be revoked*." Accordingly, according to KHI, it clearly mentions that the Treaty of Talak is not a necessity for every Muslim.

In section 51 It is mentioned that the breach of the agreement entitles the wife to request the cancellation of marriage and submit it as the reason of the divorce lawsuit to the religious court. With regard to divorce the Islamic Law compilation (KHI) mentions that the Talak Taklik could be used as a reason for a wife to file a divorce lawsuit into a religious court. Article 116 KHI mentions several reasons used to commit divorce. The reasons mentioned in KHI point A to F are exactly the same as the reason for Law No. 1 of 1974 which has been outlined above. The difference in the value of KHI lies in addition to the points (g) of the husband in violation of the Taklik Talak and (h) the transition of religion or apostasy that causes disharmony in the household.

The Taklik Talak that is valid in Indonesia has been arranged and to facilitate the implementation of the provided text which contains the written conditions and the VAT only offers to the bride whether a Taklik Talak or not read. If it is read, the marriage certificate will be treated as proof of the husband's promise before the wife. If the husband is not willing to read the Talak Taklik, then the text of Taklik Talak available is crossed by the officers as a sign of the husband does not read Taklik Talak. Because the reading of the Talak Taklik was only recommended, the husband was entitled not to read it before the wife's bride.[12]

[12] Khoiruddin Nasution, *Menjamin Hak Perempuan dengan Taklik Talak dan Perjanjian Perkawinan*, Jurnal UNISIA, Vol. XXXI No. 70, Desember 2008, hlm. 339.

C. Analysis of Maqashid Shari'a in Ta'lik Talak

The fact in the field is seen as many divorce caused by the husband's neglect of the wife in terms of management, provision, and appreciation for women. In this case it appears to be the function of the Talak Taklik that bind the husband to his wife.

From one side of the husband will be more consistent and responsible for the kelangsunan of the household and on the other side the wife will be much appreciated. The husband's transgression of the matters contained in the Taklik of the divorce is already the reason for the wife to appeal and Sue in Talak.

Although there are still some contradictory opinions on the existence of current Taklik, but the influence of appreciation for women in households is greater.

According to Abdul Karim Amrullah, Taklik Talak institution can help women from deeds arbitrariness men. As many of them took place in the Minangkabau region, many women who are Terkatung-katung, have never been a woman and have never been given a living by a husband, but not also divorced. When they complain to the court, they are actually blamed for the difficulty of the religious judge granting a divorce lawsuit from them, when they are actually abandoned by her husband, then many of them are apostate, by itself Tight marriage with her husband. Therefore in the year 1916, to liberate women from men who were not responsible, on his proposal in the region of Minangkabau enforced Taklik Talak.[13]

Mahmoud Syaltout in the books comparison book explains that Islamic jurists argue that the Treaty of Talak is the best way to protect women from the husband's misdeeds. If a husband has entered into a treaty of divorce, when the marriage contract is executed and the form of the agreement has been agreed together, then the Treaty of the Talak is considered valid for all forms of Taklik. If the husband violates the agreed agreement then the wife may request to be divorced to the judge who has been appointed by the authorities.[14]

Therefore, according to the benefits for both husband and wife, the existence of the Taklik Talak is very important. Murtadha Muthahhari illustrates a normal and normal divorce, which is an abnormal birth, which is normally normal, but a divorce from a husband who does not want to carry out its obligations and does not want to divorce His wife is an unnatural and abnormal birth, where a physician or surgeon (judge) is required.[15]

In accordance with Islamic teachings, a husband has the obligation to

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[13] Hamka, *Tafsir al-Azhar*, Juz V, Panji Masyarakat, Jakarta, 1981, hal. 71.

[14] Daniel S. Lev, *Islamic Court in Indonesia (Peradilan Agama Islam di Indonesia)*, terjemahan H. Zaini Ahmad Noeh, Cet. II., PT. Intermasa, Jakarta, 1986, hlm.4

[15] Murtadha Muthahhari, *The Rights of Women in Islam*, terjemahan M. Hashem, Penerbit Pustaka, Bandung, 1997, hlm. 197.

nurture his wife best, meaning the right of the wife is to obtain maintenance as good as from her husband. The existence of a Talak Taklik when reviewed from the law of the Agreement, is a treaty that when violated caused juridical consequences that the husband has committed a deed or a wantachievement, so that according to the author of the wife can Sue the husband to court to prosecute his rights that have been deprived by the husband according to the sound of the existing Talak Taklik. It is based on the argument that the Talak's Taklik is a treaty that is mutually agreed upon by the husband or wife.

V. Conclusion

Ta'lik Talak in marriage as one of the marriage agreements. As one of the marriage treaties of Talak has a specificity compared with the marriage treaty in general, that is the Taklik Talak once spoken and promised can not be revoked by any party also including the husband who Pronounce it

Sighat Taklik Talak As the reason of the divorce lawsuit has since become jurisprudence in the courts of religion even to date with a very many number of religious courts decided the divorce due to violation of Talak Taklik.

From the side of the Maqashid Syari'ah Ta'lik Talak for Wives is an attempt to ensure the right of the wife as well as protecting and safeguarding them from discriminatory acts and arbitrariness husbands who have the absolute right in divorce. On the other hand the benefits of Sighat Taklik Talak is as motivation and commitment of the husband to Mu'asyarah bil Ma'ruf for the realization of a family that is Sakinah, Mawaddah and Rahmah.

The author advises that the Talak Taklik is one form of legal protection for the wife of the act arbitrariness husband who does not have any good i'tikad in his household. Therefore, according to researchers it is necessary to make a strong and clear legal umbrella. The arrangement of the Talak Taklik is expected not only in the compilation of Islamic law and the Ministerial regulation of religion, but must also be firmly regulated in the Marriage Act stating that the Taklik Talak is the agreement in Marriage.

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THE BLASPHEMY AGAINS RELIGION AND THE SOLUTION BASED ON ISLAMIC LAW

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Abstrack

As a pluralism country, Indonesia acknowledge 6 (six) religion as Indonesian's religions which are Islam, Catholic, Christian, Hindi, Budhis and Konghucu. It is an embodiment of the first principle of Pancasila, that Indonesia as stated based on Tuhan Yang Maha Esa. Furthermore, the existence of those religions are ruled in Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 on article 28E and article 29 verse (2). To prevent the desecration of any protected religions in Indonesia then the government make an act which is Undang-Undang Nomor 1/pnps/1965 concerning Prevention of Abuse and / or Blasphemy Against Religion and also within article 156a Kitab Undang-Undang Hukum Pidana. This research aims to analyze the solution concerning the blasphemy against religion based on the Islamic Law as well as the Postive law in Indonesia. This research using the doctrinal research and the conceptual approach which learn all the regulations within Islamic law and positive law and the doctrine of the experts. As well as we know, since 2017 the blasphemy against religion become a bit viral especially for the Moeslim in Indonesia. The limitation of the Islamic law in Indonesia cause the unability for Moeslim to use the Islamic law if there are any blasphemy against religion especially against Islam. Indonesia only use the criminal law system as the solution of the blasphemy against religion not the Islamic law. In Islamic law, if there are any blasphemy against religion especially against Islam then the blasphemer will given the penal which there is a different between the Moeslim blasphemer and Non Moeslim blasphemer. The Moeslilm blasphemer will get the heavier penal rather than the non Moeslim blasphemer. It is due to the first aim of Islamic law which is to maintain the religion.

Keyword: Religion, Blasphemy, Solution, Islamic, Law.

I. Introduction

Indonesia is a state of law based on the divinity of the Almighty. It even becomes one of the precepts contained in the basis of the State of Indonesia, namely Pancasila, where in the first precepts reads the Almighty God. Almighty God can not be interpreted with the understanding that 'God does not exist, because God is only the illusion of the human mind'. Therefore, the concept of unity of god cannot possibly live peacefully with atheism (Dr. Adian Husaini, Pancasila:137).

The word "the Almighty" in the first precept (The Almighty God) is a balance of seven words deleted from the first precept according to the original formula. This change can be accepted with the understanding that the word "the Almighty" is an affirmation of the precepts of the God, so that the formulation of the "God of the Almighty" reflects the notion of monotheism (pure monotheism) according to Islamic faith (surah al-Ikhlas). If adherents of other religions can accept it, then we give thanks and pray." (In the book Sudjangi (Editor), *Kajian Agama dan Masyarakat, 15 Tahun Badan Penelitian dan Pengembangan Agama 1975-1990* (Jakarta: Balitbang Departemen Agama, 1991-1992), 262, in Dr. Adian Husaini, *Pancasila,* 137-138).

We are also happy because we feel that on the first basis our religious life in this country has been guaranteed. The Almighty God is our faith and belief. Our hold, life and death, the world and the afterlife. It also means that the State guarantees legal certainty for the existence of the religion adhered to in Indonesia.

With the guarantee of legal certainty given by the State, it should provide a sense of security for its adherents to carry out the teachings of their religion freely. Indonesian people should also feel calm if there is a blasphemy against their religion, the perpetrators of the blasphemy will be given a punishment commensurate with the deeds they have committed. However, in reality up to now, there are still many cases relating to blasphemy or blasphemy on religion which apparently have not been touched by law in Indonesia.

II. Aimed

1. To analyze about the Indonesia's regulation of the blasphemy against religion
2. To analyze how the regulation provided by the Islamic law dealed with the blasphemy against religion

III. The Indonesia's Regulation of The Blashpemy against religion

Legal Protection is the protection of dignity and the recognition of human rights possessed by legal subjects based on legal provisions from abuse or as a collection of regulations or rules that can protect one thing from another. Legal protection is a legal protection given to legal subjects in accordance with the rules of law both preventive and coercive (repressive). Preventive legal protection is legal protection where the people are given the opportunity to raise their

objections or opinions before a government decision gets a definitive form, whereas repressive legal protection is a form of legal protection which is more aimed at dispute resolution.

Indonesia itself recognizes 6 (six) religions, namely: Islam, Christianity, Catholicism, Buddhism, Hinduism, and Confucianism, where the state guarantees freedom and protection of religious people as stipulated in Article 28E and Article 29 paragraph (2) of the Basic Law The Republic of Indonesia in 1945 which was intended to maintain the unity of Indonesia amidst the diversity of religions recognized by Indonesia.

Article 1 paragraph (3) of the Constitution of the Republic of Indonesia states that the State of Indonesia is a State of Law, namely a state that enforces laws aimed at achieving a sense of justice, certainty and usefulness in law enforcement. Law enforcement is not an activity that stands alone, but has a close reciprocal relationship with the community. Law enforcement is an effort of the authorities to ensure legal certainty, order and legal protection in the current era of modernization and globalization.

The formalization of religious regulation by the state was first conveyed by Prof. Oemar Senoadji, SH in the symposium "The Influence of Culture and Religion on Criminal Law" in Bali in 1975 with his writing entitled "Delik Agama". Oemar Senoadji expressed the foundation and urgency why the state needs to regulate religion. The basis and urgency then gave birth to several theories of religious offense. These theories intend to explain the theoretical foundation or background of conceptual thinking about the need to criminalize religious offenses.

Oemar Senoadji put forward three theories of religious offense, namely, the theory of religious protection where religion is considered as an object that will be protected by state regulations, the theory of protection of religious feelings which will be protected is the religious feelings / feelings of religious people and the theory of religious peace protection, where the object to be protected is inter-confessional religious peace so it is more focused on public order to be protected.

According to Barda Nawawi Arief in the offense of blasphemy, there are three terms, namely offense according to religion, offense against religion and offense related to religion or religious life (Barda Nawawi Arif, 2008).

There are several cases related to blasphemy against religion that have occurred in Indonesia. According to Halili Hasan, a researcher at the Setara Institute as well as a lecturer at Yogyakarta State University, explained from the results of research conducted by the Setara Institute, during 1965-2017 there were 97 cases of blasphemy. Where before reform there were only 9 (nine) cases of blasphemy against religion. After reformation of blasphemy cases against religion increased to 88 (eighty eight) blasphemy cases against religion out of 97

cases in which 76 cases were resolved through court proceedings while the rest were resolved outside (VOA, Setara Institute).

There are several cases related to blasphemy against religion that occurred in Indonesia

NO	Case Year	Case Description	Information
1	1965	There was a massacre of the kiai and santri who were carrying out the morning prayer service.	This incident became one of the factors that influenced the government at that time to issue presidential decree number 1 / PNPS / 1965.
2	1970	Defendant HB Jassin was proven legally blasphemous against Islam because of the portrayal of Allah SWT, Prophet Muhammad SAW, and the angel Gabriel in a short story entitled "The Sky Is Increasingly Cloudy"	Sentenced to prison for 1 (one) year and 2 (two) years of probation
3	1990	Defendant Arswendo Atmowiloto, was proven legally to blasphemy against Islam for insulting the Prophet Muhammad	Sentenced to prison for 4 (four) years 6 (six) months
4	1998 - 2009	Defendant Lia Eden or Lia Aminuddin who claimed to be the reincarnation of mother maria, besides that in 2006 Lia also issued a fatwa to abolish Islam and other religions.	Sentenced to 2 times in prison in 2006 was sentenced to 2 years in prison, and in 2009 was sentenced to 2 years 6 months.
5	2012	The defendant Tajul Muluk in other words Haji Ali Murtadho taught and spread heresy.	Sentenced to 2 years imprisonment.
6	2012	The defendant Rusgi was proven guilty of blasphemy against Hinduism because he called canang an unclean ritual.	Sentenced to 14 months in prison

7	2012 - 2016	Gerakan Fajar Nusantara (Gafatar) declared a heresy because it teaches and spreads heresy.	The administrators of Gafatar were sentenced to prison for 3 and 4 years.
8	2016	Defendant Basuki Tjahaja Purnama was proven legally to blasphemy against Islam by saying "do not want to be lied to by surah Al-Maidah 51"	Sentenced to prison for 1 and 2 years probation.
9	2016	Defendant Meiliana was convicted of blasphemy against Islam because she complained about the loud voice of Adzan	Sentenced to prison for 18 months, the case is currently in the stage of appeal.
10	2018	The accused Bonaji al Adji Robert was proven legally blasphemous against Islam by corrupting and burning the attributes of Islam	Sentenced to prison for 1 year and 2 months.

Source: Author's Processed Table

A. Kitab Undang-undang Hukum Pidana

The Criminal Code regulates the offense of blasphemy against religion in Article 156a Jo. Law No. 1 / PNPS / 1965 concerning Prevention of Abuse and / or Blasphemy Against Religion which is often used as a reference for judges in deciding cases of blasphemy against religion. The provisions of Article 156a are included in the Criminal Code CHAPTER V regarding Crimes against public order which regulates acts expressing feelings of hostility, hatred or humiliation of other people or groups in public. Also against people or groups of different ethnic, religious, hereditary and so on. These articles can be interpreted as a translation of the principle of anti-discrimination and to protect minorities from the arbitrariness of the majority group.

The provisions of article 156a are cited in full as follows:

"Convicted with imprisonment for up to five years, whoever deliberately publicly issues or acts:

a. The main thing is hostility, abuse or desecration of a religion that is adopted in Indonesia;
b. With the intention that people do not adhere to any religion, which is based on the Almighty God."

Related to Article 156a, it can be categorized as a criminal offense against religion if it meets the following elements:

1. The word 'Sentenced to imprisonment for up to five years' means the maximum length of criminal sanctions to be imposed on anyone who is proven legally before the court in violation of article 156a Jo. Law No1 / PNPS / 1965 concerning Prevention of Abuse and / or Blasphemy Against Religion.
2. The element of 'whosoever' referred to here is referring to the subject of law, that is the legal subject which is the direction or purpose of who is committing this act, the word "whosoever" means that this crime can be committed by anyone, either by the general public or people who have certain personal qualities like government officials.
3. The element 'Deliberately' means what is meant by willing or knowing. Deliberate means to be desired and in Insyafi, deliberate as an intention, intentional with certainty or necessity awareness, and intentionally aware of possibilities, so by wanting and or realizing not only means what is truly desired or incarnated by the perpetrator, but also matters that are aware of the possibility, so by wanting and or realizing not only means what is truly desired or incarnated by the perpetrators, lead or close to will and conviction. The element intentionally in article 156a of the Criminal Code includes all the elements that are behind the intentional element, or all other elements contained behind the element intentionally influenced by the element intentionally, so that the perpetrator's intentions must be directed to the actions or actions that are prohibited ie expressing feelings or performing actions that are intentionally basically the nature of blasphemy against a religion that is adopted in Indonesia.
4. The element 'in public expresses feelings or acts'. said in public according to R. Soesilo in his KUHP along with his comments said that an action can be said to be done in public is if the place can be seen and visited by many people (in public places). Publicly in the criminal formulation regulated in article 156a of the KUHP does not mean that the feelings issued by the perpetrators or the actions carried out by the perpetrators must always occur in public places, but rather if the feelings issued by the perpetrators can be heard by the public, or the actions committed by the perpetrators can be seen by the public. Examples in the consideration of judges in Decision number 84 / Pid.B / 2012 / PN.END referred to in public are places where the general public can see or reach them or even pass or come to him and according to S.R Sianturi S.H. in public is an action that can be witnessed by the public, so whether an action is carried out in public or not, is not a problem but in principle can be seen by the public. Regarding the phrase 'issuing feelings' meant here is an expression of the thoughts and feelings of a person which is carried out with utterances or words that contain the nature of blasphemy against a religion that is embraced in Indonesia. According to the Big Indonesian Dictionary itself the word Blasphemy comes from the word stain which

is a kind of dirt attached to something but the figurative meaning is to denigrate, demean, or injure. In the Phrasa "doing deeds" are behaviors or actions that basically contain elements of blasphemy against religion such as destruction, burning, trampling, etc. on a religious symbols or attributes, acts here also include acts of demeaning, persecuting, or killing religious leaders or religious officials who are conducting worship in accordance with religious teachings.

5. The next element is issuing feelings or carrying out acts that are hostile, abuse or desecration of a religion that is embraced in Indonesia, which means religion is Islam, Catholic Christianity, Protestant Christianity, Buddhism, Hinduism, Confucianism. Feelings issued here are feelings of hostility, abuse or defamation of a religion held in Indonesia, feelings or acts of hostility, abuse, and desecration issued or carried out by perpetrators in a public place, which can be visited by everyone, can be heard by the public, which can be done by the perpetrators both verbally and in action. Regarding feelings or actions which can be seen as a criminal offense against religion, the KUHP does not explain clearly and seems to submit to the view the judge as a law enforcement officer.
6. The element 'With the intention that people do not adhere to any religion, which is based on the Almighty God', the word 'with the intention' here means the intention or purpose of someone to blaspheme against religion so that people who had adhered to a religion become not adhering to religion whatever is recognized in Indonesia is Islam, Christianity, Catholicism, Buddhism, Hinduism and Confucianism.

B. Undang-Undang No. 1/Pnps/1965 About Prevention of Abuse and / or Blasphemy of Religion

Law Number 1 / PNPS / 1965 mentions the prohibition of seeking public support and to interpret an religion. The prohibition is contained in article 1 which reads "Everyone is prohibited from deliberately publicly telling, encouraging or seeking public support to interpret the main religion in Indonesia or conduct religious activities that resemble religious activities, interpretation and which activities deviate from the main points of religious teachings". The provisions for the blasphemy article regulated in Article 156a of the Indonesian KUHP Jo. Law No.1 / PNPS / 1965 concerning Prevention of Abuse and or Blasphemy Against Religion in order to uphold the values of teachings that are believed, and respect the religion professed by someone, in accordance with the achievement, and not to curb religious freedom. So if someone who believes in a religion of belief and then destroys the values and teachings that have been established by the religion of belief or others then it can be called blasphemy against religion. Freedom to practice religion and freedom to choose religion are not prohibited in Indonesia in accordance with what is stated in Article 28E paragraph (1) and (2) Article 28I

paragraph (1) and Article 29 paragraph (2) of the 1945 Constitution of the Republic of Indonesia .

Even though the Indonesian state is not a religious state, but the regulation regarding blasphemy is very important because Indonesia is a country based on the Pancasila where the first precepts read "The God of the Almighty", which means a country that recognizes God, devoted to God, and recognizes the existence of religion.

Law No.1 / PNPS / 1965 concerning Prevention of Abuse and / or Blasphemy Against Religion. Article 2 of Law No / 1 / PNPS / 1965 states: Paragraph (1) "Anyone who violates the provision in Article 1 is given an order and a strong warning to stop the act in a joint decision of the Minister of Religion, Minister / Attorney General and the Minister in Country". In Paragraph (2) "If the violation referred to in Paragraph (1) is committed by an organization or something of a flow of trust, the President of the Republic of Indonesia can dissolve the organization and declare the organization or flow as an organization or prohibited one or another after the President has been considered by the Minister Religion, Minister / Attorney General and Minister of Home Affairs".

IV. Islamic Regulation of The Blasphemy Against Religion

1. Sanctions in Islamic Law

Arrangements relating to sanctions in law are regulated in Nidzomul Uqubat. In contrast to criminal law in Indonesia where the objective of punishment or the purpose of imposing sanctions is to foster with the aim that the perpetrators of crimes can become deterrent and not commit any more crimes they have committed, then the imposition of sanctions in Islamic law has two main objectives, namely:

1. zawajir or prevent, the purpose of prevention of this jawazir is for two parties namely;
   a. The perpetrators of crime, so as not to repeat the crime again
   b. The general public, so that they will never want to commit the same crime as the perpetrator. The purpose of preventive sanctions to the community is implemented through giving sanctions carried out in open fields where everyone can see how the imposition of sanctions on an offender.

   So the existence of sanctions as zawajir or prevent is because these sanctions will be able to prevent humans from committing sins and acts of violation.
2. Jawabir or atone for sin, the existence of sanctions as an answer is because uqubat can atone for the afterlife sanction where the afterlife sanction for a Muslim will be fall by sanctions imposed by the State in the world.

   The legal basis is in the argument narrated by Bukhari of Ubadah bin Shamit ra, who explains that the sanctions of the world are for certain sins, namely the sanctions imposed by the State on the perpetrators of sin

and this will invalidate the afterlife sanctions (Abdurrahman al Maliki, 2002).

The sanctions imposed in Islam are in retaliation for crimes committed by someone. While crime itself in Islam is a despicable act. The meaning of the word despicable here is something that is shamed by Shari 'or who created mankind, namely Allah SWT.

That means when something has been stipulated in Islamic law as a despicable act it is an absolute thing that a despicable thing is a crime. As long as it has been determined by the syariah law as something that is despicable, that despicable act becomes a sin and therefore must be subject to sanctions. So the substance of sin is evil (Abdurrahman al Maliki).

The sanctions contained in Islamic law in this world are the head of state or the person who represents him. It means that it is organized by the State by upholding the ablution of Allah and carrying out the laws of jinayat, ta'zir and mukhalafat.

There are several categories of sanctions in Islamic law, namely:

1. Hudud
2. Jinayat
3. Ta'zir
4. Mukhalafat

3. Blasphemy and its Regulation Within Ta'zir

Ta'zir is one type of sanctions in Islamic law. Ta'zir literally means ma'nu or prevention. While syar'i, ta'zir means sanctions imposed on immoral acts in which there is no hadith and kafarat (Abdurrahman al Maliki). The meaning of the definition is that ta'zir has been prescribed for every violation that shari'ah itself does not specify the size of the sanction. Basically, the determination of ta'zir sanctions is given to cases that have not yet been determined the size of the sanctions by syara' and submitted entirely to the head of the State or his representative and generally the representative is a qadliy or judge.

Because sanctions ta'zir made to act unassigned syar'i sanctions then in its development there are many cases and immoral acts which can be punished using these ta'zir sanctions.

According to Abdurrahman al Maliki, there are several types of actions that can impose ta'zir sanctions, namely:

a. Violation of honor or dignity;
b. Violation of glory;
c. Acts that damage the mind;
d. Violation of property;
e. Security breach;
f. Subversion;

g. Acts related to religion;

Associated with point g, namely acts related to religion, which will be discussed further related to the existence of Blasphemy.

There are many views among Muslims themselves related to the occurrence of insults to religion. According to nature, as a Muslim when his religion is insulted or humiliated, there must be a desire to defend his religion. However, a small number of people think that religion, especially Islam, does not need to be defended. Because it will not hurt the existence of religion itself if it is not defended.

Before discussing further related to the rules of Islamic law relating to Blasphemy especially to the Islamic religion, it will first be discussed regarding the views related to the obligation to defend Islam.

a. The view that says that Islam does not need to be defended is a thought that has no thought quality. Why? That is because a Muslim's belief in Allah SWT, Prophet Muhammad SAW and Al Qur'an requires a Muslim to feel angry and offended if their religion which is Islam is humiliated. So that thinking can be categorized as intellectual fantasy.
b. Allah SWT himself has ordered Muslims to defend the religion and messengers of Allah SWT as contained in the translation QS.as Shaf (14) which means: you believers, be you helpers (religion) of Allah and QS.al Fath (8-9), which means Truly We have sent you as a witness, bearer of good news and warning; so that you believe in Allah and His Messenger, while supporting and glorifying it.
c. Defending and helping the religion of Allah is a will or tool / way for us to get Allah help. Where when we defend religion, defend people, defending Messenger, Fight for syariah and help fighters who fight for religion then Allah will help us as contained in QS.Muhammad which means: For you who believe, if you help (religion) Allah, certainly Allah will help you and strengthen your position,.
d. if Allah didn't need to be defended, there never would be 'Awliya' or the guardians or lovers of Allah. The existence of Awliya is a consequence of the helpers of Allah's religion as mentioned in QS. Yunus (62) which means: Remember, truly the guardians / lovers of Allah there is not the slightest fear in themselves and they are not sad.
e. If only Allah and religion did not need to be defended, the Prophet Muhammad SAW would not have bothered preaching in Mecca to bleed and do not need to fight with his friends against the infidels more than 79 times, 27 times led by him directly (Abdurrahman al Maliki, 2002).

Associated with the existence of Blasphemy, especially those related to insults to Islam, we will see how Islam provides rules related to insults to religion, especially insults to Islam.

a. In Islam maintenance of religion is the first thing that is the goal of the existence of Islamic law so that when there are people who carry out the activities of spreading kufr ideology or kufr thought then someone in the view of Islam has committed a crime and must be given a penalty or sanction. The penalty is to impose a prison sentence ranging from 2 years to 10 years if the perpetrators are non-Muslims, but if the perpetrator is a Muslim then an apostasy sentence will be imposed on him, which is capital punishment. Noteworthy, prison sentences in Islam are not prisons like those in Indonesia today where training is given in the form of skills, non formal education, doing various activities outside the cell and can get family visits. In the Islamic view, prison is not a madrasa not a school institution so there is no provision of guidance in it. Prison in Islamic law is a place of exile for perpetrators of crime where he or she will be isolated in a closed room and no family visit. The purpose of imprisonment is in accordance with the objectives of applying punishment in Islam, namely zawajir or preventing the offender from repeating the crime he has committed.
b. Make writing or statements in which there is an insult to one of the creed owned by Muslims, then the sentence that can be handed down to the offender is to impose a prison sentence ranging from 5 years to 15 years if the perpetrators are non-Muslims, and if the culprit is a Muslim then the offender will be subject to apostasy against him, namely the capital punishment. Why? Because statements that denounce or even insult the faith of Muslims for a Muslim would already disbelieve the culprit.
c. When inviting thoughts where these thoughts will be able to influence feelings a Muslim then he will be subject to the law in the form of whip and imprisonment for up to 5 years.
d. Conduct insults to the Prophet Muhammad SAW. There are several forms of blasphemy to the Prophet Muhammad SAW, among others;
    1) Denounce and find fault with Prophet Muhammad SAW;
    2) Assume that there is a lack in Prophet Muhammad SAW;
    3) Denounce the Prophet or descendant of Prophet Muhammad SAW;
    4) Denounce the practice of religion brought by Prophet Muhammad SAW;

5) To speak ill of the noble character of Prophet Muhammad SAW;
6) Oppose or align Prophet Muhammad SAW with others with the intention of reproach, insulting and looking for mistakes.

According to the scholars, for a Muslim when he insulted the religion of Islam, including insulting the Prophet Muhammad SAW then the perpetrators unanimously declared infidels and given the punishment for apostasy is death penalty act. (Kaffah, 2019). Ibn Mundhir stated that the majority of scholars agree on the imposition of sanctions for those who insult Islam, especially if the perpetrators are Muslims, then the sentence is a death sentence. This is the opinion of Imam Malik, Imam al-Laits, Imam Ahmad bin Hanbal, Imam Ishaq bin Rahawih and Imam as Shafi'i (Kaffah, 2019).

V. Conclusion

In fact we have seen that not all acts that can be categorized as blasphemy can be sentenced in Indonesia based on the rule of law, especially now where freedom of speech is the basis for Blasphemy's perpetrators to legalize their actions.

Whereas in Islamic Law it is very clear to regulate the existence of Blasphemy especially for Islam and the Prophet Muhammad where the perpetrators if a non-Muslim will be given varying punishment ranging from caning or imprisonment. Whereas if the culprit is a Muslim then by law the offender is declared to be infidels and the culprit will be subject to the death penalty in accordance with the sanctions that can be imposed on apostates in the hudud category.

Thus clearly the rules relating to blasphemy in Islamic law so the main goal is maintaining religious Islamic law will be implemented.

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IMPLEMENTATION OF AGRICULTURAL ZAKAT ON FOOD SECURITY

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Abstract

It is ironic that in an agrarian country, Indonesia, which in fact is abundant in natural resources, still has to import several commodities. This is the cause is the gap in agricultural land ownership and the management of zakat funds that have not been maximized. One of the goals of zakat is to increase the welfare of the community equally. Zakat as a cleanser and fertilizer is one of the media for every Muslim so that his possessions become clean and pure from the things that pollute and forbid them. Zakat as a fertilizer so that the assets they have are blessed and increased. Increased ownership of this property when it reaches the threshold, then the charity must be removed. Zakat mall consists of several types, one of which is agricultural zakat. Empowerment of good agricultural zakat will have a positive impact on food security. The BAZNAS program in the food security service program aims to guarantee the availability of food of the highest quality and affordable prices for the community. BAZNAS also took part in supporting food security programs to advance the regional economy. BAZNAS integrated village community empowerment based on the potential that exists in the community in an area by helping improve the welfare of farmers through rice farmers empowerment programs in various regions. That is proof of the utilization of zakat funds which will greatly affect the empowerment of BAZNAS fostered farmers in the village because farmers will get better welfare and quality rice produced. It was able to shorten the distribution chain of rice from farmers to consumers. In addition to agricultural alms, the demand for rice increases with the obligatory zakat worship. If the zakat fitrah funds from the community are diverted to buy rice from BAZNAS fostered farmers, it will have a big impact on the welfare of farmers. If combined with zakat fitrah funds collected in mosques throughout Indonesia, this will improve the welfare of farmers. The effectiveness of zakat agriculture is expected to realize the availability of national food while increasing the welfare of rural farmers through its programs. Aside from the issue of zakat, land distribution is highly concentrated in a handful of elites. While the

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village community is still dependent on the agricultural sector. The disparity in the control of agricultural land threatens the sustainability of domestic food production. The government should do the equalization of agricultural land use for the people in the area and there is a guarantee of the distribution of agricultural products in favor of farmers. This needs to be implemented to moratorium on changes in the function of agricultural land and for the future of Indonesia's food security. This study aims to prove that agricultural zakat has a very big role in the national food security program. The research method used in this research is Analytical Descriptive and the source of research data belongs to the Library Research. The approach used is the Sociological Normative Approach. The results of this study indicate that agricultural zakat has a very big role for the food security of an area.
Key Words: *Agricultural Zakat, Food Security, Islamic Law.*

Abstrak

Hal ironis di negara agraris, Indonesia yang notabene melimpah sumber daya alamnya tetap harus melakukan impor beberapa komoditas. Hal tersebut penyebabnya adalah kesenjangan kepemilikan lahan pertanian dan pengelolaan dana zakat yang belum maksimal. Salah satu tujuan dari zakat adalah untuk meningkatkan kesejahteraan masyarakat secara merata. Zakat sebagai pembersih dan penyubur merupakan salah satu media bagi setiap muslim agar harta yang dimilikinya menjadi bersih dan suci dari hal-hal yang mengotori dan mengharamkannya. Zakat sebagai penyubur agar harta yang dimilikinya berkah dan bertambah. Bertambahnya kepemilikan harta ini apabila telah sampai pada nishab, maka mesti di keluarkan zakat malnya. Zakat mal ini terdiri dari beberapa macam, salah satunya yaitu zakat pertanian. Pemberdayaan zakat pertanian yang baik akan menghasilkan dampak positif bagi ketahanan pangan. Program BAZNAS dalam program layanan ketahanan pangan bertujuan untuk menjamin ketersediaan pangan dengan kualitas terbaik dan harga terjangkau bagi masyarakat. BAZNAS pun ikut andil dalam mendukung program ketahanan pangan untuk memajukan ekonomi daerah. BAZNAS melakukan pemberdayaan masyarakat desa secara terpadu berdasarkan potensi yang ada di masyarakat dalam suatu kawasan dengan membantu meningkatkan kesejahteraan petani melalui program pemberdayaan petani padi di berbagai daerah. Itulah bukti pendayagunaan dana zakat yang akan sangat berdampak baik untuk pemberdayaan petani binaan BAZNAS di desa karena petani akan mendapatkan kesejahteraan yang semakin baik dan beras yang dihasilkan berkualitas. Hal tersebut mampu memperpendek rantai distribusi beras dari petani kepada konsumen. Selain zakat pertanian, permintaan terhadap beras meningkat dengan adanya kewajiban ibadah zakat fitrah. Jika dana zakat fitrah dari masyarakat dialihkan untuk membeli beras dari petani binaan BAZNAS, maka akan memberikan dampak yang besar bagi kesejahteraan petani. Jika digabungkan dengan dana zakat fitrah yang dihimpun di masjid-masjid di seluruh Indonesia,

maka hal tersebut akan meningkatkan kesejahteraan petani. Efektifitas zakat pertanian ini diharapkan dapat mewujudkan ketersediaan pangan Nasional sekaligus meningkatkan kesejahteraan petani desa melalui program-programnya. Disamping masalah zakat, distribusi tanah sangat terkonsentrasi di segelintir elit. Sementara Masyarakat desa masih menggantungkan hidupnya di sektor pertanian. Kesenjangan penguasaaan lahan pertanian tersebut mengancam keberlangsungan produksi pangan domestik. Pemerintah semestinya melakukan pemerataan penggunaan lahan pertanian bagi masyarakat yang ada didaerahnya dan ada jaminan proses distribusi hasil pertanian yang berpihak kepada petani. Hal tersebut perlu dilaksanakan untuk moratorium perubahan fungsi lahan pertanian dan demi masa depan ketahanan pangan Indonesia. Penelitian ini bertujuan untuk membuktikan bahwa zakat pertanian memiliki peran yang sangat besar dalam program ketahanan pangan nasional. Metode penelitian yang digunakan dalam penelitian ini bersifat Deskriptif Analitis dan sumber data penelitian tergolong kepada Studi Kepustakaan (Library Research). Pendekatan yang digunakan adalah Pendekatan Normatif Sosiologis. Hasil penelitian ini menunjukkan bahwa zakat pertanian memiliki peran yang sangat besar bagi ketahanan pangan suatu daerah.
Kata Kunci: *Zakat Pertanian, Ketahanan Pangan, Hukum Islam.*

I. INTRODUCTION

Zakat is one of the pillars of the formation of religion and is also the fourth pillar of Islam that must be fulfilled by every Muslim community whose wealth has reached nishab. Zakat is also a system that covers all aspects, in addition to being a liaison between humans and Allah SWT, zakat is also a liaison between fellow humans. Ordinary zakat is one instrument that can be used for income distribution. If zakat is managed properly, then zakat can build economic growth and income distribution (economic with equity).[3]

On the other hand zakat can also overcome important aspects of life and Allah SWT will cover some of the gaps in the Islamic community if the management system of zakat is good.[4]

The wisdom of zakat is not only as a manifestation of faith and piety to Allah SWT, but also more than that with good management, the zakat funds can be a source that can be used and allocated to improve the welfare of the community. In Indonesia there are two zakat management institutions that are trusted to optimize the collection of zakat funds, both institutions managed by the private sector and institutions managed by the government. The government agency authorized to manage and distribute zakat is the Amil Zakat Agency from the National level (BAZNAS) and the institution managed by the private sector,

[3]Hafidhuddin D., *Fiqih Zakat Indonesia*, Jakarta: Badan Amil Zakat Nasional, 2015, page 15.

[4]Ayyub, *Fiqih Ibadah,* Bogor: PT Fathan Prima Media, 2007, page 5.

the Amil Zakat Institution (LAZ) which has obtained legality from the government in managing zakat funds.[5]

Seen in its history, during the heyday of Islam when zakat was well managed and distributed fairly to people who were entitled, zakat was proven to play a major role in improving the welfare of the community, because it became a potential source of funds as an instrument in alleviating poverty and reducing social inequality. For example in the reign of Khulafa al-Rashidin at the time of Caliph Umar bin Khathab in the country of Yemen which was one of the territories of Caliph Umar. At that time, the welfare of the people was spread evenly, to the point that economically there were no citizens who were entitled to receive zakat. Likewise in the period that followed, during the Umayyad Daula, namely the time of the Caliph Umar bin Abdul Aziz in a short time of about two years, namely in 99 H to 101 H, succeeded in prospering the community with zakat, infaq and alms, so that in Baitul Maal at that time zakat funds are abundant because it is difficult to find residents who are classified as recipients of zakat or mustahik zakat. The order to give zakat according to sharia began in the Medina period which in this period the attention of the Prophet (peace and blessings of Allah SWT be on him) led to many social problems. By referring to the sharia foundation which is commanded by Allah SWT, the zakat management system is always experiencing developments that always lead to the achievement of the economic glory of Muslims in the years afterwards. The success of zakat management in the classical Islamic era is an integrated process of the application of Islamic sharia in various fields such as law, politics, social and culture. In applying these sharia values, a professional zakat management system finds significance in the current economic development of society.[6]

Here are some of the significance of zakat in building the economic community, namely first, zakat as a compulsory worship by following the provisions set by sharia as revealed in Q.S. al-Taubah verse 60. Secondly, zakat as a container to realize a balance between the owners of excess assets with those in need. Third, zakat as a gift will help weak economic life so that it can become more empowered with productive zakat programs. Fourth, zakat can be used as a source of funds in economic development, social, defense and security, and other development programs in accordance with the needs of the State. Fifth, zakat can foster awareness and concern for humanity. Sixth, zakat can be used to carry out productive programs that can change one's economic level for the better. From this description it can be understood that zakat as a provision prescribed by Allah SWT contains a lot of potential good for the people of Indonesia.

[5]Mukhlish Muhammad Nur, "Pengaruh Pengetahuan, Pendapatan, dan Kepercayaan Terhadap Minat Muzakki Dalam Membayar Zakat di Baitul Mal Kota Lhokseumawe", in *Jurnal Ekonomi Regional*, Vol. 1, No. 3, Desember 2018 (19-29), page 19.

[6]Setiawan Budi Utomo, *Metode Praktis Penetapan Nisab (Model Dinamis Berdasarkan Standar Nilai Emas dan Kebutuhan Hidup Layak (KHL) Propinsi*, Bandung: Mizania, 2009, page 17.

Optimization of zakat if done seriously can produce good economic conditions for the people. Public awareness in the fulfillment of zakat, professionalism of its management, and capability of amil zakat are a number of supporting factors that play a role in the application of zakat in realizing zakat as an economic instrument and public welfare. Zakat is also known as one of the pillars of Islam which explains about the special obligation in issuing a portion of individual wealth for social good.[7]

The obligation of zakat in Islam has a very fundamental meaning, in addition to being closely related to aspects of divinity, it is also closely related to economic and social issues. Related to the aspect of divinity or hablumminallah (the vertical relationship between man and his god), many verses of the Qur'an mentioning zakat are including 27 verses that juxtapose obligations with the obligation of prayer together. Rasulullah SAW placed zakat as one of the main pillars in upholding the religion of Islam (H.R. Shahih Bukhari). While related to social aspects or hablunmminannaas (horizontal relations between humans and other humans), the command of zakat can be understood as an inseparable unit in an effort to realize social welfare, so that zakat is expected to minimize the gap that exists between the two layers of society namely the rich people and people who are poor by increasing economic growth at the individual level which will accumulate at the community level.[8]

Related to the close relationship between zakat and economy, in fact in the Islamic economic system there is a divine economic system built on two doctrines namely first, forbidding usury from all economic activities and secondly, the obligation to issue zakat, both zakat and zakat fitrah.[9]

As a country with the largest Muslim population in the world, the potential to become a surplus country in the field of zakat can certainly be mathematically calculated which illustrates to the public the promising economic and welfare potentials, if it is managed optimally, professionally and accountably. In the last few decades in Indonesia amil zakat swata bodies and institutions have been formed and at the National level (BAZNAS), it is on the shoulders of these bodies and institutions that hope should be relied on, but from several research findings reveal that there are still many things which needs to be addressed in an effort to optimize the management of zakat in this country.[10]

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[7]Andi Bahri S., "Zakat Sebagai Instrumen Pembangunan Ekonomi Kesejahteraan Ummat," in *Jurnal Li Falah*, Jurnal Studi Ekonomi dan Bisnis Islam, Vol. I, No. 2, Desember 2016 (74-89), page 74.

[8]Nuruddin M. Ali, *Zakat sebagai Instrumen dalam Kebijakan Fiskal*, Jakarta: Rajawali, 2006, page 2.

[9]Palmawati Tahir, "Zakat dalam Perspektif Ekonomi Islam", in *Jurnal Mimbar Ilmiah*, Hukum Universitas Islam Jakarta, Vol. IX, No. 1 Januari-Juni 2006.

[10]Andi Bahri S., "Zakat Sebagai Instrumen Pembangunan Ekonomi Kesejahteraan Ummat," in *Jurnal Li Falah*, Jurnal Studi Ekonomi dan Bisnis Islam, Vol. I, No. 2, Desember 2016 (74-89), page 75.

The fact that Indonesia is a country that has a very large zakat potential. According to research by BAZNAS (National Amil Zakat Agency), the potential for national zakat in 2015 reached Rp. 286 trillion. This figure is obtained from extrapolation results that consider GDP growth in previous years. However the fact that collected only a little when compared with the potential of existing zakat, this proves that the uptake of zakat in Indonesia is still low. In 2016, zakat received came in at Rp. 5 trillion. The amount is still very far compared to the potential for zakat in Indonesia. The potential for zakat can be calculated using the Indonesian zakat opinion of 2% and the average estimated zakat from eight countries is 4.3%. With the huge potential of zakat every year, zakat should be able to realize the creation of economic growth and income distribution for all levels of society so that wealth does not only accumulate in certain circles, so that the problem of poverty can be overcome.[11]

II. FOCUS OF RESEARCH STUDY

Some issues that concern the author related to the optimization of the potential of agricultural zakat for national food security, namely the performance of institutions in terms of zakat management institutions such as distribution, collection, and utilization of funds on a transparent basis must be considered and improved. So that the increase in performance can increase the trust of muzakki towards the National Amil Zakat Agency (BAZNAS), Baitul Mal, and other zakat institutions. Due to various inherent deficiencies in these institutions, the social function and main target of zakat are not optimally achieved. This is due to the lack of professional management or the lack of the community itself which has various interests so that all of it causes the management of zakat which is far from expectations and different from what is exemplified in the history of the glory of Islam in the past. Then there are also amil zakat institutions in some areas that don't even work and don't operate at all.

Besides the lack of counseling, socialization, and training for farmers, traders, and the community about the details of agricultural zakat, such as how to calculate, objects, and nishab zakat, because the majority of people do not know how to calculate agricultural zakat. This can actually be done when reciting in the local area, because the majority of the community usually uses the recitation as a medium to increase knowledge. There are also some farmers who do not pay zakat for agricultural products after harvest, even though they already know that there is an obligation of zakat for them. Then there are also some villagers who do not know the existence of the Amil Zakat Institution, so that no one pays their zakat to the institution because the community does not know about it.

[11]Mukhlish Muhammad Nur, "Pengaruh Pengetahuan, Pendapatan, dan Kepercayaan Terhadap Minat Muzakki Dalam Membayar Zakat Di Baitul Mal Kota Lhokseumawe", in *Jurnal Ekonomi Regional*, Vol. 1, No. 3, Desember 2018 (19-29), page 20.

The above is an effort to grow their zakat interest with the hope that when their insights increase, their interest to pay zakat in BAZNAS or in other zakat institutions will also increase. The above problems also occur because of many factors, including the ineffectiveness of the implementation of the Zakat Act, the lack of public trust in zakat institutions, and the lack of compulsory awareness of zakat. To overcome this deficit, solid steps are needed from the state and society with the spirit of the contextualization of zakat spirit.

Potential of zakat originating from the community, government, private sector, and banking which are managed and distributed in the form of zakat utilization through productive schemes, loan assistance, and capital with training, skills, and assistance at the livestock and agricultural centers will later help the economy become an independent society. . The optimal utilization and management of zakat will help the community if the distribution is carried out appropriately by paying attention to the groups that need it to be targeted.

III. RESEARCH METHODOLOGY

This research uses the Normative Sociological research method. This research is descriptive analytical and uses Primary Data Sources and Secondary Data Sources. Descriptive in the form of describing the situation, conditions, circumstances, and realities that occur in Indonesian society. Then analyzed what is the problem so that solutions can be found from these problems. Sources of data used were obtained from Library Research (Library Research).

Legal research used in this study is normative legal research with the type of sociological research on law. Sociological research on law constructs law not only as a system in the form of laws and regulations that has been understood by researchers, but law is also constructed as a social behavior that is socially legitimate. Sociology research on law observes how law lives in the community and what characterizes a community's behavior in an area in an aspect of social life to be further described, arranged and analyzed descriptively to get a complete picture of the relationship between interests and all values held and believed by the people in the region.[12]

Descriptive Analytical in this research is research that aims to make a systematic, factual, and accurate picture of the facts, properties, and relationship of the phenomenon under investigation.[13] The data in this study were collected, classified and arranged in narrative form then analyzed qualitatively.

[12]Mukti Fajar dan Yulianto Achmad, *Dualisme Penelitian Hukum Normatif dan Empiris*, Pustaka Pelajar, Yogyakarta, 2010, page 48.

[13]Soerjono Soekanto, *Metodologi Research*, Andi Offset, Yogyakarta, 1998, page 3.

IV. RESEARCH RESULTS AND DISCUSSION

1. Understanding of Agricultural Zakat

Understanding agricultural zakat when viewed in terms of language, zakat has several meanings, namely blessing, growing, clean, and good. Then when viewed in terms of terms, zakat is part of the assets with certain conditions that Allah SWT requires the owner to hand over to those entitled to receive them with certain conditions. In general, zakat is an obligation that must be carried out by the Islamic community.[14]

Zakat is divided into several types, namely zakat nafs (soul) or often called zakat fitrah and zakat maal or zakat of wealth. Maal zakat is zakat which is paid based on assets owned or controlled and used or used normally. At this time, zakat maal also includes assets which are developed and can be developed not only owned, but one of them is agricultural products. Agricultural products in the form of plants or plants that have economic value except those which are forbidden must be paid zakat which is commonly referred to as agricultural zakat. Agricultural zakat is zakat which is issued for long-term staple food crops such as rice, corn and wheat. While plants that are not staple food crops, such as oil palm, tea, cocoa, and rubber are not included in the assets to be paid for agricultural zakat, but are included in other zakat, namely zakat for plantations.[15]

In the classical fiqh study, agricultural products are all agricultural products that are planted using seeds that are edible by humans and animals. Whereas what is meant by estate crops are fruits that come from trees or tubers.[16]

In the Qur'an there are 32 words of zakat, even as many as 82 times the title is repeated using words that are synonymous with that is alms and infaq. This repetition implies that zakat has a very important position, function and role to be carried out by Muslim communities.[17]

Zakat is part of the income of the people who have enough because it must be given to those who are entitled to eradicate poverty and oppression. In the pillars of zakat there is a provision that zakat may not be given to those who are obliged to pay zakat and this is forbidden, unless they are in accordance with the eight criteria of asnaf. In the Qur'an only a few types are mentioned as assets that must be issued zakat such as gold, silver, crops, fruits, livestock, merchandise, mining goods, and general wealth. From some of these components, agricultural zakat is a major commodity in human life to continue

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[14]Hafidhuddin D., *Fiqih Zakat Indonesia*, Jakarta: Badan Amil Zakat Nasional, 2015, page 15.

[15]Hanapi, "Agricultural Zakat Accounting in Malaysia Universiti Sains Malaysia", in I*nternational Journal of Business and Social Science*, Vol. 5, No. 5, 2014, page 1.

[16]M. Arief Mufaini, *Akuntansi dan Manajemen Zakat*, Jakarta: Kencana, 2006, page 85.

[17]Abdurahman Qadir, *Zakat Dalam Dimensi Mahdah dan Sosial*, Jakarta: Raja Grafindo Persada, page 43.

life, because agriculture is a material for humans to meet the food needs that are used to stay alive.[18]

The obligation to pay agricultural zakat has also been regulated by the state. This is contained in Law No. 23 of 2011 concerning Management of Zakat in Chapter I Article 4 which contains several objects of obligatory zakat maal which must be issued. The law explicitly states that agricultural, plantation and forestry products are included in the assets that are obligatory to pay zakat. Agricultural crops included in the zakat object are staple food crops such as rice, wheat and corn. This food crop has great potential and is very much needed for domestic and foreign markets because this commodity is a staple food crop for humans. Complete in accordance with Law No. 23 of 2011 it talks about the management of zakat that zakat is a property that must be issued by a Muslim or business entity to be given to those entitled to receive it in accordance with Islamic law. From some of the above understanding it can be understood that zakat is a Muslim's obligation to issue a portion of his wealth that has reached the Nisab (minimum limit) within a certain time and is given to people who are entitled to receive zakat to purify and cleanse their souls and property in accordance with the requirements in the Qur'an.[19]

The process of exercising the rights that must be excluded from agricultural produce is material used as staple food and not rotten if stored for example from plants such as corn, rice and wheat. While from the types of fruits such as dates and grapes.[20]

Then for the zakat of this agricultural product the Nisab is 5 wasaq which is equivalent to 653 kg of dried unhusked rice. If agricultural products are other than staple foods such as fruits, vegetables, leaves, flowers, etc., then the Nisab is equated with the price of Nisab from the most common staple food in the area, for example in Indonesia, the staple food is rice. The level of zakat for agricultural products when irrigated with rain water, rivers or springs is natural irrigation is 10 percent, whereas if it is irrigated.

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[18]M. Ali Hasan, *Zakat dan Infak: Salah Satu Solusi Mengatasi Problema Sosial di Indonesia*, Jakarta: Kencana, 2006, page 25.

[19]Andi Bahri S., "Zakat Sebagai Instrumen Pembangunan Ekonomi Kesejahteraan Ummat," in *Jurnal Li Falah*, Jurnal Studi Ekonomi dan Bisnis Islam, Vol. I, No. 2, Desember 2016 (74-89), page 76.

[20]Rahmawati Muin, *Manajemen Zakat*, Makassar: Alauddin Pers, 2011, page 33.

products when irrigated with rain water, rivers or springs is natural irrigation is 10 percent, whereas if diari is watered or irrigated, the zakat is 5 percent.[21]

Nisab is the limit on the amount subject to mandatory zakat. Zakat on agricultural products is not required to reach senisab, but each time the harvest must be issued zakat. So that there are harvests of agricultural products once a year, some twice, some three times, some even four times. Every time the harvest which reaches nisab must be issued zakat and those who do not reach nisab are not subject to zakat.[22]

The scholars of the school besides Hanafi agreed that the ratio of plants and fruits was five wasaq. One wasaq is equal to sixty bushels which amount to about 910 grams. One kilo is equal to a thousand grams, if it does not reach the target, it is not required to be treated. But Hanafi believes that many and few must be treated equally.[23]

The obligation of zakat is not only limited to the types of assets that existed at the time of the Prophet Muhammad or at the beginning of Islam, such as gold, silver, merchandise, agricultural products, fruits, livestock, and rikaz (found assets or treasure), but obligatory zakat on all assets that have fulfilled the mandatory zakat requirements.[24]

2. The Foundation of Agricultural Zakat Obligations

Zakat has an open opportunity for an effective poverty eradication program by linking relevant verses of the Qur'an, for example, regarding doctrines that wish not to have a concentration of wealth that only circulates around the rich. Also the hadith of the Prophet Muhammad saw who explained the function of zakat is to transfer wealth from the rich to the poor.[25]

a. The Proof of the Qur'an

Of the 32 verses in the Qur'an that contain the provisions of zakat, 29 of them relate the provisions of zakat with prayer. Only 3 verses regarding the provisions of zakat which are not coupled with prayer are in Q.S al-Kahfi verse 81, Q.S Maryam verse 13, and Q.S al-Mu'minun verse 4 which is a Makkiyah

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[21]Muhammad Amin Suma, *Panduan Zakat Praktis*, Jakarta: Institut Manajemen Zakat, 2003, page 55.

[22]Suparman Usman, *Hukum Islam: Asas-asas dan Pengantar Studi Hukum Islam dalam Tata Hukum Indonesia*, Jakarta: Gaya Media Pratama, 2001, page 162.

[23]Muhammad Jawad Mugniyah, *Fiqih Lima Mazhab*, Jakarta: PT Lentera Basritama, 2000, page 186.

[24]Rahmawati Muin, *Manajemen Zakat*, Makassar: Alauddin Pers, 2011, page 33.

[25]Palmawati Tahir, "Zakat: Potensi Bisnis dan Manajemen (Suatu Kajian Teoritis)", in *The 1st UICIHSS UHAMKA International Conference On Islamic Humanities and Social Sciences*, University of Muhammadiyah Prof. Dr. Hamka, 22-23 March 2017, Jakarta: UHAMKA Press (88-96) page 96.

verse. This shows that zakat is very closely related to prayer, and at the same time shows that Islam is very concerned about human relations with God or hablumminallah and the relationship between humans or hablumminannas.

Agricultural products, both plants and fruits, must be issued zakat if they meet the requirements. This is as contained in QS al-Anam verse 141 which means that, "And He is the one who makes gardens that uphold and which do not uphold, date palms, plants that vary in fruit, olives and similar pomegranates. (the shape and color) and not the same (taste), eat from the fruit (the various kinds) when it bears fruit and exercise its right to reap the rewards (by giving it to the poor) and don't overdo it. Verily, Allah SWT does not like exaggerated people".[26]

b. The Proof of the Hadits

Imam Bukhari and Imam Muslim have collected around 800 hadiths related to zakat including several atsars. Some of these hadiths give general orders about zakat and there are also hadiths in the form of details of the implementation of zakat such as an explanation of the types of assets that must be tithed, Nisab, haul, and the target of zakat. Provisions of zakat in the hadith also contain the wisdom of zakat with a view to giving impetus to the Muslim community to issue zakat voluntarily.[27] The hadith on the provisions of agricultural zakat is "From Abi Sa'id al-Khudri, from the Prophet SAW said that it is not mandatory to provide staple food ingredients that are less than five ausuq, nor livestock with fewer than five animals, and gold silver with less than five uqiah ". (H.R. Muslim).[28]

Then another hadith namely, "From Abi Hurairah said, said the Prophet Muhammad saw that the plants are irrigated with rain then the zakat is 10 percent and that is irrigated with water other than rain then the zakat is 5 percent." (H.R. Tirmidhi).[29]

c. The Proof of Ijma'

Abu Bakr As-Siddiq as the successor caliph of the Prophet Muhammad SAW then after the Prophet's death, during his leadership there was a movement of a group of people who refused to pay zakat to the caliph. So Abu Bakr invited his friends to come to an agreement to strengthen the implementation and application of zakat, and to take decisive action to crush those who refused to pay zakat by categorizing them as apostates. Furthermore, during the tabi'in, mujtahid

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[26]Nuruddin M. Ali, *Zakat sebagai Instrumen dalam Kebijakan Fiskal*, Jakarta: Rajawali, 2006, page 24.

[27]Nuruddin M. Ali, *Zakat sebagai Instrumen dalam Kebijakan Fiskal*, Jakarta: Rajawali, 2006, page 27.

[28]Imam Abu Husein Muslim bin Hujjaz al-Qusairi al-Naisaburi, *Shahih Muslim*, Chapter 2, tt: Maktabah Dahlan, t. th., page 673.

[29]Abu Isa Muhammad bin Isa bin Surah, *Sunan Tirmidzi*, tt :Dar al-Fikr, t.th, page 133.

formulated the operational pattern of zakat according to the situation and conditions at that time.[30]

Abu Hanifah said that zakat must be removed from all types of plants that grow on earth, both in small or large amounts, except for grass and parsi bamboo (bamboo that can be used as a pen), palm fronds, tree stems, and all plants that it grows accidentally. However, if a piece of land is deliberately made as a place for bamboo, trees, grass and diaries to grow on a regular basis and forbidden by others to touch it, then zakat must be issued by one tenth or ten percent.[31]

Then jumhur ulama, including two friends of Abu Hanifah, said that the zakat of the plant and its legal fruits are not mandatory, except for staple food and which can be stored, whereas according to the Hambali madzhab it can be dried, durable and can be measured. Then the vegetables and fruits are not required to issue zakat.[32]

d. Historical Basis

Historically zakat has been prescribed to the Prophets and Apostles before Muhammad saw peace be upon him, as was prescribed to the Prophet Ibrahim and Prophet Ismail as, even to the Children of Israel namely the people of the Prophet Musa as the Shari'a zakat has been applied. Likewise with the people of Prophet Isa as when the Prophet Jesus was still in the cradle. Scripture experts are also instructed to perform zakat as one of the religious instruments that has a good effect on all humanity.[33]

Thus it can be concluded that zakat is a universal teaching because it is ordered to every people in every age and is one of the treatises carried by the Prophets and Apostles. The difference is only in the technical aspects of the implementation of zakat orders.

3. Conditions in Agricultural Zakat

In each zakat there are several general requirements including Islam, baligh and understanding (according to Imam Hanafi, zakat is not required on children and crazy people), full ownership, not including assets receivable (if the assets to be combined with assets at home have reached nishab), and has passed haul (one year) except zakat on plants.[34]

The agricultural zakat requirements to be fulfilled are in the form of grains and fruit (the proposition is a hadith which means that there is no zakat on

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[30]Nuruddin M. Ali, *Zakat sebagai Instrumen dalam Kebijakan Fiskal*, Jakarta: Rajawali, 2006, page 27.

[31]Rahmawati Muin, *Manajemen Zakat*, Makassar: Alauddin Pers, 2011, page 37.

[32]Wahbah al-Zuhayli, *al-Fiqh al-Islamiy wa Adillatuh*, t.th, page 1884.

[33]Nuruddin M. Ali, *Zakat sebagai Instrumen dalam Kebijakan Fiskal*, Jakarta: Rajawali, 2006, page 28.

[34]Wahbah Al-Zuhayli, *Zakat Kajian Berbagai Madzab*, Bandung: Remaja Rosda Karya, 2005, page 183.

grains and fruits before reaching 5 wasaq), the method of calculation of seeds and fruit as applicable in the community is weighed or dikilogramkan, seeds and fruit can be stored and not preserved, reaching Nisab that is at least 5 wasaq or 653 kg net weight, dry, and clean, at the time of harvest the item is legitimate owner.[35]

Agricultural products including grains and fruits that must be tasted like rice, wheat, fruits, and other crops such as dates, grapes, raisins, olives, nuts, beans, and sesame.[36]

4. Factors That Affect Interest in Zakat Payment

a. Income

Revenues are material or non-material benefits obtained through certain businesses. Islam does not only require zakat on wealth but also requires zakat on income, such as zakat on agricultural income, merchandise results, and other results obtained from various jobs and businesses. Property requirements that must be fulfilled in the obligation of zakat are definite ownership of assets and full ownership, development, full ownership, exceeding basic needs, clearing debt, reaching nishab, reaching haul, a certain amount.[37]

b. Thrust

Thrust is a positive expectation or hope that others will not go through or exceed words, actions, and policies to act opportunistically.[38]

The concept of trust in general can be divided into two types, namely political trust (social trust) and social trust (social trust). In a political perspective, trust occurs when assessing government institutions and their leaders can fulfill promises, be efficient, be fair, and be honest. To build trust, seven values are needed: first, there is openness because confidentiality and lack of transparency between the two parties in carrying out cooperation will disrupt trust building. Therefore, openness is needed between the two parties so that they can trust each other. Second, competence which is one of the most important things that we must have because if someone wants to gain the trust of the community, it is necessary to have the ability to carry out what has been charged to him. Third, honesty which is the most important element in gaining a trust because with honesty, things that are detrimental can be avoided. Honest means the correspondence between the information provided and the available facts. In other words honest is every statement we make in accordance with reality and truth. Fourth, integrity is the compatibility between words, intentions, thoughts, and actions. For example in words in the form of promises to carry out their duties

[35]Rahmawati Muin, *Manajemen Zakat*, Makassar: Alauddin Pers, 2011, page 40.

[36]Ugi Suharto, *Keuangan Publik Islam: Reinterprestasi Zakat dan Pajak,* Yogyakarta: Pusat Studi Zakat Islamic Business School, 2004, page 255.

[37]Inoed, *Anatomi Fiqh Zakat*, Sumatera: Pustaka Pelajar, 2005.

[38]S. Gito, *Perilaku Organisasi*, Jakarta: Salamba Empat, 2002.

professionally to produce optimal resources. The fifth accountability is the encouragement that someone has to account for something that has been done to the environment or other people. Accountability can be measured by questions about how much motivation to complete the work and how much effort to complete the work. Sixth, sharing is a recognition or self-disclosure of others that serves to share something to alleviate a problem. Sharing is an important element in building trust because it has the benefit of psychological value which is to help build better relationships with one another. This includes sharing information, skills, experience, and expertise. Seventh, appreciation as a driver of trust. Trust must be built with respect and mutual respect between one another.[39]

c. Interest In Paying Zakat

An interest is a mental tool consisting of a mixture of feelings, hopes, convictions, prejudices, fears, or other tendencies that lead individuals to a particular choice. Kinds of interests are the first innate interests, that is, interests that arise based on one's talent and IQ. Second, interest in learning outcomes is an interest that arises because of influences from outside ourselves. Third, the influence of the social environment. The fourth is the mental and physical health of a person.[40]

d. Factors Affecting Interest

Factors that influence the emergence of interest are the first impulse from within the individual such as the urge to eat, curiosity and others. Muzakki who already knows about the obligations to his assets and with the awareness in each muzakki individual, muzakki always has a commitment to issue zakat every year. Second, social motives can be a factor to generate interest in carrying out a particular activity. Encouragement from the outside determines a person to pay zakat for example encouragement from the family, friends, and encouragement from the surrounding environment. The third factor is emotional, interest has a close relationship with emotions. Every muzakki who issues zakat will certainly be doubled in his wealth by Allah SWT and that muzakki will expect a reward from Allah SWT.[41]

5. Between Zakat and Tax

Zakat as a religious concept on the one hand and tax as a worldly concept on the other hand, is not a dichotomous dualism relationship but a dialectical oneness relationship. Zakat is not something that must be separated, parallelized, let alone competed with taxes, but rather is something that must be united as

[39]Wibowo, *Manajemen Perubahan*, Jakarta: PT Grasindo Persada, 2006.
[40]Mappiare, *Psikologi Remaja*, Surabaya: Usaha Offest Printing, 2000.
[41]S. Hapsari, *Bimbingan & Konseling SMA Kls X*, Bandung: Grasindo, 2005.

united. Separating zakat from taxes is the same as separating the spirit from the body or separating form from its essence.[42]

Such a modernist interpretation of zakat and tax can be seen in its application during the Islamic kingdoms of the archipelago. During the Islamic Kingdom of Aceh, for example, the people gave their zakat to the state which obliged zakat or tax to each of its citizens.[43] The kingdom plays an active role in collecting these taxes and the kingdom forms a body which is handled by royal officials with the task of collecting taxes or zakat. This tax is collected in markets, river mouths that are traversed by commercial boats, and for people who are gardening, farming, or people who plant in the forest. Therefore many types and types of taxes are imposed on each source of income and the livelihood of its citizens. This tax payment office during the reign of the kingdom of Aceh which took place in mosques. An imam and qadi (prince) are appointed to lead the implementation of religious rituals. The headman played a major role in managing the mosque's finances sourced through alms, alms, grants, and endowments.[44]

Like the Aceh Kingdom, the Banjar Kingdom also played an active role in collecting zakat and taxes. The tax is imposed on all citizens (citizens of the kingdom), both officials, farmers, traders, or others. The types of taxes that prevailed at that time also varied, such as the head tax, land tax, tenth rice tax, gold and diamond panning tax, merchandise tax, and city tax. Withdrawal of taxes on agricultural products is carried out every year after the harvest season, in the form of cash or cash crops.[45] All of this is in accordance with the practice of agricultural zakat payment in Islamic teachings. Payment of taxes in the Banjar kingdom was handed over to the tax affairs agency called Mantri Bumi. The people who work at Mantri Bumi come from ordinary royal citizens but have the skills and expertise that are qualified in their fields therefore they are appointed as royal officials.[46]

Various opinions developed in the community about the similarities and differences between zakat and tax. Of the various opinions there is an absolute equal, there is an absolute difference, and there are also those who see that one side there are similarities between the two, while on the other hand there are very basic differences between the two. As Yusuf Qaradhawi, which is a lot of

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[42]Masdar Farid Mas'udi, *Agama Keadilan dan Risalah Zakat dalam Islam*, Jakarta: Pustaka Firdaus, 1991, page 117.

[43]C. Van Vollenhoven, *Het Adatrecht Van Nederlandsch Indie*, Leiden: E.J. Brill, 1931, page 164.

[44]Azyumardi Azra, "Filantropi dalam Sejarah Islam di Indonesia" in Kuntarno Noor Aflah, *Zakat dan Peran Negara*, Jakarta: Forum Zakat, 2006, page 20.

[45]Johannes Jacobus de Hollander, *Handleiding Bij De Beoefenig Der Land En Volkenkunde Van Nederlandsch Oost Indie*, Breda: Broese, 1895, page 49.

[46]J. J. Rass, *Hikajat Bandjar: A Study in Malay Historiography,* The Hague: Leiden; Bibliotheca Indonesica 1, 1968, page 196.

references in Indonesia, considers that zakat and tax as something different and cannot be combined, even allowing taxes in addition to the obligation of zakat.[47]

From some thoughts about zakat and tax, some similarities can be made between zakat and tax as state fiscal revenues, that both are collected from assets owned by a person or legal entity and both are used for social purposes rather than for the benefit in the context of equitable distribution of social justice to the community. While the differences between the two systems include that the tax experienced a significant development both in terms of its type and the amount of the tax provisions issued from assets. Tax today has a binding power for tax subjects because it is recognized in positive State law. For tax offenders the legal consequences are clear, while for zakat offenders there are no positive legal provisions and it is the responsibility of every Muslim individual with his Lord. Tax provisions have been rationalized with reason, so that people can willingly pay taxes even with high numbers. While the Muslim community to pay zakat which is 2.5 percent is still objected, because it is not supported by the rationality of macroeconomic calculations because it contains the value of ubudiyyah to God, while reflecting the weak faith of some Islamic societies also reflects the economic weakness of Muslims. In further developments, zakat and tax become two obligations borne by the Islamic community. Faced with this problem, there are at least three opinions raised, first, zakat and tax are both paid by each taxpayer and zakat. Second, a Muslim chooses one of the two instruments. Third, choose one and assume what he has chosen already represents both. If he pays the tax, then he considers the tax to be charity from his wealth.[48]

6. The Potential of Zakat in Supporting National Food Security

In the modern Islamic world there are several Islamic countries that require their citizens to issue zakat in order to alleviate poverty and for carrying out religious orders. Among these Islamic countries are the Kingdom of Saudi Arabia, Sudan, Pakistan, Jordan, Kuwait and Malaysia.[49]

Along with the times, each country is different in managing and distributing zakat. In Indonesia, the management of zakat is carried out by the National Amil Zakat Agency (BAZNAS) which is formed directly by the President.[50] In addition, zakat is also regulated by the Law of the Republic of

[47]Nuruddin M. Ali, *Zakat sebagai Instrumen dalam Kebijakan Fiskal*, Jakarta: Rajawali, 2006, page 11.

[48]Nuruddin M. Ali, *Zakat sebagai Instrumen dalam Kebijakan Fiskal*, Jakarta: Rajawali, 2006, page 21.

[49]Faisal, Sejarah Pengelolaan Zakat di Dunia Muslim dan Indonesia (Pendekatan Teori Investigasi Sejarah Charles Peirce dan Defisit Kebenaran Lieven Boeve)", in *Jurnal Analisis*, Vol. XI, No. 2, Desember 2011 (241-272), page 251.

[50]Budi Al-Ashad, "Pengaruh Pembayaran Zakat Pertanian Terhadap Kesejahteraan Masyarakat Desa Sumberjo Kidul Bojonegoro: Kajian Sosial Hukum Islam" in *Shakhsiyah Burhaniyah: Jurnal Penelitian Hukum Islam*, Vol. 1, No. 01, Januari 2016 (57-78), page 65.

Indonesia Number 23 of 2011. This law contains the management of zakat which includes planning and organizing activities in the collection, distribution and utilization of zakat. In Law No. 23 of 2011 stated that the management of zakat aims to improve the effectiveness and efficiency of services in the management of zakat and to increase the benefits of zakat in realizing public welfare and poverty reduction.[51]

The formation of the National Amil Zakat Board or commonly referred to as BAZNAS is an effort in achieving the objectives of zakat management. BAZNAS is a zakat management institution that is nationally independent and reports to the President through the Minister. As in Law Number 23 of 2011 it is stated that in carrying out its duties BAZNAS carries out the functions of firstly planning, collecting, distributing and utilizing zakat. Secondly, the collection, distribution and utilization of zakat. Third, control, collection, distribution and utilization of zakat. Fourth, namely the reporting of accountability for the implementation and management of zakat.[52]

From an economic perspective, zakat is an economic instrument that has enormous potential. The National Amil Zakat Agency (BAZNAS) and the Faculty of Economic Management of the Bogor Agricultural University (FEM IPB) in 2011 conducted research on the potential of National Zakat. The results of this research indicate that the potential value of zakat nationally reaches 217 trillion rupiah. Based on BAZNAS research, the potential for National Zakat in 2015 has reached 286 trillion rupiah. This figure was generated using an extrapolation method that takes into account GDP growth in previous years. But the collection of zakat has not been done optimally. This can be seen from the research results of BAZNAS and FEM IPB which revealed that the total zakat revenue is only 1 percent of the total potential of national zakat.[53]

Then when viewed from the potential that exists in each province, then West Java is the province with the greatest zakat potential of 17.67 trillion, followed by East Java and Central Java which have zakat potential of 15.49 trillion and 13.28 trillion, respectively.[54]

The implementation of zakat which has been taking place so far in Indonesia is felt to be undirected. This encourages Muslims to carry out the collection of zakat as well as possible. Various attempts have been made to make this happen, both by official bodies such as the Ministry of Religion, Local Government, and by Islamic leaders and private Islamic organizations. National management of zakat is getting more intensive after the issuance of the Law on Management of Zakat. The law is indeed a formal legal basis for the

[51]Undang-Undang Republik Indonesia Nomor 23 Tahun 2011 Pasal 3.

[52]Undang-Undang Republik Indonesia Nomor 23 Tahun 2011 Pasal 7 ayat 1.

[53]Badan Amil Zakat Nasional (BAZNAS), *Outlook Zakat Indonesia 2017*, Jakarta: Pusat Kajian Strategis BAZNAS, 2016.

[54]Hafidhuddin D., *Fiqih Zakat Indonesia*, Jakarta: Badan Amil Zakat Nasional, 2015, page 9.

implementation of zakat in Indonesia. Consequently, the government from the central to regional levels must facilitate the formation of zakat management institutions, namely the National Amil Zakat Agency (BAZNAS). This BAZNAS was formed based on Presidential Decree No. 8 of 2001 dated January 17, 2001. Broadly speaking, the zakat law above contains rules regarding the management of zakat funds that are well-organized, transparent and professional, and are carried out by official amil appointed by the government. Periodically a journal will be issued, while supervision will be carried out by scholars, community leaders and the government. So that if there is negligence and errors in the recording of zakat assets, sanctions can be even assessed as a criminal act. Thus the management of zakah is possible to avoid irresponsible forms of fraud. In the zakat law also mentioned the type of assets subject to zakat that had never existed in the time of the Messenger of Allah, namely the income and services. This type of property is a treasure that must be treated as an income that is only known in modern times. Zakat for the results of this opinion is also known as professional zakat. In other words, the law is a new breakthrough. BAZNAS has a national-scale scope that includes Zakat Collecting Units (UPZ) in Departments, SOEs, Consulates General, and National-scale Private Legal Entities.[55]

The presence of the law provides a new spirit. Zakat management must be handled by the State as it was practiced in the early days of Islam. According to Islamic teachings, zakat should be collected by the state and the government acts as a representative of the poor to get their rights in the property of the rich. This is based on the words of the Prophet. to Mu'adz ibn Jabal that the ruler is in charge of managing zakat. Both directly and through their representatives, the government is tasked with collecting and distributing zakat. The history of zakat in classical times has proven that an Islamic state that applies zakat well accompanied by awareness of muzakki on the importance of zakat payment, can deliver the lives of its people at the gates of prosperity and prosperity. Likewise, modern Islamic countries that require their citizens to pay zakat can reduce poverty in their countries. The key word here is welfare and prosperity via zakat. Welfare is the target and goal of all efforts in managing zakat. Community welfare needs to be fought for and the main vision for zakat management must be achieved. The Law on the Management of Zakat is indeed a legal umbrella and the culmination of the struggle of Indonesian Muslim communities to be able to practice their religious teachings. With the existence of this law, many zakat management institutions and zakat houses have also been mushroomed. However, the Indonesian Islamic world today has not fully achieved a glorious experience in the history of adultery in the past. Poverty, unemployment and

[55]Fakhruddin, *Fiqh dan Manajemen Zakat di Indonesia*, Malang: UIN Malang Press, 2008, page 249.

ignorance are still rampant. Management and application of zakat in Indonesia does not have a satisfying impact of change.[56]

Meanwhile the zakat fund management system in Indonesia is not entirely professional and satisfying because it does not make the hearts of the people to fully believe. If at the time of the Prophet Muhammad the state played an active role with the "pick up the ball" model in order to collect and distribute zakat from the muzakki to mustahiq, then in Indonesia there was polarization. First, the muzakki give away their zakat directly to those who are entitled to receive zakat (mustahiq). Secondly, zakat is given to amil zakat committee or institutions.[57] However, the institutions and governing bodies of zakat formed by the government and the community do not have the "force to force" against muzakki who are lazy to issue zakat. The law on the management of Zakat did not necessarily make this country modeled on the policies of the ancient Islamic kingdoms of the archipelago, where its citizens were required to issue zakat. A state law that has no consequences and penalties for offenders is the same as an ineffective regulation. The polarization of the transfer of zakat like this never happened in the time of the Messenger of Allah SWT and in the modern Islamic world, therefore it is not surprising that there is a historical deficit. The existence of such polarization and exacerbated by a legal umbrella that is less effective so that causes some agencies and other institutions such as educational institutions for example, have not simultaneously become zakat collector movements.[58]

Even though the law on zakat is a trigger for the mushrooming of zakat collection and distribution institutions, it does not have access to touch the soul and arouse enthusiasm in paying zakat. Whereas the law was originally created not for people who are pious and conscious, but rather to anticipate people who have the potential to commit violations. Furthermore, the polarization above is also caused by public distrust of the zakat management bodies and institutions. That is because the agency has several shortcomings namely administrators who are not trustworthy, dishonest, not capable, and less professional, only formalistic, do not have a clear list of mustahiq targets, there is no control and responsibility for muzakki. Other causes are subjective interests or community groups.[59]

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[56]Faisal, Sejarah Pengelolaan Zakat di Dunia Muslim dan Indonesia (Pendekatan Teori Investigasi Sejarah Charles Peirce dan Defisit Kebenaran Lieven Boeve)", in *Jurnal Analisis*, Vol. XI, No. 2, Desember 2011 (241-272), page 264.

[57]Rahmat Hidayat, "Pengelolaan Zakat di Indonesia dan Malaysia", in *Jurnal Harmoni*, Vol. V, No. 20, Oktober-Desember 2006, page 55.

[58]Faisal, Sejarah Pengelolaan Zakat di Dunia Muslim dan Indonesia (Pendekatan Teori Investigasi Sejarah Charles Peirce dan Defisit Kebenaran Lieven Boeve)", in *Jurnal Analisis*, Vol. XI, No. 2, Desember 2011 (241-272), page 265.

[59]Ahmad Rofiq, *Kompilasi Zakat*, Semarang: Balai Penelitian dan Pengembangan Agama, 2010, page 3.

Such deficits in the role and function of zakat will continue to occur and recur if the spirit of zakat's re-contextualization is not met. The formation of an increasingly mushrooming zakat institution or management body will not bring much benefit if it is not accompanied by active activities accompanied by legal force to withdraw zakat from muzakki. An active role accompanied by legal force is a prerequisite for the optimal function of zakat as a media and instrument in alleviating poverty and bringing prosperity. Furthermore, the community as muzakki must eliminate the ego of their individuality and distribute zakat through government bodies or institutions which of course it requires professionalism of the performance of the managers to instill a sense of trust in the hearts of the people themselves.[60]

7. Problems in the Management of Zakat

Behind the rapid advancement of zakat in Indonesia, there are still many problems that need to be resolved including the potential gap and collection of zakat, the still weak public attention to zakat, the issue of institutional credibility, the issue of HR (Human Resources) namely amil zakat, zakat regulation issues, problems the role of the National Amil Zakat Board (BAZNAS), and the issue of the effectiveness and efficiency of the zakat empowerment program. The problem of zakat is based on its institutional sources namely the regulator or the Organization of Zakat Management (OPZ) and the community as muzakki and mustahiq. The Central Government which is categorized as Zakat Regulator has a very large share, but so far it is considered as the most problematic institution in the management of national zakat because the roles that should be performed by regulators are not carried out properly and optimally. Such as the creation of a network system and national standardization of zakat management and effective functioning of the guidance and supervision of the government as the regulator of zakat management. Provide support and facilities needed in the framework of implementing the laws and technical regulations issued regarding the management of zakat at the central level. In addition the government as a zakat regulator, has an obligation to realize the budget for zakat management operations for the Amil Zakat Agency through the State Budget, then accommodate proposals and aspirations that develop in the community with regard to the substance of amendments to the law on zakat management, including proposals and aspirations that want zakat is recognized as a tax deduction as outlined in the tax regulations.[61]

[60]Faisal, Sejarah Pengelolaan Zakat di Dunia Muslim dan Indonesia (Pendekatan Teori Investigasi Sejarah Charles Peirce dan Defisit Kebenaran Lieven Boeve)", in *Jurnal Analisis*, Vol. XI, No. 2, Desember 2011 (241-272), page 268.

[61]Nurul Huda, *Zakat perspektif Mikro dan Makro; Pendekatan Riset*, Jakarta: Kencana, 2015, page 43.

Continuing from the above, zakat which is only positioned as a voluntary obligation by the State (voluntary system) has a negative impact on the management of national zakat, this has a negative impact on people's zakat awareness (muzakki), as well as the knowledge of zakat fiqh is not enough to encourage the public to perform zakat because there is no sanction (punishment) received if not paying zakat, and there is also no incentive (reward) obtained when paying zakat. Another problem arising from several studies on zakat is the low intensity of coordination between regulators and zakat management organizations (OPZ), one of the weaknesses of zakat management regulators in this case is the Ministry of Religion which is the lack of guidance and supervision of OPZ, as the only institution which is authorized to carry out the arrangement and accreditation of zakat management, the ministry of religion seems to be free from responsibility and submits it fully to the National BAZNAS. Considering that the National BAZNAS should only play a role as a regulator of national zakat management that avoids conflicts of interest (conflict of interest), but in reality in addition to acting as a regulator, the Central BAZNAS currently also acts as an operator who carries out the functions of collecting, managing and utilizing zakat funds. Zakat Management Organization (OPZ) in Indonesia has experienced rapid growth in recent years. but unfortunately this is not balanced with the availability of professional amil resources, due to the absence of a human resource development system that can supply the needs of amil resources for OPZ. At the same time, amil personnel are currently filled by people who are not from professional amil education. Most of them come from backgrounds that have nothing to do with the amil profession. This makes the work ethic, creativity and professionalism weak in OPZ. In addition to the limited human resources that are needed in the management of zakat is the synergy between OPZ, the lack of synergy between zakat managers is very apparent in the lack of cooperation between BAZ and BAZNAS. The reason is the selfishness that appears on both sides of the management of zakat. On the one hand BAZ feels that the institution is the most entitled to manage zakat and on the other hand some amil zakat institutions consider that the new zakat regulation is Law No. 23 of 2011. The next problem is the lack of public knowledge about zakat fiqh. Part of the community views that zakat is only limited to zakat fitrah, some others still consider that zakat is only issued in the month of Ramadan, zakat is also still understood only as a ritual worship which is actually one of the pillars of Islam that has a social dimension. The phenomenon of paying testicles directly to mustahik has become a tradition in most people in Indonesia. Muzakki preferred to pay his zakat directly to mustahik in the form of social assistance.[62]

One of the groups entitled to receive zakat is the administrators of zakat (amilin). If zakat is distributed directly from muzaki to mustahiq, then the amil

[62]Nurul Huda, *Zakat perspektif Mikro dan Makro; Pendekatan Riset*, Jakarta: Kencana, 2015, page 50.

profession should not need to exist. Amil will not have any role if all muzakki pay zakat directly to mustahiq. He raised the amil profession directly by Allah SWT. It is a sign that zakat should be managed by Amil so that zakat can be more effective in creating social and economic changes in society.[63]

Lack of muzakki's interest to pay zakat at the National Amil Zakat Agency (BAZNAS) is influenced by several things, one of which is ignorance of the obligation to pay zakat. One of the causes of zakat has not been collected as a whole in the institutions of collecting zakat, because public knowledge is limited to conventional sources which are clearly stated in the Koran and the Hadith with certain statements.[64]

In addition, income is also believed to be a factor influencing community interest in paying zakat. Islam states that a person is obliged to pay zakat if the income he owns has reached his Nisab and haul and vice versa if someone who has income has not reached Nisab and his haul, then that person is not obliged to issue his zakat. Then besides that there is also distrust of the Zakat Management Institute. One of the factors influencing the reluctance of people to pay zakat at the National Amil Zakat Agency (BAZNAS) is the lack of public trust in the National Amil Zakat Agency (BAZNAS) in distributing zakat to mustahiq so that some people issue their zakat not through amil zakat, but directly to mustahiq.[65] If muzakki's knowledge, income, and trust towards zakat management institutions increase, muzakki's interest in paying zakat at zakat management institutions increases, but conversely if the level of muzakki's knowledge, income, and trust decreases then muzakki's interest to pay zakat at the Amil Zakat Agency National (BAZNAS) will also decline.[66]

From this description, it can be stated about optimizing zakat, namely first, building awareness to do zakat for Muslim communities. There are still Muslims who do not issue zakat which, according to sharia, they have fulfilled the obligatory zakat criteria, this indicates that there has not been a well-developed awareness of zakat in the community. Second, the professionalism of the zakat management organization (OPZ). Increasing the professionalism of zakat management organizations will certainly foster public confidence. Based

[63]Setiawan Budi Utomo, *Metode Praktis Penetapan Nisab (Model Dinamis Berdasarkan Standar Nilai Emas dan Kebutuhan Hidup Layak (KHL) Propinsi),* Bandung: Mizania, 2009, page 46.

[64]Hafidhuddin D., *Fiqih Zakat Indonesia*, Jakarta: Badan Amil Zakat Nasional, 2015, page 12.

[65]Daulay & Lubis, I., "Analisis Faktor-faktor Penyebab Keengganan Masyarakat Membayar Zakat Melalui Instansi Bazis atau LAZ di Kota Medan (Studi Kasus: Masyarakat Kecamatan Medan Tembung)", in *Jurnal Ekonomi Dan Keuangan*, Vol. 3, No. 38, 2006 (241-251), page 242.

[66]Mukhlish Muhammad Nur, "Pengaruh Pengetahuan, Pendapatan, dan Kepercayaan Terhadap Minat Muzakki Dalam Membayar Zakat Di Baitul Mal Kota Lhokseumawe", in *Jurnal Ekonomi Regional Unimal*, Vol. 1, No. 3, Desember 2018 (19-29), page 21.

on these things, of course this can be to optimize the management of zakat, the solutions to these problems must be overcome.[67]

V. CONCLUSIONS AND RECOMMENDATIONS

1. CONCLUSIONS

Agricultural charity is a right that must be excluded from agricultural products. Zakat is one of the models of religious calls to eradicate poverty and economic inequality. The classical and modern Islamic world has published various laws and implemented various patterns of zakat management in the context of alleviating poverty. Zakat management bodies and institutions in various Islamic countries have been formed. In Indonesia, even though it is not an Islamic country, the management of zakat is also formed both by the government and by the people themselves. However, various deficiencies are inherent in these institutions so that the social function and the main target of zakat are not optimally achieved. That is caused by the less professional management due to having various interests, all of which cause the management of zakat to be far different from what is exemplified in the history of the glory of Islam in the past.

Zakat as an economic instrument and welfare of the people, the effort of optimization in terms of management becomes a necessity because it is one of the pillars of Islam with the dimensions of ubudiyyah, ijtimaiyyah, and iqtishadiyah that can contribute to improving the welfare of the community. Problems with zakat management include limited skills and qualified human resources in the management of zakat and weak regulations that can improve optimization of zakat management. As a solution to these problems is to rush solutions to problems that occur in zakat management organizations (OPZ), stakeholder involvement (government) in regulating zakat management mechanisms and to promote education to the public about the obligations and potential of zakat as an economic and welfare instrument.

Some communities pay alms from agriculture by giving it directly to the needy, poor, and elderly people in the neighborhood around their homes, as well as to their own relatives or relatives. There are also some farming communities who do not pay zakat for agricultural products after harvest, even though they already know that there is an obligation for zakat for them. In some places there are even some zakat institutions that do not run at all so that the people in the area also do not know the existence of these institutions, so no one pays their zakat because the community does not know. The problem of the lack of potential for zakat also occurs due to many factors, including the ineffectiveness of the implementation of the Zakat Act, the lack of public trust in zakat institutions, and

[67]Setiawan Budi Utomo, *Metode Praktis Penetapan Nisab (Model Dinamis Berdasarkan Standar Nilai Emas dan Kebutuhan Hidup Layak (KHL) Propinsi),* Bandung: Mizania, 2009, page 26.

the lack of compulsory awareness of zakat. To overcome this deficit, solid steps are needed from the state and society so that the spirit of zakat spiritually re-contextualizes.

Potential zakat comes from government, private, and banking. The managed zakat is distributed in the form of utilizing zakat through productive schemes, loan assistance, and capital through training and skills as well as assistance to livestock centers and agriculture. Utilization of targeted zakat is carried out through loan and capital assistance accompanied by training and skills that will later help the community's economy and become an independent community. The optimal utilization and management of zakat will help the community if its distribution is carried out appropriately by taking into account the groups that accept it so that its utilization can be right on target so that agricultural zakat does have a very large role in a regional food security program and on a national scale.

2. RECOMMENDATIONS

For the government and zakat management institutions, it is expected that the results of this research can be information and input for the implementation of zakat collection and management policies in agriculture. For academics and the public, this research is expected to add insight and information regarding the collection and management of agricultural zakat.

Suggestions for the private Amil Zakat Agency and the National Amil Zakat Agency (BAZNAS) to be able to further improve the performance of institutions both in terms of management of zakat management institutions, distribution, collection, and utilization of funds transparently, so that by increasing performance can increase the trust of muzakki against Amil Zakat Agencies and National Amil Zakat Agencies (BAZNAS).

The Amil Zakat Agencies and the National Amil Zakat Agency (BAZNAS) need to make counseling for the community and farmers in an effort to grow zakat interest in the hope that when their insight increases, their interest in paying zakat in the Amil Zakat Agencies and the National Amil Zakat Agency (BAZNAS) also increased.

The majority of the community paid their zakat directly to the poor people around them because of the unavailability of LPZ and UPZ in their area. Therefore, it is expected that BAZNAS can collaborate with local governments to establish UPZ which is spread throughout the region so that farmers can pay their income zakat to LPZ and UPZ. This is done to facilitate BAZNAS in managing zakat revenue so that the distribution of zakat funds can be felt by all mustahik.

In addition, so that the income of agricultural zakat can be in accordance with the amount of potential zakat, BAZNAS must cooperate with village and sub-district officials and the DKM of the mosque and local scholars to carry out socialization and training on the details of zakat, such as how to calculate, object,

and the zakat nishab, because the majority of people do not know how to calculate zakat in agriculture. This can be done when the local area study is carried out, because the majority of people use the Koran recitation and Friday sermons as media to increase knowledge.

The government and BAZNAS must work together with the mosque's DKM in the regions to create a religious program to improve the community's faith in the congregational prayer movement, recitation at the district level, and others. So that his hopes with increasing faith, public awareness of agricultural tithes will also increase.

In order to optimize the potential of zakat, appropriate policies and laws regarding zakat regulations are needed, so that all parties who are obliged to pay zakat.

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Abstrak

Lombok Timur merupakan daerah yang penduduknya mayoritas beragama Islam dan taat. Masyarakat Lombok Timur memiliki tradisi perkawinan menarik yang dikenal dengan "*merariq*" dan "*merariq kodeq*". Tradisi "*merariq Kodeq*" dianggap menjadi pemicu tingginya angka pernikahan dini di Lombok. Pernikahan dini menimbulkan banyak permasalahan yaitu antara lain, tingginya angka perceraian, rendahnya tingkat pendidikan, serta terganggunya kesehatan ibu dan anak. Melalui penelitian ini, Peneliti ingin mengetahui bagaimana tradisi merariq ditinjau berdasarkan perspektif hukum Islam serta menganalisis hubungan antara tradisi merariq dengan tingginya angka pernikahan dini di Lombok Timur. Untuk menjawab dua rumusan masalah ini, metode penelitian yang penulis gunakan adalah tinjauan pustaka dan wawancara dengan kajian analisis yuridis-normatif. Pernikahan dini tidak hanya disebabkan oleh tradisi merariq, tetapi juga karena tingkat kemiskinan yang tinggi serta pergaulan bebas akibat kemajuan teknologi. Islam tidak mengatur batas usia pernikahan secara kuantitatif, tetapi mengukur kemampuan kualitatif yang dilihat berdasarkan kriteria jasmani dan rohani. Islam lebih memperhatikan rukun, syarat, dan asas-asas perkawinan, antara lain yakni asas persetujuan antar keluarga dan kesukarelaan. Untuk mengatasi tingginya angka pernikahan dini di Lombok Timur, Pemerintah Daerah sebaiknya membuat peraturan daerah (*awig-awig*) terkait dengan pernikahan. Para tokoh agama dan tokoh masyarakat harus ikut mendorong keberlakuan peraturan tersebut dan masyarakat harus mematuhi peraturan tersebut.

Kata kunci: Pernikahan Dini; Tradisi Merariq; Perkawinan Islam; Lombok Timur.

Abstract:

East Lombok is a predominantly Muslim area. The people of East Lombok have an interesting marital tradition known as "*merariq*" and "*merariq kodeq*". "Merariq kodeq" tradition is considered to be the trigger for high rates of early marriage in Lombok. Early marriage causes many problems, among others, high divorce rates, low levels of education, and dangerous for mother and child's health. Through this study, researchers want to know how merariq tradition is reviewed based on the perspective of Islamic law as well as analyze the

relationship between merariq tradition and the high rate of early marriage in East Lombok. To answer these problem formulations, the research methods the authors used were literature review and interviews with juridical-normative analysis studies. Early marriage is not only caused by merariq tradition, but also because of high levels of poverty and free association due to technological advances. Islam does not regulate the quantitative age limit of marriage, but measures qualitative abilities seen based on physical and spiritual criteria. Islam pays more attention to the pillars, conditions, and principles of marriage, among others, the principle of mutual consent and volunteerism. To overcome the high rate of early marriage in East Lombok, the Local Government should make local regulations (awig-awig) related to marriage. Religious leaders and community leaders must participate in pushing for the enactment of the regulation and the public must abide by the rules.
Keywords: Early Marriage; Merariq Tradition; Islamic Marriage; East Lombok

I. Pendahuluan

Pada tahun 2018 yang lalu, masyarakat digegerkan oleh berita pernikahan dini yang terjadi di Lombok Timur, Nusa Tenggara Barat (NTB). Pernikahan ini menjadi kontroversi karena dilakukan oleh mempelai pria yang masih duduk di kelas satu SMP dan mempelai wanita duduk di kelas 2 SMP.[1] Walaupun kabar ini sekilas terlihat mengejutkan, kasus ini merupakan puncak gunung es dari fenomena pernikahan dini di Indonesia. Tidak dapat dipungkiri, pernikahan dini masih menjadi fenomena yang umum terjadi di beberapa daerah di Indonesia. Menurut data Survei Sosial Ekonomi Nasional 2015, angka pernikahan dini di Indonesia mencapai 22,82 persen, yang berarti jumlah anak di bawah umur 18 tahun yang menikah di Indonesia mencapai angka tersebut.[2]

Tujuan perkawinan sesungguhnya adalah untuk membina hubungan yang langgeng antara kedua pasangan, sehingga dalam menjalani perkawinan dibutuhkan kedewasaan dan tanggung jawab baik secara fisik maupun mental. Oleh karena itu, Pasal 7 ayat (1) Undang-Undang No. 16 tahun 2019 tentang Perubahan Atas Undang-Undang No. 1 Tahun 1974 tentang Perkawinan mengatur usia minimal perempuan untuk menikah adalah 19 (sembilan belas) tahun.[3] Walaupun Undang-Undang ini telah memberikan batasan umur minimal

[1] _____, Viral! Masih SMP, Sepasang Remaja Ini Menikah di Lombok Timur NTB, tribunnews.com tersedia di http://manado.tribunnews.com/2018/04/27/viral-masih-smp-sepasang-remaja-ini-menikah-di-lombok-timur-ntb (diakses 8 Februari 2019).

[2] Badan Pusat Statistik. Perkawinan Usia Anak di Indonesia 2013 dan 2015. Jakarta: Badan Pusat Statistik. Diakses di https://www.bps.go.id/publication/2017/12/25/b8eb6232361b9d8d990282 ed/perkawinan-usia-anak-di-indonesia-2013-dan-2015-edisi-revisi.html

[3] Indonesia. Undang-Undang Tentang Perubahan Atas Undang-Undang No. 1 tahun 1974 tentang Perkawinan, UU Nomor 16 tahun 2019 LN Nomor 186 Tahun 2019, TLN No. 6401, Pasal 7 ayat (1)

19 tahun untuk perempuan, namun ketentuan tersebut dapat ditinjau ulang bila ada pengajuan dispensasi ke Pengadilan dari pihak yang ingin menikah sebelum memenuhi syarat umur tersebut.[4] Lebih lanjut lagi, Peraturan Menteri Agama No.11 tahun 2007 tentang Pencatatan Nikah menyatakan bahwa calon mempelai yang belum berusia 21 tahun harus mendapat izin tertulis dari orangtua.[5] Artinya, masih ada mekanisme yang memungkinkan dilakukannya pernikahan di bawah umur. Sehingga, tidak jarang terjadi pernikahan dini di mana salah satu atau kedua mempelai masih di bawah umur yang diatur dalam undang-undang.

Pada praktiknya, pernikahan dini masih mengakar dalam beberapa masyarakat, bahkan menjadi bagian dari budaya setempat. Salah satu daerah dimana marak terjadi pernikahan dini adalah di Nusa Tenggara Barat, yang didukung dengan tradisi masyarakat setempat yaitu kawin culik atau merariq kodeq atau yang lebih dikenal dengan nama Merariq. Merariq adalah salah satu tradisi masyarakat suku Sasak dari Pulau Lombok, dimana seorang laki-laki menculik seorang perempuan tanpa sepengetahuan keluarga untuk kemudian dinikahi. Orangtua yang anaknya "diculik" mau tidak mau harus menikahkan anaknya karena jika mereka menolak akan dianggap sebagai aib yang memalukan nama baik keluarga.[6] Tradisi merariq ini sedikit banyak berkontribusi pada tingginya angka pernikahan dini di NTB.[7]

Dalam adat Sasak, tradisi *merariq* sebenarnya tidak bisa sembarang dilakukan. Ada sekitar 20 proses yang harus dijalani kedua calon mempelai sebelum menikah. Untuk sampai tahap *merariq*, kedua pasangan harus melalui proses perkenalan terlebih dahulu melalui perantara. Namun, perkembangan teknologi menjadikan terjadinya pergeseran makna pada praktik *merariq*. Para pasangan membuat janji dengan berkomunikasi lewat ponsel pintar ataupun media sosial seperti Facebook[8] sehingga, proses "kawin culik" menjadi suatu hal yang mudah dilakukan bahkan oleh para remaja.

Tidak mengherankan, Provinsi NTB merupakan provinsi dengan angka perkawinan usia muda yang cukup tinggi. Data BKKN menunjukkan bahwa angka pernikahan dini di NTB pada tahun 2015 pada usia 15-19 tahun berada di atas 50%, terutama di Kabupaten Lombok Timur (67,15%) dan Lombok Tengah

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[4] Indonesia. Undang-Undang Tentang Perkawinan, UU Nomor 1 Tahun 1974 LN Nomor 1 Tahun 1974, TLN No. 3019, Pasal 7 ayat (2)

[5] Peraturan Menteri Agama Republik Indonesia Nomor 11 Tahun 2007. Tentang Pencatatan Nikah, Seksi Urusan Agama Islam Departeman Agama. Pasal 7.

[6] Putri, R., (2017), Upaya Menekan Angka Perkawinan Anak: Belajar dari NTB, *tirto.com*, tersedia di https://tirto.id/upaya-menekan-angka-perkawinan-anak-belajar-dari-ntb-cBJQ (diakses pada tanggal 10 Februari 2019).

[7] Rosyidah, I. dan Iklilah, F., "Menebar Upaya, Mengakhiri Kelanggengan: Problematika Perkawinan Anak di Nusa Tenggara Barat.", Harmoni 12, no. 2 (2013): 59-71. Diakses di http://jurnalharmoni.kemenag.go.id/index.php/harmoni/article/view/175

[8] Putri, R., (2017), Upaya Menekan Angka Perkawinan Anak: Belajar dari NTB, *tirto.com*, tersedia di https://tirto.id/upaya-menekan-angka-perkawinan-anak-belajar-dari-ntb-cBJQ (diakses pada tanggal 10 Februari 2019).

(63,28%)[9] Usia perkawinan di bawah umur ini bervariasi, untuk perempuan berada dalam rentang antara usia 9 tahun hingga 15 tahun namun kebanyakan berada di kisaran usia 14-15 tahun, selepas sekolah SD atau tidak lulus SD. Sementara itu, laki-laki usia anak-anak yang menikah ditemukan dalam rentang usia antara 13-18 tahun. Kebanyakan perkawinan anak terjadi pada pihak perempuan, sedang suaminya adalah laki-laki dewasa. Namun, masih ada juga kasus-kasus dimana baik pihak laki-laki maupun perempuan menikah dalam usia dini.[10]

Pernikahan dini ini salah satunya terjadi karena masih kuatnya pengaruh agama, khususnya agama Islam di Lombok Timur. Bahkan, di Desa Sembalun Bumbung tercatat 100% penduduknya beragama Islam. Masyarakat Sembalun memiliki anggapan bahwa lebih baik menikahkan anak-anak mereka meskipun belum cukup umur menurut hukum perkawinan nasional daripada membiarkan anak-anak tersebut melakukan zina. Selain itu, pernikahan dini juga terjadi karena orang tua beranggapan bahwa anak tersebut sudah baligh sehingga dengan demikian mereka boleh dinikahkan meskipun usia mereka belum mencapai usia yang diperbolehkan untuk menikah berdasarkan hukum perkawinan nasional.

Dalam penelitian ini, Peneliti akan meneliti dan menjawab dua rumusan masalah, yakni:

1. Bagaimana tradisi merariq pada masyarakat Lombok ditinjau dari hukum Islam?
2. Bagaimana upaya mengatasi pernikahan dini pada masyarakat Lombok Timur?

Penelitian ini adalah penelitian studi pustaka dengan desain penelitian kualitatif. Penelitian ini merupakan penelitian teoritis-normatif. Data primer penelitian ini adalah kasus pernikahan dini dan tradisi Merariq di Lombok Timur, khususnya di Sakra Timur dan Sembalun. Sedangkan untuk data sekunder, Penulis memeroleh data-data tersebut dengan melakukan observasi lapangan dan melakukan wawancara terhadap pihak-pihak terkait, yakni masyarakat Kecamatan Sakra Timur dan Sembalun, pihak KUA setempat, Puskesmas, dan Lembaga Perlindungan Anak Lombok Timur. Penulis juga memeroleh data-data pendukung melalui literatur-literatur terkait. Data yang terkumpul kemudian akan dianalisis dikaitkan dengan hukum Islam.

II. Pernikahan menurut Hukum Islam

Indonesia sebagai negara dengan mayoritas penduduknya beragama Islam, menjadikan hukum Islam sebagai hukum positif. Saat ini Perkawinan telah

[9] _____, (2017), Pernikahan Dini di NTB Sulit Dibendung, suarantb.com, tersedia di https://www.suarantb.com/headline/2017/07/242717/Pernikahan.Dini.di.NTB.Sulit.Dibendung/ (diakses pada tanggal 9 Februari 2019)

[10] Rosyidah, I, dan Iklilah M., "Menebar Upaya…." Diakses di http://jurnalharmoni.kemenag.go.id/index.php/harmoni/article/view/175

diatur dalam UU Perkawinan,[11] tetapi bagi umat Islam juga berlaku peraturan khusus mengenai hukum perkawinan Islam di Indonesia, yaitu Kompilasi Hukum Islam (KHI). Di dalam Pasal 2 Ayat (1) UU Perkawinan disebutkan bahwa perkawinan sah apabila dilakukan menurut hukum masing-masing agama dan kepercayaannya. Artinya, bagi orang yang beragama Islam, jika ia melakukan perkawinan wajib berdasarkan hukum perkawinan Islam dengan memenuhi syarat dan rukun perkawinan yang saat ini telah dirinci lebih dalam pada KHI sebagai pedoman bagi orang atau lembaga yang berkepentingan yang berkaitan dengan KHI, berdasarkan Instruksi Presiden Nomor 1 Tahun 1991.[12]

Pengertian perkawinan terdapat dalam Pasal 2 KHI yang bunyinya akad yang sangat kuat atau *mitsaqan ghalidhan* untuk menaati perintah Allah dan melaksanakannya merupakan ibadah". Kata *mitsaqan ghalidhan* ini diambil dari Firman Allah SWT di dalam Alquran Surat An Nisa Ayat 21 (Q.S. 4:21) bahwa, "*dan bagaimana kamu akan mengambilnya kembali, padahal kamu telah bergaul satu sama lain (sebagai suami-istri). Dan mereka (istri-istrimu) telah mengambil perjanjian yang kuat (ikatan pernikahan) dari kamu.*[13] Sayuti Thalib mengatakan bahwa makna *mitsaqan ghalidhan* adalah suatu ikatan atau perjanjian yang sangat kuat antara suami dan isteri.

Rukun dan syarat perkawinan menurut KHI adalah sebagai berikut.

a. Calon suami dan calon istri, yang mana syarat-syaratnya adalah sebagai berikut:[14]
   (a) Keduanya jelas identitasnya dan dapat dibedakan dengan yang lainnya, baik menyangkut nama, jenis kelamin, keberadaan, dan hal lain yang berkenaan dengan dirinya. Hal ini dapat diketahui melalui proses peminangan, sehingga kedua calon mempelai telah sama-sama tahu dan saling mengenal secara baik dan terbuka.
   (b) Keduanya sama-sama beragama Islam.
   (c) Antara keduanya tidak terdapat halangan atau larangan perkawinan.

[11] Saat ini Pemerintah telah menetapkan Perubahan Undang-Undang Perkawinan menjadi UU No.16 tahun 2019.

[12] Neng Djubaedah, Sulaikin Lubis, dan Farida Prihatini, *Hukum Perkawinan Islam di Indonesia,* (Jakarta: PT Hecca Mitra Utama, 2005), hlm. 56.

[13] *Alquran*, diterjemahkan oleh Lajnah Pentashihan Mushaf Alquran (LPMQ) Kementerian Agama Republik Indonesia, (Jakarta: Kementerian Agama Republik Indonesia, 2017), Surat An Nisa (4): 21.

[14] Amir Syarifuddin, *Hukum Perkawinan Islam di Indonesia: Antara Fiqh Munakahat dan Undang-Undang Perkawinan,* cet. 3, (Jakarta: Kencana, 2009), hlm. 64-68

(d) Kedua belah pihak dapat memberikan persetujuan untuk kawin dan setuju pula dengan pihak yang akan mengawininya.

Dalam Pasal 16 Kompilasi Hukum Islam disebutkan bahwa persetujuan ini dapat diberikan dalam bentuk pernyataan tegas dan nyata dengan tulisan, lisan, isyarat, maupun diam (dalam arti selama tidak ada penolakan yang tegas). Menurut Pasal 15 KHI, perkawinan hanya boleh dilakukan oleh calon mempelai yang telah mencapai umur yang ditetapkan dalam Pasal 7 UU Perkawinan, yaitu calon suami dan istri sekurang-kurangnya berumur sembilan belas tahun tahun. Walaupun, di dalam Alquran maupun Hadis tidak ada petunjuk mengenai batas usia perkawian, karena pada dasarnya dalam Islam batas umur untuk kawin adalah *baligh* (dewasa).

b. Wali nikah
c. Saksi nikah
d. Ijab dan Kabul

Akad nikah adalah perjanjian yang berlangsung antara dua pihak yang melangsungkan perkawinan dalam bentuk Ijab dan Kabul. Ijab adalah penyerahan dari pihak pertama, sedangkan Kabul adalah penerimaan dari pihak kedua.[15]

Mengenai batas usia untuk menikah, KHI merujuk ke UU Perkawinan. Ini terlihat dalam Pasal 15 dikatakan bahwa untuk kemaslahatan keluarga dan rumah tangga perkawinan hanya boleh dilakukan oleh mempelai yang telah mencapai umur yang ditetapkan dalam Pasal 7 ayat (1) Undang-Undang No. 16 tahun 2019 tentang Perubahan Atas Undang-Undang No. 1 Tahun 1974 tentang Perkawinan jo. Pasal 7 (1) Undang Undang No. 1 Tahun 1974 yakni calon suami dan istri sekurang-kurangnya berumur 19 tahun. Jelas sekali batas usia perkawinan antara UU Perkawinan dan KHI sama. Selain itu KHI juga mengambil peraturan dalam Pasal 6 ayat (2), (3), (4) dan (5) UU Perkawinan untuk keharusan bagi calon mempelai untuk mendapat ijin orang tua jika mereka belum berumur 21 tahun. Dapat disimpulkan baik UU Perkawinan maupun KHI sependapat tentang usia layak dan dianggap siap untuk menikah.

III. Tradisi Merariq pada Masyarakat Lombok Timur

Merariq, secara harfiah berarti kawin culik, adalah kondisi dimana seorang laki-laki menculik seorang perempuan tanpa sepengetahuan keluarga untuk kemudian dinikahi. Merariq memiliki makna ganda dalam tradisi suku Sasak. Merariq dapat diartikan tindakan melarikan diri atau membebaskan gadis

[15] Syarifuddin, *Hukum Perkawinan Islam di Indonesia*, hlm. 61.

dari ikatan orang tua serta keluarganya.[16] Selain itu, *Merariq* juga berarti sebuah ritual untuk memulai proses perkawinan menurut adat sasak.[17] Tradisi merariq sudah dianut oleh suku Sasak di Lombok sedari dahulu. Konon, dulu di Lombok ada seorang raja dengan putri yang sangat cantik. Karena terlalu cantiknya, semua pria suka padanya dan berlomba-lomba melamarnya. Maka sang Raja mendirikan sebuah kamar dengan sistem penjagaan yang sangat ketat. Lalu raja memberi tantangan, "Barangsiapa berhasil menculik putriku, akan kunikahkan dia dengan putriku". Dari situ, pria-pria Lombok memiliki kebanggaan jika berhasil menculik orang yang dicintainya. Maka, jika sudah berhasil terculik, pihak keluarga perempuan harus rela anaknya dinikahkan dengan sang penculik.[18]

Tradisi Merariq juga digunakan sebagai sarana mempertahankan harga diri sekaligus menunjukkan sifat maskulinitas laki-laki Sasak karena berhasil melarikan calon istrinya. Tradisi Merariq membuat lelaki Lombok merasa menjadi seperti ksatria dan pria sejati karena jika seorang laki-laki berani melarikan anak gadis orang, ia dianggap berani bertanggung jawab atas pernikahannya kelak. [19] Sementara itu, orang tua si gadis juga merasa enggan memberikan anak gadisnya begitu saja kepada seorang laki-laki dengan cara yang biasa, karena mereka beranggapan bahwa anak gadisnya adalah sesuatu yang berharga. Jika diminta secara biasa, maka dianggap seperti meminta barang yang tidak berharga. Ada ungkapan yang biasa diucapkan dalam bahasa Sasak: *Ara'm ngendeng anak manok baen* (seperti meminta anak ayam saja)"[20]

Merariq dapat dilakukan melalui 3 cara, yaitu diminta secara baik-baik, diculik, atau dipergok. Apabila ada dua orang dipergoki sedang berduaan, mereka akan langsung disuruh menikah saat itu juga. Namun, cara yang paling popular di masyarakat ialah cara kedua yakni diculik.[21] Tradisi ini secara tidak langsung mempengaruhi bentuk rumah adat di Desa Sade yang dihuni oleh suku Sasak. Dalam rumah adat suku Sasak, kamar seorang gadis diletakkan paling belakang sementara kamar orangtua berada di paling depan. Hal ini dimaksudkan agar anak perempuan tidak mudah diculik dari rumahnya, namun harus melewati kamar orangtuanya dulu. Namun, merariq yang sebenarnya merupakan tindakan

[16] Yasin, Nur. 2008. *Hukum Perkawinan Islam Sasak.* Yogyakarta: UIN-Malang Press hlm 151

[17] Sulkhad, Kaharuddin. 2013. *Merarik pada Masyarakat Sasak*. Yogyakarta: Ombak. hlm104

[18] Amalia, Annisa Rizky. *Tradisi Perkawinan Merariq Suku Sasak Di Lombok: Studi Kasus Integrasi Agama dengan Budaya Masyarakat Tradisional*. BS thesis. Jakarta: Fakultas Ushuluddin dan Filsafat UIN Syarif Hidayatullah, 2017.

[19] *Ibid.*

[20] Bustami Saladin, "Tradisi Merari' Suku Sasak Di Lombok Dalam Perspektif Hukum Islam," *Al-Ihkam: Jurnal Hukum Dan Pranata Sosial* 8, no. 1 (June 2013): 24, https://doi.org/10.19105/al-ihkam.v8i1.338.

[21] Diskusi dengan warga Desa Sakra Timur, Lombok

melarikan anak orang tidak dianggap sebagai perbuatan kriminal di Lombok, karena sudah dianggap lumrah oleh masyarakat Suku Sasak.[22]

Ada perbedaan antara istilah *Merariq* yang biasa terjadi dengan membawa kawin lari gadis biasa dengan membawa lari gadis di bawah umur, yang disebut oleh masyarakat Sasak dengan istilah *Merariq Kodeq*. Dalam masyarakat adat suku Sasak, kawin lari di usia dini (*merariq kodeq)* menjadi hal yang biasa dilaksanakan asalkan mendapat persetujuan dari kedua orangtua calon mempelai perempuan.[23]

Terdapat aturan-aturan yang wajib diperhatikan dalam *Merariq*. Proses *Merariq* secara keseluruhan diatur oleh adat yang disebut *"awig-awig"*, yaitu aturan-aturan pelaksanaan adat yang diberlakukan dan berdasarkan kesepakatan bersama warga setempat. Menurut penelitian Zuhdi (2012)[24], Anggraeny (2017),[25] dan Ratmaja & Bahrie (2014),[26] beberapa aturan *Merariq* yang berlaku secara umum pada suku Sasak adalah sebagai berikut:

1) Calon mempelai perempuan harus diambil di rumah orangtuanya dan tidak boleh diambil di rumah keluarganya atau di tengah jalan, sawah, tempat kerja, pondok, apalagi di sekolah. Namun prakteknya, terkadang si gadis dijemput pada tempat selain rumah yang telah disepakati kedua calon pengantin.
2) Calon mempelai perempuan yang mau diambil itu benar-benar bersedia untuk kawin dan bahkan pernah ada janji dengannya untuk kawin.
3) *Merariq* harus dilakukan pada malam hari dari habis magrib sampai menjelang isya (maksimal jam 23.00 WITA). Ada sanksi adat bagi yang *Merariq* di luar jam tersebut.
4) *Merariq* harus dilakukan dengan cara-cara yang sopan dan bijaksana, tidak boleh dengan jalan paksaan, kekerasan, dan lainnya.
5) Calon mempelai lelaki saat Merariq harus menyertakan seorang perempuan dengan tujuan menemani gadis calon mempelai guna menghindari terjadinya hal-hal yang di luar norma susila dan demi menghindari kecurigaan masyarakat.
6) Calon mempelai perempuan yang diambil itu tidak boleh dibawa langsung ke rumah laki-laki. Ia harus dibawa ke rumah salah seorang keluarga pihak laki-laki guna menghindari keterkejutan atau kemarahan

[22] Kusumawati, Yayuk. "DILEMA DUALISME HUKUM KASUS MERARIQ KODEQQ SUKU SASAK." *SANGAJI: Jurnal Pemikiran Syariah dan Hukum* 1.1 (2017): 32-48.

[23] *Ibid.*

[24] M. Harfin Zuhdi, *Praktik Merariq: Wajah Sosial Masyarakat Sasak* (Mataram: LEPPiM IAIN Mataram, 2012)

[25] Anggraeny, Baiq Desy. "Keabsahan perkawinan hukum adat lombok (merarik) ditinjau dari perspektif undang-undang nomor 1 tahun 1974 tentang perkawinan dan hukum islam (studi di kabupaten lombok tengah)." *De Jure: Jurnal Hukum dan Syariah*9.1 (2017).

[26] Lalu Ratmaja dan Sudirman Bahrie, *Prosesi Perkawinan Masyarakat Gumi Sasak* (NTB: Puskanda, 2014).

orangtua laki-laki karena tidak setuju. Tempat menyembunyikan gadis itu dirahasiakan, tidak boleh diketahui oleh keluarga perempuan.

7) Calon mempelai perempuan yang diambil harus segera diinformasikan keadaannya kepada kepala dusunnya dan keluarganya atau *tepesejati* dan *tepeselebar.*

IV. Pernikahan Dini di Lombok Timur

Lombok Timur merupakan salah satu daerah di Indonesia yang memiliki angka pernikahan dini yang cukup tinggi. Data BKKN menunjukkan pada tahun 2015, sebesar 67,15% masyarakat usia 15-19 tahun di Kabupaten Lombok Timur melakukan pernikahan dini[27]. Menurut data Lembaga Perlindungan Anak Lombok Timur, anak-anak tersebut mayoritas menikah di usia 16-17 tahun. Dilihat dari jenis kelamin, pernikahan dini ini lebih banyak dilakukan oleh anak-anak perempuan dengan presentase 93,3 %, sedangkan anak laki-laki yang menikah di usia dini hanya sebesar 6,6% dari populasi masyarakat Lombok Timur. Data Badan Pusat Statistik tahun 2015 mencatat, sebanyak 911.644 anak perempuan di Indonesia menjadi korban pernikahan dini.

Terdapat beberapa faktor eksternal yang mendorong terjadinya pernikahan dini di Lombok Timur. Salah satu di antaranya adalah pandangan masyarakat, khususnya tokoh agama dan tokoh adat dalam memandang pernikahan dini. Zainal Asikin, salah seorang tokoh adat di Lombok Timur mengatakan bahwa seseorang yang menikah dalam usia dini akan memiliki kesempatan lebih mudah dalam mengurus anak. Disamping itu, menikah dalam usia dini juga memungkinkan lebih banyak generasi dari keturunan keluarga tersebut yang lahir. Slogan "banyak anak banyak rezeki" yang masih mengakar kuat di Lombok Timur menjadi salah satu landasan mengapa baik orang tua menikahkan anak-anak mereka di usia yang masih belum cukup umur dan banyak anak yang bersedia menikah dini.

Sedangkan dilihat dari segi sosial kemasyarakatan, berdasarkan hasil temuan LmRS/LPA Kabupaten Lombok Timur di kecamatan Jerowaru, seseorang akan dikatakan *mosot* (tidak laku-laku) apabila orang yang berumur di atas 25 tahun bagi laki-laki dan 22 tahun bagi perempuan yang belum menikah saat menginjak usia tersebut. Di daerah lainnya bahkan istilah "mosot" ini digunakan untuk menyebut orang yang belum menikah pada saat usianya telah menginjak 17 tahun keatas. Pelabelan "*mosot*" ini secara sosial merupakan suatu sanksi sosial yang menyebabkan baik orang tua maupun anak menjadi tidak nyaman dan memilih untuk menikah di usia muda, bahkan di usia yang belum dinyatakan cukup umur untuk menikah menurut hukum nasional.

[27] _____, (2017), Pernikahan Dini di NTB Sulit Dibendung, suarantb.com, tersedia di https://www.suarantb.com/headline/2017/07/242717/ Pernikahan.Dini.di.NTB.Sulit. Dibendung/ (diakses pada tanggal 9 Februari 2019)

Seiring berjalannya waktu, terdapat permasalahan lainnya yang menimbulkan kekhawatiran orang tua terhadap anak-anak mereka, yakni pergaulan anak-anak khususnya anak-anak remaja yang melewati batas wajar pergaulan, seperti banyaknya seks bebas dan lain sebagainya. Hal ini membuat orang tua berfikir lebih baik mereka dinikahkan daripada berzina yang merupakan dosa besar dalam agama Islam. Selain itu, maraknya kasus hamil di luar nikah juga membuat orang tua terpaksa menikahkan anak-anak mereka yang belum cukup umur daripada menjadi aib keluarga.

Usia yang belum cukup untuk menikah menurut hukum nasional ini menimbulkan banyak permasalahan. Salah satu permasalahan utama yang dihadapi tersebut ialah tidak adanya buku nikah yang dimiliki oleh pasangan yang menikah dini. LPA Lombok Timur pada tahun 2013 mencatat hanya terdapat 35 orang (38,9 %) dari 90 orang anak yang telah melakukan pernikahan usia dini yang memiliki buku nikah sedangkan 45 orang sisanya menikah tanpa dokumen legal.

Peneliti juga menemukan adanya perbedaan sikap antara Kepala Desa dengan Kepala KUA di Kecamatan Sembalun, Lombok Timur. Masyarakat yang menikah dini mengandalkan Surat Keterangan untuk Nikah sebagai tanda sahnya pernikahan tersebut. Padahal, bukti pernikahan yang sah di mata hukum hanyalah buku nikah. Pak Sukardi selaku perwakilan dari Kantor Urusan Agama Kecamatan Sembalun menyayangkan sikap kepala desa yang mudah mengeluarkan Surat Keterangan untuk Nikah. Apabila diketahui bahwa anak yang menikah tersebut masih dibawah umur yang ditentukan oleh Undang-Undang No.1 tahun 1974 tentang Perkawinan, KUA akan menolak untuk mengeluarkan buku nikah. Namun dalam praktiknya, KUA menemui banyak permasalahan dari masyarakat. Masyarakat mendesak KUA untuk membuatkan buku nikah dengan beragam alasan seperti anaknya sudah terlanjur diculik jadi mau tidak mau harus dinikahkan sebelum menjadi aib keluarga, anak tidak mau pulang apabila tidak dinikahkan, serta pernikahan dilakukan karena terjadi kehamilan yang tidak diinginkan. Meskipun begitu, KUA hanya akan mengurus buku nikah apabila dilakukan sesuai prosedur yang sesuai dengan hukum yang berlaku, yakni para pihak menghadap ke pengadilan agama dan menjalani sidang isbat. Setelah itu, hakim akan mengeluarkan surat rekomendasi dan hasil persidangan. Surat rekomendasi dan hasil persidangan itulah yang akan digunakan sebagai dasar apakah KUA akan menerbitkan buku nikah atau tidak.

V. Faktor Penyebab Pernikahan Dini di Lombok Timur

Terdapat beberapa faktor yang menyebabkan maraknya pernikahan dini di Nusa Tenggara Barat. Penelitian oleh Rosyidah & Fajriyah mengungkapkan faktor-faktor antara lain sebagai berikut.[28]

a. Faktor ekonomi dan pendidikan

Keterbatasan ekonomi pada masyarakat Sasak berimplikasi pada rendahnya tingkat pendidikan. Survei BJPS tahun 2010 menunjukkan bahwa persentase penduduk usia 10 tahun ke atas yang buta huruf di NTB berjumlah 16,51% dengan selisih jumlah 8,54% lebih banyak perempuan dibandingkan laki-laki. Rendahnya tingkat pendidikan menyebabkan masyarakat belum menyadari dampak negatif dari pernikahan dini. Selain itu, masyarakat NTB memiliki kecenderungan untuk menikahkan anak yang tidak melanjutkan sekolah untuk meringankan beban ekonomi keluarga. Dengan dinikahkan, orang tua berpikir bahwa tanggungan mereka berkurang karena anak tersebut sudah tidak lagi berada tanggungan orang tua.

Rendahnya pendidikan orang tua menyebabkan orang tua tidak begitu memprioritaskan pendidikan anak-anak mereka, khususnya anak perempuan. Bu Syaeun selaku ketua Perempuan Tangguh dan Ketua POKJA 4 Kecamatan Sembalun menambahkan bahwa pernikahan dini marak di Desa Sembalun Bumbung karena mereka tidak punya apa-apa yang dapat dilakukan, seperti tidak adanya akses untuk melanjutkan sekolah ke jenjang yang lebih tinggi seperti ke SMA atau perguruan tinggi dan tidak memiliki keterampilan yang bisa menunjang mereka untuk bekerja sehingga memilih untuk menikah saja. Di Desa Sembalun Bumbung, mengenyam bangku Sekolah Menengah Atas (SMA) merupakan suatu hal yang mewah. Tidak banyak perempuan yang melanjutkan pendidikan ke perguruan tinggi. Masih kuatnya pandangan bahwa perempuan tidak perlu sekolah tinggi-tinggi karena nantinya hanya akan mengurusi dapur (menjadi ibu rumah tangga) membuat orang tua lebih condong menikahkan anak mereka setelah mereka putus sekolah. Namun, di sisi lain, pernikahan dini justru lebih banyak membuat siklus kemiskinan berulang. Anak yang menikah dini ini lebih banyak justru mengalami kesulitan ekonomi karena rendahnya pendidikan, rendahnya kemampuan, sulitnya mendapatkan pekerjaan, dan lain sebagainya.

b. Dekadensi moral

Dekadensi moral dan pemahaman keagamaan yang terbatas menyebabkan maraknya perkawinan anak akibat telah terjadinya kehamilan di luar perkawinan. Berdasarkan kasus pernikahan dini yang ditangani oleh Lembaga Perlindungan Anak (LPA) Kabupaten Lombok Timur terdapat ada tiga faktor utama penyebab terjadinya pernikahan dini, yaitu akibat putus sekolah,

[28] Rosyidah, I. dan Iklilah, F., "Menebar Upaya, Mengakhiri Kelanggengan: Problematika Perkawinan Anak di Nusa Tenggara Barat.", Harmoni 12, no. 2 (2013): 59-71. Diakses di http://jurnalharmoni.kemenag.go.id/index.php/harmoni/article/view/175

sudah dilakukannya hubungan biologis, serta hamil di luar nikah.[29] Menikahkan anak di usia dini adalah bentuk tanggung jawab dari pihak keluarga laki-laki yang melakukan seks pranikah dan sebagai cara untuk mengurangi rasa malu.

c. Perkembangan teknologi

Penggunaan teknologi yang mudah diakses anak-anak dan remaja mendukung mereka dalam membangun hubungan melalui telepon genggam tanpa sepengetahuan orang tua. Sehingga proses sebelum menikah yang sesuai dengan adat menjadi terlewati.

d. Adat dan budaya

Masyarakat Lombok Timur menganggap bahwa apabila proses *merariq* tidak dilanjutkan dengan perkawinan, maka perempuan tersebut akan sulit mendapatkan jodoh sehingga keluarga mendapat tekanan untuk menikahkan anak perempuan mereka walaupun di usia yang masih dini demi menjaga nama baik keluarga. Selain itu, setelah mengetahui bahwa anak perempuan tersebut diculik, pihak keluarga perempuan tersebut mau tidak mau menikahkan anak perempuan yang diculik tersebut dengan laki-laki yang menculik. Hal ini dilakukan karena masih kuatnya adat Merariq serta adanya pandangan dari masyarakat bahwa perempuan yang telah diculik dianggap telah menikah dan sudah dilakukan perzinahan diantara mereka.[30] Dengan demikian, menjadi sebuah aib apabila perempuan yang telah 'dikawinkan' dikembalikan ke pihak keluarga sehingga pihak keluarga perempuan tidak memiliki pilihan lain selain menikahkan kedua pihak.

e. Rendahnya kesadaran hukum

Selain itu, para pelaku pernikahan dini belum menyadari pentingnya akta nikah bagi perlindungan hukum kedua belah pihak, sehingga perkawinan dan perceraian yang terjadi pada mayoritas kalangan masyarakat dilakukan hanya melalui proses adat dan tidak melalui proses persidangan di Pengadilan Agama.

VI. Dampak Pernikahan Dini di Lombok Timur

Berdasarkan penelitian Kusumawati (2017)[31], terdapat beberapa dampak yang terjadi akibat Merariq di bawah umur, antara lain:

a. Tingginya Angka Perceraian

Pernikahan dini yang dilangsungkan oleh anak atau remaja yang belum memiliki kematangan secara emosional untuk menyelesaikan permasalahan-permasalahan yang terjadi di dalam pernikahan mendorong tingginya angka perceraian di Lombok Timur. Banyak

[29] Suara NTB, (2017), 30 Persen Nikah Dini di Lotim Berakhir dengan Perceraian, *suarantb.com*, tersedia di https://www.suarantb.com/lombok.timur/2017/07/242685/30.Persen.Nikah.Dini.di.Lotim.Berakhir.dengan.Perceraian/ (diakses pada tanggal 10 Februari 2019)

[30] Diskusi dengan warga Desa Sakra Timur, Lombok

[31] Kusumawati, Yayuk. "Dilema Dualisme Hukum Kasus Merariq Kodeqq Suku Sasak." *Sangaji: Jurnal Pemikiran Syariah dan Hukum* 1.1 (2017)

pernikahan dini yang berlangsung hanya sekitar 6 bulan – 2 tahun saja, kemudian bercerai. Pada tahun 2013, LPSDM mencatat terdapat 80.000 (delapan puluh ribu) janda di Lombok Timur. Tidak harmonisnya rumah tangga akibat komunikasi yang tidak sejalan dapat menyebabkan terjadinya perceraian. Kawin-cerai sudah menjadi hal yang biasa di kalangan Suku Sasak. Beberapa faktor yang mengakibatkan perceraian tersebut ialah faktor ekonomi, faktor psikologi, dan orang ketiga. Pasangan yang menikah dini kebanyakan belum bekerja dan tinggal menumpang dengan mertua. Selain itu, pihak laki-laki belum dewasa secara psikologi sehingga belum siap bertanggungjawab mencari nafkah sebagai peranan yang seharusnya dilakukan sebagai seorang suami. Hal lain yang mengakibatkan perceraian adalah munculnya orang ketiga. Perceraian terjadi karena banyak pernikahan di usia dini dilakukan atas dasar cinta sejenak, keinginan sesaat dan emosional untuk menikah. Kemudian ketika perasaan cinta menggebu-gebu itu hilang, maka perceraian menjadi jalan keluar. Tidak heran, hampir 30 % kasus pernikahan dini yang ditangani oleh Lembaga Perlindungan Anak (LPA) Kabupaten Lombok Timur (Lotim) berakhir dengan perceraian.[32]

b. Anak Tidak Berpendidikan dan Putus Sekolah

Pernikahan dini juga dapat mengakibatkan tingginya generasi putus sekolah. Ketika anak-anak menikah pada usia dini, terutama perempuan, mereka memutuskan untuk tidak melanjutkan sekolah demi mengurus keluarga. Sehingga, kesempatan mereka untuk mengenyam level pendidikan yang lebih tinggi menjadi rendah, bahkan tidak sedikit pula yang tidak menyelesaikan bangku pendidikan dasar.

c. Tingginya Angka Pekerja Migran di Lombok Timur

Kurangnya pendidikan serta perceraian yang terjadi di Lombok Timur akibat pernikahan dini mendorong banyaknya Pekerja Migran Indonesia (PMI) / Tenaga Kerja Indonesia (TKI) yang bekerja di luar negeri. Setiap tahunnya, sekitar 26.000 (dua puluh enak ribu) penduduk Lombok Timur berangkat ke luar negeri sebagai TKI. Tercatat hingga Juli 2019, jumlah TKI asal Lombok Timur sebesar 13.825 (tiga belas ribu delapan ratus dua puluh lima) orang (Data LPA Lombok Timur). Tidak mengherankan bila kabupaten Lombok Timur menjadi salah satu kabupaten lumbung TKI di Indonesia.

d. Banyaknya Ayla (Anak yang Ditelantarkan)

Pernikahan dini juga menimbulkan konsekuensi lainnya yakni munculnya Ayla (Anak yang Ditelantarkan). Anak yang lahir dari pernikahan dini ini berpotensi tidak mendapatkan pengasuhan dari orang tua mereka. Hal ini disebabkan orang tua yang menikah dini yang belum cukup dewasa dan siap untuk menjadi orang baik secara psikis dan

[32] *Ibid*

psikologis mengalami kesulitan dalam membina dan mengamati tumbuh kembang anak.

e. Kemiskinan

Pernikahan dini yang pada awalnya diharapkan dapat mengurangi beban orang tua, justru kembali menjadi beban orang tua, terlebih setelah terjadinya perceraian dan lahirnya anak dari pernikahan dini tersebut karena pelaku pernikahan dini belum mapan secara ekonomi. Hal ini berpotensi menyumbang angka kepala keluarga miskin baik di kabupaten maupun provinsi.

f. Kekerasan Dalam Rumah Tangga

Pernikahan dini yang dilakukan oleh pasangan yang belum matang secara psikis, psikologis, dan ekonomi ini juga mendorong terjadinya kekerasan dalam rumah tangga. KDRT ini juga menjadi penyebab tingginya angka perceraian yang dialami oleh pernikahan dini. Gadis-gadis yang menikah pada usia dini pada lazimnya bersuamikan pria yang memiliki jarak usia jauh lebih tua darinya. Gap antara usia pasangan ini menyebabkan timbulnya problem komunikasi dalam keluarga. Sehingga munculah kekerasan dalam rumah tangga yang kebanyakan menjadi korbannya adalah perempuan.

g. Kesehatan Ibu dan Anak

Kehamilan pada usia muda dapat membawa akibat yang berbahaya, baik bagi ibu muda maupun bayinya. Ibu muda itu beresiko melahirkan bayi prematur dengan berat badan di bawah rata-rata. Hal ini sangat berbahaya bagi bayi tersebut karena meningkatkan resiko kerusakan otak dan organ-organ tubuh lainnya. Pada tahun 2017, Angka Kematian Ibu di NTB terjadi sebanyak 85 kasus, sementara kasus kematian balita terjadi sebanyak 1.012 kasus.[33] Di samping itu, anak yang menikah di usia dini cenderung belum siap mengasuh anak, sehingga anak mereka menjadi kurang gizi. Anak yang lahir dari Ibu yang melakukan pernikahan dini berpotensi mengalami kurang gizi. Rahim perempuan yang masih berusia dibawah 18 tahun masih belum siap untuk melahirkan anak sehingga banyak balita kurang gizi karena lahir akibat pernikahan dini.

h. Trauma Psikologis

Kekerasan yang terjadi dalam rumah tangga dan perceraian dapat berdampak traumatis bagi sang ibu muda. Hal ini disebabkan karena pernikahan dini mencabut masa kanak-kanaknya, dimana ia menjadi dewasa secara instan akibat pernikahan dini. Ibu muda harus mengasuh

[33] Profil Kesehatan Provinsi Nusa Tenggara Barat Tahun 2017. Diterbitkan oleh Dinas Kesehatan Provinsi Nusa Tenggara Barat, dapat diakses di http://www.depkes.go.id/resources/download/profil/PROFIL_KES_PROVINSI_2017/18_NTB_2017.pdf

dan membesarkan bayi serta melayani suami. Hal ini dapat memunculkan trauma psikologi yang berkepanjangan.

VII. Tradisi Merariq ditinjau dari Perspektif Hukum Islam

Hukum asal dari pernikahan adalah kebolehan (mubah). Namun, hukum tersebut bisa berubah menjadi wajib, sunnah, makruh, dan haram sesuai dengan illat-nya. Apabila pernikahan dilakukan tanpa kesiapan dan menimbulkan mudharat bagi kedua belah pihak, maka hukum pernikahan tersebut bisa berubah menjadi makruh, bahkan haram.

Bila mengacu pada rukun dan syarat perkawinan menurut Hukum Islam, pada dasarnya, tradisi merariq sesuai dengan rukun dan syarat perkawinan sehingga hukumnya boleh dilakukan. Hal tersebut berbeda dengan tradisi *Merariq Kodeq* atau membawa lari gadis di bawah umur, yang mana dalam hal ini dimungkinkan terdapat rukun, syarat, dan asas perkawinan yang tidak terpenuhi. Dalam hal perkawinan yang dipaksakan karena anak tidak ingin menikah, perkawinan yang tidak disetujui orang tua, perkawinan karena hamil terlebih dulu, prosedur yang dilakukan dalam perkawinan tersebut tidak memenuhi rukun, syarat, dan asas hukum perkawinan Islam. Dalam hal perkawinan yang dipaksakan, terdapat pelanggaran terhadap rukun perkawinan, syarat perkawinan, dan asas konsensualisme dalam perkawinan, dimana seharusnya kedua belah pihak yang menikah sepakat untuk melangsungkan pernikahan. Selain itu, dalam tradisi merariq kodeq, perkawinan yang dilakukan dengan anak dibawah umur tidak memenuhi syarat dalam perkawinan Islam karena salah satu syarat untuk dapat menikah menurut Islam adalah baligh atau dewasa. Islam tidak mengatur batas usia pernikahan secara kuantitatif, tetapi mengukur kemampuan kualitatif yang dilihat berdasarkan kriteria jasmani dan rohani. Pasal 15 KHI bahkan mengatur secara lebih tegas bahwa perkawinan hanya boleh dilakukan oleh calon mempelai yang telah mencapai umur yang ditetapkan dalam Undang-Undang Perkawinan, yaitu calon suami dan istri sekurang-kurangnya berumur sembilan belas tahun tahun. Selain itu, ditinjau dari segi manfaat, perkawinan dini yang dilakukan oleh pihak-pihak yang belum siap untuk membina rumah tangga lebih banyak membawa kemudharatan. Hal tersebut dapat dilihat dari banyaknya dampak negatif pernikahan dini bagi keluarga, khususnya perempuan dan anak yang dilahirkan akibat pernikahan dini tersebut. Kembali kepada konsep illat sebagai penentu hukum dalam hukum Islam, apabila perkawinan yang dilaksanakan melalui prosedur tradisi merariq kodeq justru berpotensi membawa akibat buruk karena ketidaksiapan kedua belah pihak, maka hukumnya adalah haram. Namun apabila kedua belah pihak telah siap, telah dewasa dan mampu membina rumah tangga, mampu memenuhi kewajiban yang akan timbul setelah pernikahan, maka hukumnya bisa berubah menjadi mubah atau sunnah. Untuk dapat menilai hukum dari tradisi merariq, harus ditinjau dari illat yang mempengaruhi hukum tersebut.

VIII. Upaya Mengatasi Pernikahan Dini di Lombok Timur

Untuk mengatasi kasus pernikahan dini di Lombok Timur, tidak dapat dilakukan secara parsial dan sporadis, namun haruslah didukung oleh berbagai pihak terkait, yaitu antara lain calon pengantin, masyarakat sekitar, tokoh agama dan tokoh masyarakat, petugas pencatatan perkawinan (KUA), dan pemerintah setempat dan jajaran terkait serta pemerintah pusat. Upaya yang dilakukan haruslah terus menerus dan menyeluruh. Berikut disampaikan upaya represif dan prefentif yang dapat dilakukan oleh berbagai pihak terkait sebagaimana dijelaskan di atas.

a. Upaya Preventif

Adapun upaya preventif yang dapat dilakukan adalah sebagai berikut.

1. Sosialisasi Pencegahan Pernikahan Dini
   Semua pihak baik pemerintah, masyarakat, dan LSM harus selalu giat melakukan sosialisasi pencegahan pernikahan dini dengan melibatkan tokoh adat, tokoh masyarakat. Sosialisasi harus memperhatikan kondisi dan adat masyarakat setempat. Dapat juga dengan melibatkan pelaku pernikahan dini untuk memberikan kesaksian tentang kesulitan dan keuntungan melakukan pernikahan dini dan kiat-kiat mempertahankan perkawinan serta mewujudkan keluarga yang bahagia. Diharapkan dengan melibatkan seluruh pihak yang terlibat usaha ini dapat berhasil dengan sukses.
2. Penyusunan peraturan daerah (awig-awig) yang dapat mencegah pernikahan dini.
3. Membuat sarana dan prasarana bagi remaja untuk melakukan aktivitas yang bermanfaat.

b. Upaya Represif

Apabila perkawinan dini sudah terjadi atau harus tetap dilakukan karena telah terjadi kehamilan diluar kehendak maka ada beberapa hal yang dapat dilakukan, yaitu:

1. Menunda kehamilan

Sebagaimana telah dijelaskan di atas salah satu akibat pernikahan dini adalah belum siapnya organ reproduksi wanita untuk hamil . Dari sudut kesehatan batas usia ideal untuk wanita hamil adalah pada usia 21-35 tahun. Oleh karena itu agar diperoleh anak yang sehat dan ibu juga sehat, sebaiknya para perempuan yang menikah di bawah usia ideal menunda kehamilannya.

2. Membentuk Konseling Perkawinan

Bagi pasangan yang menikah diusia muda tentu secara kejiwaan maupun emosional belum stabil. Oleh karenanya, perlu dibentuk lembaga konseling perkawinan. Lembaga ini dapat memberikan nasihat perkawinan, seminar atau sejenisnya yang berisi mengenai ketahanan keluarga serta memberikan layanan penyelesaian

perselisihan yang timbul dalam rumah tangga sehingga pasangan yang bertikai dapat rukun kembali. Usaha-usaha ini diharapkan dapat mengurangi perceraian.

3. Melakukan Penguatan Ekonomi Keluarga

Salah satu sebab terjadinya pernikahan dini adalah faktor ekonomi. Kemiskinan orang tua menyebabkan anak segera dinikahkan dengan harapan beban yang dipikul orang tua akan berkurang. Namun hal ini tidak selalu benar. Perkawinan pada usia dini tentu pasangan tersebut juga tidak mempunyai bekal pendidikan yang tinggi sehingga untuk bekerja hanya sebagai buruh kasar yang penghasilannya jauh dari mencukupi. Faktor kekurangan ini dapat memicu perpecahan dalam rumah tangga. Untuk mencegah hal ini perlu dilakukan peningkatan ekonomi bagi pasangan suami isteri tersebut. Penguatan ini dapat dilakukan misalnya dengan memberikan ketrampilan sesuai minat mereka seperti menjahit, berkebun, pertukangan, dan lain-lain serta diberikan pinjaman lunak untuk modal atau bahkan dapat bekerja sama dengan pihak pemerintah atau swasta untuk dapat dipekerjakan atau diberikan bantuan modal.

XI. Penutup

a. Kesimpulan

1. Tradisi merariq pada masyarakat Lombok pada prinsipnya mengacu pada rukun dan syarat menurut hukum perkawinan Islam. Tapi bila melihat kasus yang terjadi pada merariq Kodeq, antara lain perkawinan yang dipaksakan (anak yang tidak ingin menikah), perkawinan yang tidak disetujui orang tua, perkawinan karena hamil terlebih dulu, merupakan perkawinan yang tidak memenuhi rukun dan syarat hukum perkawinan Islam. Bila dilihat dari illat perkawinan, maka perkawinan pada dasarnya adalah boleh. Namun dapat menjadi haram atau wajib bila terdapat kondisi illat yang memengaruhinya.
2. Upaya untuk mengatasi kasus pernikahan dini di Lombok Timur tidak dapat dilakukan secara parsial dan sporadis, namun haruslah didukung oleh berbagai pihak terkait, yaitu antara lain calon pengantin, masyarakat sekitar, tokoh agama dan tokoh masyarakat, petugas pencatatan perkawinan (KUA), dan pemerintah setempat dan jajaran terkait serta pemerintah pusat. Upaya yang dilakukan haruslah terus menerus dan menyeluruh. Terdapat berbagai upaya represif yang dapat dilakukan yaitu antara lain, menunda kehamilan, membentuk konseling perkawinan, melakukan penguatan ekonomi keluarga. Upaya pencegahan yang dapat dilakukan antara lain adalah melakukan

sosisaliasi, menyusun peraturan daerah yang mencegah pernikahan dini, membuat sarana dan prasarana untuk aktifitas bermanfaat bagi remaja, dan lain-lain

b. Saran

Sebagai tindak lanjut dari hasil penelitian ini, terdapat beberapa saran yang diajukan oleh penulis, yaitu:

1. Terhadap rumusan masalah pertama, saran yang diajukan oleh penulis adalah sebagai berikut:
   Dalam hal pelaksanaan tradisi merariq untuk melangsungkan perkawinan, pihak KUA harus lebih tegas kepada masyarakat. Pihak KUA harus menolak perkawinan yang dilakukan oleh calon yang belum memenuhi syarat untuk menikah baik berdasarkan hukum Islam dan hukum perkawinan nasional.
2. Terhadap rumusan masalah kedua, saran yang diajukan oleh penulis adalah sebagai berikut:
   a) Untuk mengatasi tingginya angka pernikahan dini di Lombok Timur, Pemerintah Daerah sebaiknya membuat peraturan daerah (*awig-awig*) terkait dengan pernikahan.
   b) Para tokoh agama dan tokoh masyarakat harus ikut mendorong keberlakuan peraturan daerah (*awig-awig*) terkait dengan pernikahan
   c) Masyarakat harus menaati peraturan daerah (*awig-awig*) terkait dengan pernikahan yang telah dibuat oleh Pemerintah Daerah.
   d) Pemerintah Daerah sebaiknya membuat kebijakan wajib sekolah 12 (dua belas) tahun bagi pelajar di Lombok Timur sehingga angka pernikahan dini dapat dikurangi.
   e) Dinas Ketenagakerjaan sebaiknya membuat pelatihan-pelatihan kerja baik bagi pemuda Lombok Timur agar memiliki keterampilan yang dibutuhkan dalam pekerjaan, khususnya bagi laki-laki yang telah menikah dini agar ia dapat menjalankan kewajibannya untuk memberikan nafkah bagi keluarganya atau bagi perempuan yang menikah dini kemudian bercerai agar ia dapat menghidupi anak yang lahir akibat pernikahan dini tersebut.

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CHILDREN'S RIGHTS AND THE LEGAL CULTURE OF SOCIETY ON UNREGISTERED MARRIAGE
(Case Study in KampungKedondong, Pesawaran Regency, Lampung Province, Indonesia)

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Abstract

Many people do the unregistered marriage for various reasons while inconsistencies between articles of the Marriage Act No.1/1974 jo. KompilasiHukum Islam (Compilation of Islamic Law) as well as the legal culture of religious judge have triggered numerous problems concerning to the rights of the children who born within this marriage. Revision to Article 43 of Marriage Actitself is also not sufficient to provide a significant impact to the rights of these children.Therefore, this research conducted to explore the causative factors of people do the unregistered marriage and to reveal more about the legal protection of children's rights that born by this marriage. The research held in Kampung (village) Kedondong, Pesawaran Regency, Lampung Province by using qualitative approach. There are three main factors as the reasons for the people do the unregistered marriage which are : (1) Islamic exclusive view concept, (2) economic condition, and (3) procedures and formalities contents on the regulations. In addition, there is also a fact that the children's rights who born within the unregistered marriage do not have the legal protection from the constitution law, even if they are protected by the local communities through the local wisdom.

Keywords: unregistered marriage; the protection of child's law; moslem children justice; Islamic justice

1. INTRODUCTION

In principle, the unregistered marriage poses the problemssinceby the legislation this type of marriage does not have the force of law. Consequently, it gives the negative impacts to the legal protection of children's rights who born within this marriage.

In 1974, the Indonesian government published the Marriage Act No.1/1974 jo. Compilation of Islamic Law regarding to the registration of marriage in top down model whereas this and several other reasons actually trigger the unregistered marriage phenomenon. The discussion in this paper will only be restricted to the unregistered marriage in shariacondition which is the marriage with the purpose to foster the *sakinah, mawaddah* and*warahmah* family

and has been qualified the eligibility and the pillars of Islam so that can be declared as the legal marriage in religion view, despite that this marriage is not held in the presence and under the supervision of PegawaiPencatatNikah (PPN)[198]andalso not registered in Kantor Urusan Agama (Office of Religious Affairs). The formulation of this research problems are dedicated to the questions "What do the causative factors that trigger the unregistered marriage?" and "How does the legal protection of the children's rights on unregistered marriage?", so therefore this research purpose are to discover the causative factors of people do the unregistered marriage[199] and to perceive how the legal protection granted to the children's rights who born within this marriage.

2. RESEARCH METHOD

This research implement the qualitative tradition[200]with natural paradigm[201] in the form of case study. The samples as referred to as informants are determinedpurposively[202] where the number of the key informants are not set limitedly but rather following the snowball principle. Research instrument is the researcher itself and constructively applying research motive : (1) to explore, (2) to critizise, (3) to understand. The main data sources are the key informants who are the Religious Judge of South Jakarta Religious Court, Drs. Yasardin, M.Ag and Islamic Law expert and former of the Constitutional Judge, Dr. Ahmad FadlilSumadi, S.H., M.Hum. Secondary data obtained through the study of documents against several primary legal materials. Data collection techniques are observation, visual interview[203], document interpretation through to text and material documents, and personal experience. Data analysis technique of Strauss and J.Cobin[204] is put in place regarding to the choice of constructivism paradigm.

3. FINDING AND DISCUSSION

3.1. The Causative Factors of Unregistered Marriage on Society

The emergence of unregistered marriage phenomenon in significant intensity caused by this following factors:

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[198]Literally can be interpreted as the officials who conduct the examination requirements, monitoring and registering the events of marriage / reconciliation, *thalaq*divorce registration, contested divorce, and perform marriage counseling.

[199]Amnawaty in *PerlindunganHukumAnakpadaPerkawinanTidakDicatat*

[200]NoengMuhadjir, 2002, page 165-168

[201]Lexy J. Moloeng, 1996,page 31-32

[202]Purposive samples are the samples which accurately selected so that relevant to the purpose of research, which have special characteristics and essential. This all depends on the consideration or judgment of researcher.

[203]Amanda Coffey, 2004, page 120. She says :*Interviewing is perhaps the most common social science method. Interviews can generate life and oral histories, narratives, and information about current experiences and opinions.*

[204]A.Strauss and Jo. Corbin, 1990, hlm.19.

1. Islamic Exclusive View Concept
   Islamic exclusive communities take the decision to do unregistered marriage based on the principle to adhere the Islamic religious law that the prioritize of the marriage onlyaccording to religious rules and to prevent adultery.
2. Economic Condition
   From the findings of the As's case, the man aged 56 years old and domiciled in KampungKedondong, who has 3 wives and 11 children known that As'slivelihood is only as a farmer and a collector of perennials agricultural products such as coffee beans and cocoa. In that case, financial factor became one of the As's reasons did the unregistered marriage.
3. Procedures and Formalities Contents on the Regulations
   The majority of Indonesian people believe that the procedures and formalities requirements contained in law regulations are too complicated and convoluted. As the result, when people have the othersalternative choices that easily and not breaking the law, thus the choices which inherent to the procedures and legal formalities be abandoned.

3.2. Children's Rights on Unregistered Marriage

3.2.1. Constitutional Law Perspective

Children's rights on unregistered marriage actually already adequately protected by the revision of Article 43 of the Marriage Law No.1/1974 through the verdict ofMahkamahKonstitusi (Constitutional Court) No. 46/PU-VIII/2010 which states that:

"A child born out of wedlock has civil relations with its mother and the mother's relatives along with the man as its father who can be proved based on science and technology and/or other evidence which according to the law has blood relations, including civil relations with its father's family."

3.2.2. Children Rights on Islamic Law Perspective

Islamic concern against the children's rights one of which materialized in Al-Qur'an Surah An-Nisaa verse 33 that state :

"And for all, We have made heirs to what is left by parents and relatives. And to those whom your oaths have bound [to you] – give them their share. Indeed Allah is ever, over all things, a Witness."

Besides that,Wahbah al-Zuhaili detailed more specifically about five types of children's rights against their parents which are : *nasab* right (parental guardian), *radla'* right (suckle), *hadlanah*right (nurture), *walayah*right, (guardianship), and alimentation right.[205]

[205]Wahbah al-Zuhaili in Amnawaty, 2013,page II, 6-7

3.2.3. Children's Rights on Human Rights Perspective

Children's rights absolutely guaranteed presence in Human Rights Act No. 39/1999 which detailed in these following articles :

1. Article 52 : (1) All children have the right to protection by parents, family, society and state, (2) Children's rights are human rights which in the children's interest are recognized and protected before the law at the time of conception.
2. Article 56 : Every child has the right to know who his parents are and to be brought up and cared for by his own parents.
3. Article 57 : (1) Every child has the right to be raised, cared for, educated and guided through life by his parents or guardian until he is of full age, in accordance with prevailing legislation.
4. Article 58 : (1) Every child has the right to protection before the law against all forms of physical and mental violence, neglect, mistreatment and sexual assault while under the care of his parents, guardian, or any other party responsible for his care, (2) Should a child's parent, guardian or benefactor commit any form of physical or mental abuse; neglect; mistreatment; sexual assault, including rape; or murder of a child under his protection, he shall be subject to maximum legal sanctions.
5. Article 59 : (1) Every child has the right not to be separated from his parents against his wishes, except for valid legal reasons and procedures indicating that this separation is in the best interests of the child, (2) Under the circumstances referred to in a clause (1), the child's right to regular direct meetings and individual contact with his parents is guaranteed and protected by the provisions set forth in this Act.

3.3. Factors that Affecting Children's Rights on Unregistered Marriage

3.3.1. Inconsistencies Between Articles of the Marriage Act No.1/1974 jo. Compilation of Islamic Law

There are articles friction in Marriage Act No.1/1974 jo. Compilation of Islamic Law that gives the negative impacts against the protection of children's right who born within unregistered marriage. In Article 2 Section 1 of Marriage Act mentioned that a marriage is lawful when entered in accordance with the laws of the respective religions and beliefs of the parties. It is also reaffirmed by the Compilation of Islamic Law Article 4 which refer back the meaning of a legal marriage to the Marriage Act No.1/1974 Article 2 Section 1 before. In other word, a marriage that has been qualified the eligibility and the pillars of Islam can be declared as the legal marriage in constitutional law view.

On the other hand, the Compilation of Islamic Law also regulate these following materials:

1. Article 5 : (1) To ensure the orderliness of the Moslem societies every marriage has to be registered, (2) The registration of the marriage as

referred to in a clause (1) do by PegawaiPencatatNikah (PPN) as stipulated in the Act No.22/1946 jo. the Act No.32/1954.

2. Article 6 : (1) To meet the provisions of Article (5), every marriage should be held in the presence and under the supervision of PegawaiPencatatNikah (PPN), (2) The marriage that held out of PegawaiPencatatNikah (PPN) supervision considered as has no the law force.

From the description above, it is sufficiently clear that there is a clash between articles of Compilation of Islamic Law. Furthermore, the authority to certify the validity of marriage thoroughly addressed to PegawaiPencatatNikah (PPN). Although the unregistered marriage has been valid and qualified the eligibility and the pillars of Islam, but it stillcan notstated as the legal marriage and has no the legal force if it is not conducted in the presence and under the supervision of PegawaiPencatatNikah (PPN). Thereby, the position of marriage guardian as the legality requirement of the marriage under the Islamic rule replaced by PegawaiPencatatNikah (PPN).

Fatally, in Article 42 of Marriage Act and also Article 99 Section 1 of Compilation of Islamic Law stated that a legal child is a child who born as the result of the legal marriage. Trace back to the previous descriptions, it means that a child who born within the unregistered marriage can not be considered as a legal child and admittedly has no the legal protection against its rights.

3.3.2. The Legal Culture of Religious Judge

In the legal system of marriage, the religious judge culture applying positivistic view in handling marriage case in religious court. Religious judge, based on the interview with Muhyidin, a religious judge of South Jakarta Religious Court for MachichaMoechtar case on her son legalization status, IR, as the result of her unregistered marriage, says that the judges mightily bound by the rules so that can not conduct the law breakthrough *(rechtvinding)* because their performance is under the supervision of Judicial Commission.

Even though the Article 43 of Marriage Act No.1/1974 has been revised by the Constitutional Court verdictNo.46/PU-VIII/2010, however the Religious Court by the verdict No.1241/2012/PAJS rejecting the MachichaMoechtar's petition concerning to her son legalization status with the pretext that the Constitutional Court verdict is not retroactive. Hence, the government intervention still needed to issue the additional regulation in order to implement and to enforce that Constitutional Court verdict in the realm of the courts. There is a need to synergize between the government regulation and the others regulation regarding to Marriage Act No.1/1974 Article 43 that recently revised.

3.4. The Legal Culture of Society through the Local Wisdom

From the in-depth research result against As's case, the resolution of his unregistered marriage case and the responsibilities of the children's rights done amicably kinship.

After As died, the children from his second and third wife be the waif children. These children are not protected in *de jure*. They do not have the excerpt of birth certificate and unfortunately, the As's children from his third wife who still in early age abandoned by their birth mother in their house.

These children then be cared of by a family elder who is F, until finally the indigenous leader invited the As'squiverful to do the family meeting by inviting the first As's wife who domiciled in Jakarta with the purpose to discuss about the responsibilities against the children, which basically asks for the inheritance rights of children from the gardens and fields belonging to As. It is approved by the first wife and also the children that both the three children of the third wife will be given part from every rice harvest but not from perennials agricultural productscrops. The amount will depend on the result of the harvest. It is also agreed further that the children will be taken care by F with the cost about 1 million on each harvest.

The initiative of the indigenous leader to conduct the meeting and also the first wife's family decisions as the absolute holder of the deceased legacy to share the inheritance wealth are the form of local wisdom of the society. Moreover, another thing that makes these children happy is the fact that they are recognized by their father's relatives.

4. CONCLUSION

To conclude, the existence of the children's rights has clearly stated in constitutional law perspective, Islamic law perspective and in Human Rights perspective even though in fact, the inconsistencies between articles of the Marriage Act No.1/1974 jo. Compilation of Islamic Law,revision to Article 43 of Marriage Actby the Constitutional Court verdict No.46/PU-VIII/2010 as well as the legal culture of religious judge still can not provide the legal protection against the children's rights who born within the unregistered marriage.

Ideally, the Article 43 of Marriage Act which has been revised already sufficient to protect the children's rights who born within the unregistered marriage, but contrary on it, itstill can not be implemented because there is no subsequent rules yet so that in the stages of law enforcement, this verdict can not be executed.

Related to this fact, there is not found the legal protection through the constitutional law against the children's rights who born within the unregistered marriage in KampungKedondong, Pesawaran Regency, Lampung Province, though socially the children's rights protection has been given by the society upon the local wisdom.

5. SUGGESTION

Based on the findings on this research, it is expected that the government may issue the additional regulations in order to implement and/or to enforce the Constitutional Court verdict No.46/PU-VIII/2010 in the realm of the courts and also there is a need to harmonize between the government regulation and the others regulations regarding to Marriage Act No.1/1974 Article 43 that recently revised.

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Abstrak

Eksistensi Peradilan Agama di Indonesia telah ada sejak sebelum kemerdekaan, bahkan sejak Islam masuk ke Indonesia. Selain karena jabatan hakim *(qadhi)* dalam Islam merupakan fardhu kifayah, keberadaan lembaga peradilan ini didasarkan pada kebutuhan umat muslim akan sebuah badan, lembaga atau bahkan seseorang yang dapat menyelesaikan segala bentuk sengketa dalam kaitannya dengan agama sehingga tidak terjadi perpecahan di masyarakat mengenai hukum-hukum yang tepat untuk ditetapkan dalam kasus tertentu. Dalam perkembangannya, Peradilan Agama di Indonesia menjadi salah satu bagian pelaku kekuasaan kehakiman dibawah Mahkamah Agung. Secara khusus, untuk pertama kalinya Peradilan Agama memiliki peraturan tersendiri yakni melalui UU No. 7 Tahun 1989 tentang Peradilan Agama, kemudian mengalami perubahan menjadi UU No. 3 Tahun 2006, dan terahir menjadi UU No. 50 Tahun 2009 tentang perubahan kedua atas UU No. 7 Tahun 1989 tentang Peradilan Agama. Terhadap perubahan aturan tersebut, penulis tertarik untuk meneliti lebih lanjut mengenai reformasi kekuasaan Peradilan Agama di Indonesia, bagaimana perubahan substansi hukumnya, serta latar belakang perubahan hukum dalam kaitannya dengan Peradilan Agama. Metode yang digunakan dalam penelitian ini adalah metode kualitatif, jenis penelitian yuridis normatif dan pendekatan penelitian perbandingan. Kesimpulan yang didapatkan adalah bahwa perubahan substansi hukum mengenai Peradilan Agama melalui ketiga undang-undang tersebut adalah berdasarkan perubahan struktur ketatanegaraan, struktur politik, kebutuhan masyarakat, serta perkembangan masyarakat Islam di Indonesia.
Kata Kunci: Peradilan Agama, UU No. 7 Tahun 1989, UU No. 3 Tahun 2006, dan UU No. 50 Tahun 2009.

Abstract

The existence of the Religious Courts in Indonesia has existed since before independence, even since Islam entered Indonesia. Apart from because the position of judge (qadhi) in Islam is fardhu kifayah, the existence of this judiciary is based on the needs of Muslims for a body, institution or even someone who can resolve all forms of disputes in relation to religion so that there are no divisions in the community regarding laws the right to be specified in certain cases. In its development, the Religious Courts in Indonesia have become part of the perpetrators of judicial power under the Supreme Court. In particular, for the

first time the Religious Courts have their own regulations, namely through Law No. 7 of 1989 concerning the Religious Courts, then changed to Law No. 3 of 2006, and finally becomes Law No. 50 of 2009 concerning the second amendment to Law No. 7 of 1989 concerning the Religious Courts. Regarding the changes in the rules, the authors are interested in examining further about the reform of the Religious Courts power in Indonesia, how the legal substance changes, and the background of legal changes in relation to the Religious Courts. The method used in this study is a qualitative method, a type of normative juridical research and a comparative research approach. The conclusion obtained is that the change in legal substance regarding the Religious Courts through the three laws is based on changes in constitutional structure, political structure, community needs, and the development of Islamic societies in Indonesia.
Keywords: Religious Courts, Law No. 7 of 1989, Law No. 3 of 2006, and Law No. 50 of 2009.

I. PENDAHULUAN

Eksistensi Peradilan Agama merupakan bukti historis perkembangan Hukum Islam di Indonesia. Sebagai umat mayoritas, kehadiran Peradilan Agama merupakan konsekuensi logis yang harus dipersiapkan oleh negara. Hal ini tidak terlepas dari perubahan UUD 1945 yang membawa perubahan mendasar mengenai penyelenggaraan kekuasaan kehakiman di Indonesia.[206]

Keberadaan Peradilan Agama dalam sistem peradilan nasional Indonesia, merupakan salah satu pelaku kekuasaan kehakiman dibawah Mahkamah Agung. Selain Peradilan Agama, terdapat tiga lembaga peradilan lain yang memiliki kedudukan serta derajat yang sama, yaitu Peradilan Umum (Negeri), Peradilan Tata Usaha Negara, dan Peradilan Militer.[207] Peradilan Agama memiliki spesifikasi tersendiri, karena ketundukannya pada dua sistem hukum yangberbeda, yaitu hukum Islam dan hukum negara. Keberadaannya sebagai lembaga peradilan negara di bidang syari'ah Islam secara religius politis dan yuridis sangat dibutuhkan oleh warga negara Indonesia maupun orang asing yang beragama Islam dalam konteks kehidupan beragama dan bernegara. Hal ini tercermin dari adanya relevansi antara peraturan agama dengan teori negara hukum pancasila, yakni antara agama dan negara memiliki hubungan simbiotik. Hubungan ini telah melahirkan Peradilan Agama yang mengabdi kepada pelayanan hukum dan keadilan bagi masyarakat muslim Indonesia.[208]

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[206]Pasca Amandemen UUD 1945, kekuasaan kehakiman di Indonesia dilakukan oleh sebuah Mahakamah Agung dan badan peradilan yang berada di bawahnya dalam lingkungan peradilan umum, lingkungan peradilan agama, lingkungan peradilan militer, lingkungan peradilan tata usaha negara, dan oleh sebuah Mahkamah Konstitusi.

[207]Pasal 24 Ayat (2) UUD 1945.

[208]Jihadul Hayat dan Refky Fielnanda, "Peradilan Agama Era Reformasi Kedua Setelah Berlakunya UU No. 3 Tahun 2006 tentang Peradilan Agama", *Jurnal Panggung Hukum PMHI DIY,* Vol.1,No.1, 2015, hlm. 127.

Undang-undang pertama yang secara komprehensif mengatur mengenai Peradilan Agama adalah UU No. 7 Tahun 1989 tentang Peradilan Agama. Seiring berkembangnya sistem ketatanegaraan Indonesia yang sejalan dengan perkembangan permasalahan keagamaan dikalangan umat muslim, pada tahun 2006, beberapa pasal pada undang-undang ini mengalami perubahan. Perubahan ini diakomodir dalam UU No. 3 Tahun 2006 tentang perubahan atas UU No. 7 Tahun 1989. Selanjutnya, pada tahun 2009, undang-undang ini mengalami perubahan kedua kali, yang kemudian menjadi UU No. 50 Tahun 2009 tentang Perubahan kedua atas UU No. 7 Tahun 1989 tentang Peradilan Agama. Atas dasar berbagai perubahan tersebut, penulis tertarik untuk mengkaji secara komprehensif mengenai perubahan substansi hukum dari perubahan UU No. 7 Tahun 1989, UU No. 3 Tahun 2006 dan UU No. 50 Tahun 2009 tentang Peradilan Agama.

II. PEMBAHASAN

A. Peradilan Agama di Indonesia Pra Kemerdekaan

Para pakar dan ahli hukum sejarah sepakat bahwa sistem Peradilan Agama di Indonesia sudah dikenal sejak Islam masuk ke Indonesia, yaitu pada abad ke-7 Masehi. Pada masa itu, hukum Islam mulai berkembang di wilayah nusantara bersama-sama dengan hukum adat.[209] Mula-mula masyarakat Islam membentuk kelompok sendiri yang selanjutnya menjadi kerajaan Islam. Mereka membutuhkan lembaga peradilan yang dapat menyelesaikan segala persoalan dan persengketaan yang terjadi. Sehingga, Peradilan Agama mulai memperoleh tempat melalui kerajaan-kerajaan Islam yang ada, seperti di Aceh, Banten, Mataram, Demak, dan lain sebagainya. Hal ini dapat dimaklumi karena jabatan *qodhi* (hakim) menurut syari'at Islam merupakan "fardhu kifayah" dalam pelaksanaan syari'at Islam. Jabatan hakim ini dilakukan dengan berbagai cara, antara lain dengan cara menunjuk seorang hakim *(tahkim)*, dengan cara bai'at oleh *ahlul hilli 'aqdr* yaitu pengangkatan seseorang untuk jadi hakim oleh majelis terkemuka masyarakat, atau dengan pemberian kuasa dari Sultan atau kepala negara kepada seseorang untuk melaksanakan tugas menjadi hakim *(tauliyah).*[210]

Pada masa penjajahan, awalnya pemerintah Belanda tidak begitu memperhatikan urusan penyelesaian sengketa antarpenduduk pribumi di lembaga Peradilan Agama. Tetapi setelah pemerintahan penjajahan kuat, mereka mengadakan pemisahan antara peradilan keduniawian *(wereldijke rechpraak)* yang dilakukan peradilan Gubernemen dengan Peradilan Agama yang dibiarkan tumbuh dalam masyarakat tanpa pembinaan, dan selanjutnya secara berangsur-angsur wewenang serta kekuasaannya dikurangi. Beberapa bentuk campur tangan pemerintah Belanda dalam hal Peradilan Agama adalah sebagai berikut:

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[209]https://mnj.my.id/wp-content/uploads/2017/02/SEJARAH-PERADILAN-AGAMA.pdf diakses pada tanggal 21Mei 2019.

[210]Abdul Manan, dkk., "Peradilan Agama Ditinjau Dari Berbagai Aspek", *E-Book* Cendramata Diklat Cakim Angkatan II PPC Terpadu Seluruh Indonesia, (Bandung), 2013. Hlm. 73.

a. Dikeluarkannya*Regenten Istructie* 1820, yaitu instruksi kepada seluruh bupati di Jawa dan Madura agar menyerahkan perselisihan waris kepada para ulama yang ahli dalam bidang hukum Islam.
b. Stbl. 1835 No. 58 tentang wewenang Peradilan Agama menyelesaikan sengketa perkawinan dan pembagian harta benda.
c. Stbl. 1884 dan 1885 tentang perubahan atas *Regenten Istructie* 1820 dan Stbl. 1835 No. 58.
d. Stbl. 1882 No. 52 tentang pembentukan Peradilan Agama di Jawa dan Madura[211] yang terdiri dari 7 poin, diantaranya:
    1) Pada daerah yang telah memiliki Pengadilan Negeri *(Landraad)* dibentuk pula Peradilan Agama
    2) Majelis hakim Peradilan Agama terdiri dari penghulu yang dibantu hakim dari Pengadilan Negeri, minimal 3 dan maksimal 8 anggota.
    3) Pengadilan Agama tidak boleh mengambil keputusan jika tidak memenuhi minimal 3 orang anggota hakim termasuk ketua.
    4) Setiap keputusan Pengadilan Agama harus dimuat dalam surat putusan yang memuat pertimbangan hukum, ditandatangani oleh semua yang hadir, dan dicatat pula tentang biaya perkara.
    5) Kepada kedua belah pihak yang berperkara harus diberi salinan surat keputusan yang ditandatangani oleh ketua majelis hakim.
    6) Putusan Pengadilan agama dimuat dalam register yang setiap tiga bulan sekali diserahkan pada kepala daerah setempat untuk memperoleh penyaksian padanya.
    7) Putusan pengadilan agama yang melampaui batas atau tidak memenuhi poi dua,tiga, dan empat, dinyatakan tidak berlaku.
e. Stbl. 1909 No. 182 dan Stbl 1926 No. 232 yaitu perubahan atas Stbl 1882 No. 152.[212]
f. Pembentukan panitia "Priesteraden Commissie" yang betugas menyelidiki keadaan Pengadilan agama dan mengatasi hal-hal yang

[211]Perlu dicatat bahwa meskipun Pengadilan Agama telah dibentuk secara resmi sedemikian rupa namun kenyataannya pemerintah Belanda tidak memperlakukan Pengadilan Agama seperti lembaga lain. Pemerintah Belanda tidak menyediakan anggaran belanja dan gaji untuk aparat yang bertugas di Pengadilan agama, sehingga segala keperluan pengadilan hanya dibebankan pada ongkos perkara saja. Pejabat yang digaji hanya ketua pengadilan, itupun dalam kedudukannya sebagai penasehat *Landraad*.

[212]Perubahan ini menimbulkan kekecewaan bagi kalangan umat muslim karena bebera hal: *Pertama*, diantara Pengadilan Agama ada yang memungut biaya sampai 10% dari harta waris yang diselesaikannya. *Kedua*, tidak ada instansi yang lebih tinggi untuk mengadakan banding atas putusan yang dianggap keliru. *Ketiga*, Putusan Peradilan Agama harus dinyatakan "executor Verklaring" dari Landraad, maka berarti timbul proses peradilan ganda yang mengakibatkan ongkos perkara bertambah mahal. *Keempat*, orang yang dianggap cakap dalam bidang hukum Islam tidak bersedia diangkat menjadi pegawai pemerintah Belanda sehingga anggota Pengadilan Agama banyak yang tidak cakap dalam bidangnya.

dianggap perlu. Selanjutnya Piesteraden Commissie menetapkan Stbl. No. 5 tentang Peradilan agama.[213]

g. Stbl. 1937 No. 116 tentang pembatasan kewenangan Pengadilan Agama, salah satunya adalah penghapusan kedudukan Pengadilan Agama sebagai penasihat Landraad.

h. Stbl. 1937 No. 610 tentang pembentukan Mahkamah Islam Tinggi untuk wilayah Jawa dan Madura.

i. Stbl. 1937 No. 638 tentang pembentukan Pengadilan Agama di Kalimantan Selatan dan Timur, Tanah Bambu dan Pulau Sungai.

Ketika Jepang berkuasa, penguasa Jepang mengubah sistem politik pemerintah Belanda dengan memberikan penghargaan kepada umat Islam berupa kantor Agama yang diberi nama "Suumubu" dan kantor agama daerah yang diberi nama "Shuumuka". Kebaikan pemerintah Jepang tersebut bukan tanpa alasan, karena pemerintah Jepang berharap umat Islam bersedia mendukung perjuangan kemakmuran Asia Timur Raya. Dari uraian di atas diketahui bahwa kekuasaan Pengadilan Agama sebelum kemerdekaan terkadang berbenturan dengan Pengadilan Negeri. Hal ini sengaja dibentuk oleh pemerintah Belanda karena ajaran Islam bertentangan dengan agama mereka.[214]

B. Peradilan Agama Pasca Kemerdekaan

Proklamasi kemerdekaan pada tanggal 17 Agustus 1945 merupakan titik permulaan perubahan dalam segala bidang kehidupan ketatanegaraan berbangsa dan bernegara. Peluang mengembangkan hukum Islam semakin besar karena memperoleh dukungan dari struktur pemerintahan dengan dibentuknya Departemen Agama pada tahun 1946. Melalui Penetapan Pemerintah No. 5/SD pada tanggal 25 Mei 1946, Pengadilan Agama yang semula berada di bawah Kementrian Kehakiman dipindahkan ke Departemen Agama. Sebagaimana Pasal II aturan peralihan UUD 1945 (asli), segala peraturan yang ada masih tetap berlaku sampai diadakan yang baru menurut UUD.[215]Hal ini berarti bahwa segala jenis peraturan yang berlaku, termasuk mengenai Peradilan Agama masih tunduk pada produk hukum buatan Belanda. Selanjutnya, dikeluarkan UU No. 22 Tahun 1946 tentang Pencatatan Nikah, Talak, dan Rujuk. Lahirnya UU ini menyebabkan terbentuknya penghulu kabupaten yang dibedakan dengan penghulu hakim yang dikhususkan menangani perkara di Pengadilan Agama.

Pada tahun 1948, Badan Pekerja Nasional Indonesia Pusat menyetujui untuk mengesahkan UU No. 19 Tahun 1948 tentang Susunan dan Kekuasaan

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[213]Ketetapan ini berisi dua bagian, *Pertama*, Peradilan Agama berisi seorang penghulu sebagai hakim disamping dua penasehat dan seorang panitera, kekuasaannya dibatasi hanya memeriksa perkara yang bersangkutan dengan nikah, talak, dan rujuk, sedangkan masalah mawaris, wakaf dan hadhanah dilimpahkan pada Landraad, serta dibentuknya Mahkamah Islam Tinggi sebagai pengadilan tingkat banding. *Kedua*, campur tangan Landraad di Jawa dan Madura terhadap pengangkatan wali atas harta benda orang Indonesia. *Ketiga*,pembentukan wali di bawah pengawasan Landraad.

[214]Abdul Manan, dkk., "Peradilan Agama..., hlm. 73-81.

[215]Pasal II Aturan Peralihan UUD 1945 Naskah Asli.

Badan-Badan Kehakiman dan Kejaksaan. Namun, UU ini menentukan bahwa hanya terdapat tiga lingkungan peradilan, yaitu Peradilan Negeri, Peradilan Tata Usaha Pemerintahan, dan Peradilan Ketentaraan.[216] Hal ini merupakan langkah yang wajar karena Peradilan Agama telah dipindahtangankan ke Departemen Agama. Tahun 1951, pemerintah menetapkan UU Darurat No. 1 Tahun 1951 yang menyatakan bahwa Peradilan Agama yang masih hidup di masyarakat tidak perlu dihapus. Sebenarnya pemisahan Peradilan Agama dari ketiga peradilan lain yang berada di bawah Mahkamah Agung menjadi dilema tersendiri bagi pemerintah, karena disatu sisi pemerintah membutuhkan sistem peradilan yang utuh, tetapi disisi lain, kekuasaan Peradilan Agama masih berada di bawah Departemen Agama. Dilema ini kemudian terjawab dengan disahkannya UU No. 14 tahun 1970 tentang Kekuasaan Kehakiman yang menyatakan bahwa badan peradilan dibedakan menjadi empat lingkungan kompetensi yang mengadili perkara tertentu, yakni Peradilan Agama, Peradilan Militer, Peradilan Tata Usaha Negara dan Peradilan Umum.[217]Dengan demikian, Peradilan Agama mulai menemukan titik terang untuk hidup setara dan sederajat dengan ketiga peradilan lainnya. Kedudukan Peradilan Agama menjadi lebih kuat pasca disahkannya UU No. 1 Tahun 1974 tentang Perkawinan.

Meski telah disahkan UU No. 14 tahun 1970, kontroversi mengenai Peradilan Agama terus berlanjut. Hal ini terlihat ketika pembahasan RUU tentang Peradilan Agama yang dibahas di DPR, bahwa terdapat beberapa pihak yang masih tidak sepakat dengan hadirnya UU khusus yang mengatur Peradilan Agama karena dianggap tidak sesuai dengan sistem hukum nasional yang mengacu pada Pancasila sebagai falsafah bangsa serta satu-satunya asas dalam kehidupan bermasyarakat. Namun, pendapat yang lebih kuat menyatakan bahwa UU No. 14 tahun 1970 yang telah menyatukan Peradilan Agama dalam sistem peradilan nasional yang integral perlu ditegaskan kembali dalam sebuah peraturan khusus, karena nantinya Peradilan Agama bisa saja disatukan dengan Peradilan Umum, sehingga perlu dibentuk UU Peradilan Agama. Upaya ini kemudian membuahkan hasil pada tahun 1989 dengan disahkannya UU No. 7 Tahun 1989 tentang Peradilan Agama.[218]

C. Peradilan Agama dalam UU No. 7 Tahun 1989

Sebagaimana diketahui bahwa UU No. 7 Tahun 1989 merupakan UU pertama yang mengatur secara spesifik mengenai Peradilan Agama. Sebelumnya, peraturan perundang-undangan yang menjadi dasar hukum lembaga Peradilan Agama antara lain:

a. Peraturan tentang Peradilan Agama di Jawa dan Madura (Staatsblad 1882 No. 152 dan Staatsblad 1937 No. 116 dan No. 610).

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[216]Pasal 35 ayat (2), Pasal 66 dan Pasal 68 UU No. 19 Tahun 1948 tentang Susunan dan Kekuasaan Badan-Badan Kehakiman dan Kejaksaan.

[217]Hasbi Hasan, *Kompetensi Peradilan Agama,* (Depok, Gramata Publishing), 2011. Hlm. 50.

[218]Abdul Manan, dkk., "Peradilan Agama..., hlm. 85.

b. Peraturan tentang Kerapatan Qadi dan Kerapatan Qadi Besar untuk sebagian Residensi Kalimantan Selatan dan Timur (Staatsblad 1937 No. 638 dan No. 639).
c. Peraturan Pemerintah No. 45 Tahun 1957 tentang Pembentukan Pengadilan agama/Mahkamah Syar'iyah di luar Jawa dan Madura.

Berbagai peraturan tersebut mengakibatkan beragamnya pula susunan, kekuasaan, dan hukum acara Peradilan Agama sehingga perlu dibentuk kesatuan dan penyamaan antarlembaga peradilan yang notabene merupakan peradilan yang sama. Selain itu, UU ini merupakan bentuk penyesuaian dari lahirnya UU No. 14 tahun 1970 yang mengatur mengenai keberadaan Peradilan Agama di bawah lingkungan Mahkamah Agung.

Secara garis besar, UU No. 7 Tahun 1989 mengatur mengenai susunan, kekuasaan, hukum acara, kedudukan para hakim, dan segi-segi administrasi lain pada Pengadilan Agama. Susunan Pengadilan terdiri dari Pengadilan Agama yang dibentuk dengan Keputusan Presiden dan Pengadilan Tinggi Agama yang dibentuk dengan undang-undang. Pengadilan Agama bertugas dan berwenang memeriksa, memutus, dan menyelesaikan perkara-perkara antara orang-orang yang beragama Islam di beberapa bidang dibawah ini:[219]

a. Bidang perkawinan sebagaimana diatur dalam UU No. 1 Tahun 1974.
b. Bidang kewarisan, wasiat dan hibah yang dilakukan berdasarkan hukum Islam. Bidang kewarisan yaitu mengenai penentuan ahli waris, penentuan harta peninggalan, penentuan pembagian warisan, dan pelaksanaan pembagian harta warisan bilamana pewarisan tersebut dilakukan berdasarkan hukum Islam. Sehubungan dengan hal ini, para pihak sebelum berperkara dapat mempertimbangkan untuk memilih hukum apa yang akan dipergunakan dalam pembagian warisan.
c. Wakaf dan shadaqah

Hal penting lain dalam UU ini adalah mengenaipembinaan dan hukum acara Peradilan Agama. Pembinaan peradilan yang dimaksud berupa pembinaan teknis peradilan, pembinaan organisasi, administrasi, dan keuangan pengadilan. Dalam Pasal 5 disebutkan bahwa pembinaan teknis peradilan bagi pengadilan dilakukan oleh Mahkamah Agung sedangkan pembinaan organisasi, administrasi, dan keuangan pengadilan dilakukan oleh Mentri agama. Sedangkan hukum acara yang berlaku dalam lingkungan Peradilan Agamaadalah hukum acara perdata yang berlaku pada pengadilan dalam lingkungan Peradilan Umum, kecuali yang telah diatur secara khusus dalam UU No. 7 Tahun 1989.[220]

D. Peradilan Agama dalam UU No. 3 Tahun 2006

Secara konseptual, tuntutan reformasi telah merombak tata kehidupan berbangsa dan bernegara yang bersimpul pada supremasi hukum dengan

[219]Pasal 49 UU No. 7 Tahun 1989 tentang Peradilan Agama
[220]Pasal 54 UU No. 7 Tahun 1989 tentang Peradilan Agama.

mengedepankan perspektif kekuasaan kehakiman yang merdeka dan bebas dari pengaruh kekuasaan apapun. Selain Mahkamah Agung, amandemen UUD 1945 melahirkan kekuasaan kehakiman baru yakni Mahkamah Konstitusi. Kekuasaan kehakiman oleh Mahkamah Agung dilakukan dengan perangkat badan peradilan yang berada di bawahnya dalam lingkungan Peradilan Umum, lingkungan Peradilan Agama, lingkungan Peradilan Militer dan lingkungan Peradilan Tata Usaha Negara. Dalam rangka menyelenggarakan kekuasaan kehakiman yang merdeka tersebut, diterbitkan UU No. 4 Tahun 2004 tentang Kekuasan Kehakiman. Dengan disahkannya UU tersebut, telah terjadi perubahan sistempenyelenggaraan kekuasaan kehakiman secara komprehensif yang sejalan dengan kehidupan ketatanegaraan sebagaimana termuat dalam Pasal 2 UUD 1945 hasil amandemen.

Secara historis, proses awal lahirnya UU No. 3 Tahun 2006 berangkat dari keinginan Peradilan Agama untuk diintegrasikan ke Mahkamah Agung. Pada tahun 1999 telah dikeluarkan UU No. 35 Tahun 1999 tentang perubahan atas UU No. 14 tahun 1970 tentang Ketentuan-Ketentuan Pokok Kekuasaan Kehakiman yang isinya mengatur mengenai penyatuan seluruh badan peradilan pelaksana kekuasaan di bawah Mahkamah Agung, karena selama iniadministrasi, organisasi, dan finansial Peradilan Umum, Peradilan Tata Usaha Negara, Peradilan Agama, dan Peradilan Militer dilakukan oleh departemen terkait. Meski UU No. 35 tahun 1999 telah menetapkan demikian, namun UU ini disahkan dalam keadaan setengah dipaksakan. Sehingga hanya mengatur beberapa poin inti yang utamanya berkaitan dengan upaya melepaskan campur tangan eksekutif dalam bidang peradilan. Atas dasar hal tersebut, pemerintah menyiapkan berbagai RUU yang akan mengatur mengenai kekuasaan kehakiman secara komprehensif, kecuali Peradilan Agama, karena pemerintah menganggap RUU Peradilan Agama akan disiapkan sendiri oleh Departemen Agama.[221]Selanjutnya terjadi pro kontra kembali terkait perlu atau tidaknya memasukkan Peradilan Agama dalam lingkungan peradilan di bawah Mahkamah Agung. Pro dan kontra tersebut kemudian terselesaikan dengan diundangkannya UU No. 4 Tahun 2004 tentang Kekuasaan Kehakiman yang ahirnya menetapkan bahwa Peradilan Agama masuk dalam salah satu lingkungan Peradilan di bawah Mahkamah Agung. Untuk menyesuaikan dengan materi dalam UU ini, UU No. 7 Tahun 1989 yang mengatur mengenai kompetensi Peradilan Agama juga diubah menjadi UU No. 3 Tahun 2006.[222]Secara garis besar, perubahan terhadap UU No. 7 tahun 1989 menjadi UU No. 3 Tahun 2006 meliputi tiga hal, yaitu:

[221]Pernyataan ini diungkapkan oleh Taufiq (Mantan Wakil Kerua MA yang juga pernah menjabat Direktur Pembinaan Badan Peradilan agama). Selain itu, Busthanul Arifin dan Ismail Suny berpendapat bahwa Peradilan Agama tidak akan pernah pindah ke Mahkamah agung dan berada di bawah Depag.

[222]Jaenal Aripin, *Peradilan Agama dalam Bingkai Reformasi Hukum di Indonesia*, (Jakarta: Media Grafika), 2008. Hlm. 11.

a. Kompetensi Peradilan Agama

Dalam Pasal 49 UU No. 3 Tahun 2006 disebutkan bahwa kompetensi absolut Peradilan Agama diperluas termasuk memeriksa, memutus, dan menyelesaikan perkara di bidang ekonomi syari'ah. Penjelasan Pasal 49 huruf i menyebutkan bahwa yang dimaksud dengan ekonomi syari'ah adalah perbuatan atau kegiatan usaha yang dilaksanakan menurut prinsip syari'ah, antara lain meliputi: bank syari'ah, lembaga keuangan mikro syari'ah, asuransi syari'ah, reasuransi syari'ah, reksadana syari'ah, obligasi syari'ah dan surat berharga berjangka menengah syari'ah, sekuritas syari'ah, pembiayaan syari'ah, pegadaian syari'ah, dana pensiun lembaga keuangan syari'ah, dan bisnis syari'ah. Kompetensi absolut Peradilan Agama atas perkara di bidang ekonomi syari'ah juga dipertegas dengan disahkannya UU No. 21 Tahun 2008 tentang Perbankan Syari'ah.

b. Pembinaan

Pembinaan yang dimaksud adalah teknis peradilan, organisasi, administrasi dan finansial dan keuangan. Semula, pembinaan teknis peradilan dilakukan oleh Mahkamah Agung sedangkan pembinaan organisasi, administrasi dan finansial oleh Mentri Agama. Namun, Pasal 5 UU No. 3 Tahun 2006 menyatakan bahwa segala pembinaan baik teknis peradilan, organisasi, administrasi dan finansial pengadilan dilakukan oleh Mahkamah Agung.

c. Hak opsi

Hak opsi yang dimaksud adalah hak para pihak untuk memilih forum dalam penyelesaian sengketa yang berkaitan dengan kewarisan sebagaimana pernah diatur dalam UU No. 7 Tahun 1989.[223] Lahirnya UU No. 3 Tahun 2006 secara resmi menghapus adanya hak opsi tersebut karena dinilai tidak menciptakan kepastian hukum bagi kedua belah pihak.[224]

E. Peradilan Agama dalam UU No. 50 Tahun 2009

Lahirnya UU No. 50 Tahun 2009 dilatarbelakangi oleh adanya Putusan MK No. 05/PUU-IV/2006 yang menyatakan bahwa Pasal 34 ayat (3) UU No. 4 Tahun 2004 tentang Kekuasaan Kehakiman dan pasal-pasal yang menyangkut pengawasan hakim sebagaimana tertuang dalam UU No. 22 Tahun 2004 tentang Komisi Yudisial bertentangan dengan UUD 1945. Sebagai konsekuensi logis-yuridis dari putusan MK tersebut, telah dilakukan perubahan atas UU No. 14 Tahun 2004 tentang perubahan atas UU No. 5 Tahun 2004 tentang Mahkamah Agung menjadi UU No. 3 Tahun 2009 tentang perubahan kedua atas UU No. 5

[223]Dalam penjelasan umum bagian dua disebutkan bahwa sehubungan bidang kewarisan, para pihak sebelum berperkara dapat mempertimbangkan untuk memilih hukum apa yang akan dipergunakan dalam pembagian warisan. Pilihan hukum ini timbul karena masih adanya beberapa sistem hukum kewarisan yang berlaku dalam masyarakat, yaitu sistem hukum Islam, sistem hukum adat, dan sistem hukum barat (BW).

[224]Dalam penjelasan umum alinea kedua UU No. 3 Tahun 2006 disebutkan bahwa kalimat yang terdapat dalam penjelasan umum UU No. 7 Tahun 1989 tentang Peradilan Agama yang menyatakan: "Para pihak sebelum berperkara dapat mempertimbangkan untuk memilih hukum apa yang dipergunakan dalam pembagian warisan", dinyatakah dihapus.

Tahun 2004 tentang Mahkamah Agung. Selanjutnya, perlu ada singkronisasi antarperaturan perundang-undangan terutama yang ada kaitannya dengan pengawasan hakim, sehingga perlu untuk merubah UU No. 3 Tahun 2006 tentang perubahan atas UU No. 7 Tahun 1989 tentang Peradilan Agama. Secara garis besar, perubahan kedua atas UU No. 7 Tahun 1989 adalah sebagai berikut:[225]

a. Penguatan pengawasan hakim, baik pengawasan secara internal Mahkamah Agung maupun pengawasan eksternal melalui Komisi Yudisial.
b. Memperkuat persyaratan pengangkatan hakim melalui proses seleksi hakim yang dilakukan secara transparan, akuntabel, dan partisipatif dan harus melalui proses atau lulus pendidikan hakim.[226]
c. Pengaturan mengenai pengadilan khusus dan hakim *adhoc.*
d. Diberlakukannya kode etik dan pedoman prilaku hakim yang wajib ditaati.[227]

F. Perubahan Substansi Hukum Peradilan Agama (Studi UU No. 7 Tahun 1989, UU No. 3 Tahun 2006 dan UU No. 50 Tahun 2009 tentang Peradilan Agama)

Secara garis besar, perubahan aspek substansi hukum Peradilan Agama dapat dilihat dari tabel berikut:[228]

ASPEK	UU No. 7 Tahun 1989	UU No. 3 Tahun 2006	UU No. 50 Tahun 2009
Jumlah Pasal dan Bab	7 Bab dan 108 Pasal.	Perubahan atas UU No. 7 Tahun 1989, dengan mengubah 42 Pasal.	Perubahan kedua atas UU No. 7 Tahun 1989, dengan mengubah 24 Pasal.
Dasar hukum	Pasal 5 (1), Pasal 20 (1), Pasal 24, dan Pasal 25 UUD 1945. UU No. 14 Tahun 1970 tentang Pokok-Pokok	Pasal 20, 21, 24, dan 25 UUD 1945. UU No. 5 Tahun 2004 Perubahan atas UU No. 14 Tahun 1985 tentang	Pasal 20, 21, 24, dan 25 UUD. UU No. 3 Tahun 2009 Perubahan kedua atas UU No. 14 Tahun 1985 tentang Mahkamah Agung.

[225]Penjelasan umum UU No. 50 Tahun 2009 tentang perubahan kedua atas UU No. 7 Tahun 1989 tentang Peradilan Agama.

[226]Pasal 13A ayat (1) UU No. 50 Tahun 2009 tentang perubahan kedua atas UU No. 7 Tahun 1989 tentang Peradilan Agama.

[227]Pasal 12B ayat (2) UU No. 50 Tahun 2009 tentang perubahan kedua atas UU No. 7 Tahun 1989 tentang Peradilan Agama.

[228]Aden Rosadi, *Peradilan Agama di Indonesia: Dinamika Pembentukan Hukum* (Bandung: Simbiosa Rekatama Media), 2015. Hlm. 116-117.

	Kekuasaan Kehakiman. UU No. 14 Tahun 1985 tentang Mahkamah Agung.	Mahkamah Agung. UU No. 7 Tahun 1989 tentang Peradilan Agama. UU No. 4 Tahun 2004 tentang Kekuasaan Kehakiman.	UU No. 3 Tahun 2006 Perubahan Kedua atas UU No. 7 Tahun 1989 tentang Peradilan Agama. UU No. 48 Tahun 2009 tentang Kekuasaan Kehakiman.
Kekuasaan pengadilan (Bab III)	Perkawinan, kewarisan, wasiat, hibah, wakaf, dan sedekah.	Perkawinan, kewarisan, wasiat, hibah, wakaf, zakat, infak, sedekah, dan ekonomi syari'ah.	Perkawinan, kewarisan, wasiat, hibah, wakaf, zakat, infak, sedekah, dan ekonomi syari'ah.
Pembinaan	Pembinaan teknis peradilan oleh Mahkamah Agung. Pembinaan teknis organisasi, administrasi dan keuangan oleh Mentri Agama.	Pembinaan teknis peradilan, organisasi, administrasi, dan keuangan oleh Mahkamah Agung.	Pengertian teknis peradilan, organisasi, administrasi, dan keuangan oleh Mahkamah Agung. Pengawasan secara eksternal oleh Komisi Yudisial.
Lain-lain		Penambahan Pasal 3A yang mengatur mengenai pengkhususan pengadilan dilingkungan Peradilan Agamadiatur dengan UU.	Penambahan ayat dalam Pasal 3A yang mengatur mengenai adanya hakim *adhoc* pada pengadilan khusus yang ada dalam lingkungan Peradilan Agama

III. PENUTUP

Peradilan Agama merupakan salah satu pelaku kekuasaan kehakiman bagi rakyat pencari keadilan yang beragama Islam mengenai perkara perkawinan, waris, wasiat, hibah, wakaf, zakat, infaq, shadaqah dan ekonomi syari'ah. Peradilan Agama telah ada sejak Islam masuk ke Indonesia yang ditandai dengan didirikannya kerajaan-kerajaan Islam nusantara. Eksistensi Peradilan Agama ini terus berlanjut hingga masa penjajahan Belanda, masa penjajahan Jepang, dan bahkan sampai akhirnya Indonesia merdeka.

Pasca proklamasi kemerdekaan RI 17 Agustus 1945, keberadaan Peradilan Agama yang memang telah ada sejak masa pra kemerdekaan tersebut mendapatkan ruang dengan didirikannya Departemen Agama pada tahun 1946.Perjalanan Peradilan Agama di Indonesia mengalami pasang surut sedemikian rupa baik diakibatkan oleh perubahan struktur ketatanegaraan, struktur politik, kebutuhan masyarakat, serta perkembangan masyarakat Islam di Indonesia. Sampai akhirnya muncul peraturan perundang-undangan khusus yang mengatur mengenai Peradilan Agama, yaitu UU No. 7 Tahun 1989, kemudian dirubah menjadi UU No. 3 Tahun 2006, dan terahir dirubah kembali menjadi UU No. 50 Tahun 2009 tentang perubahan kedua atas UU No. 7 Tahun 1989 tentang Peradilan Agama.

Secara garis besar, UU No. 7 Tahun 1989 mengatur mengenai susunan, kekuasaan, hukum acara, kedudukan para hakim, dan segi-segi administrasi lain pada Pengadilan Agama. Pengadilan Agama bertugas dan berwenang memeriksa, memutus, dan menyelesaikan perkara-perkara antara orang-orang yang beragama Islam dalam bidang perkawinan, kewarisan, wasiat dan hibah, wakaf dan shadaqah.Pembinaan Peradilan Agama berupa pembinaan teknis peradilan dilakukan oleh Mahkamah Agung sedangkan pembinaan organisasi, administrasi, dan keuangan pengadilan dilakukan oleh Mentri agama. dalam perjalanannya, Peradilan Agama ingin diintegrasikan ke Mahkamah Agung secara keseluruhan, sebagaimana tiga peradilan lain yaitu Peradilan Umum, Peradilan Tata Usaha Negara, dan Peradilan Militer yang berada di bawah binaan Mahkamah Agung. Ahirnya pada tahun 2004 disahkan UU No. 4 Tahun 2004 tentang Kekuasaan Kehakiman yang menetapkan bahwa Peradilan Agama masuk dalam salah satu lingkungan Peradilan di bawah Mahkamah Agung. Untuk menyesuaikan dengan materi dalam UU ini, UU No. 7 Tahun 1989 yang mengatur mengenai Peradilan Agama juga diubah menjadi UU No. 3 Tahun 2006.

Selain memberikan menjadi awal penyatuatapan sistem peradilan di bawah Mahkamah Agung, lahirnya UU No. 3 Tahun 2006 telah membawa perubahan besar bagi kompetensi Peradilan Agama dengan dimasukannya sengketa ekonomi syari'ah. Secara garis besar, perubahan terhadap UU No. 7 tahun 1989 menjadi UU No. 3 Tahun 2006 meliputi tiga hal, yaitu kompetensi Peradilan Agama, pembinaan peradilan yang berada di bawah Mahkamah Agung, dan dihapuskannya hak opsi dalam sengketa perkawinan. Dalam

perkembangannya, salah satu payung hukum UU No. 3 Tahun 2006 yaitu UU No. 4 Tahun 2004 tentang Kekuasaan Kehakiman diujikan ke Mahkamah Konstitusi karena ada beberapa pihak yang secara konstitusional dirugikan dengan keberadaan UU ini.

Terhadap kaitannya dengan hal ini, Mahkamah Konstitusi memberikan putusan No. 05/PUU-IV/2006 yang menyatakan bahwa Pasal 34 ayat (3) UU No. 4 Tahun 2004 tentang Kekuasaan Kehakiman dan pasal-pasal yang menyangkut pengawasan hakim sebagaimana tertuang dalam UU No. 22 Tahun 2004 tentang Komisi Yudisial bertentangan dengan UUD 1945. Sebagai konsekuensi logis dari putusan ini, UU terkait pengawasan hakim termasuk UU Peradilan Agama harus melakukan penyesuaian yang kemudian direalisasikan dengan perubahan kedua UU No. 7 Tahun 1989, yakni UU No. 50 Tahun 2009. Secara garis besar, perubahan dalam UU ini adalah penguatan pengawasan hakim, baik pengawasan secara internal Mahkamah Agung maupun pengawasan eksternal melalui Komisi Yudisial, memperkuat persyaratan pengangkatan hakim melalui proses seleksi hakim yang dilakukan secara transparan, akuntabel, dan partisipatif dan harus melalui proses atau lulus pendidikan hakim, pengaturan mengenai pengadilan khusus dan hakim *adhoc*danberlakunya kode etik dan pedoman prilaku hakim.

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