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Leadership (Qawâmah) in Islamic Family a Comparative Study Between Mahmud Syaltut and Muhammad Syahrur Though

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Abstract:

Understanding the concept of Qawâmah in the family is controversial among Islamic scholars, including mutaqaddimîn and contemporary scholars. The thoughts of contemporary scholars are influenced by the issue of gender justice. As contemporary scholars, Mahmud Syaltut and Muhammad Syahrur have different concepts. This research's objectives are: to explain the thought of Mahmud Syaltut and Muhammad Syahrur about qawâmah in the family; to identify the similarities and differences between Mahmud Syaltut and Muhammad Syahrur's thoughts about qawâmah in the family. The type of this research is library research and using a comparative approach. This study found that Mahmud Syaltut understands qawâmah as a men's nature as a leader for his wife because of their physical strengths and abilities. Syahrur understands qawâmah as the position of leader that can be owned by male or female as long as they have the characteristics of qawwâm which are not only from physical factors. Syaltut and Syahrur have thoughts that elevate the status of women so that they have an idea of equality between men and women. Mahmud Syaltut seemed not to leave the classical thinking pattern about qawâmah truly. Syaltut's qawâmah concept is different from Muhammad Syahrur's thought which is different from classical thinking.

Keywords: qawamah; gender justice; family studies.

Introduction

The concept of *qawâmah* between husband and wife is controversial among Islamic scholars, including *mutaqaddimîn* and contemporary scholars. In general, the thoughts of contemporary scholars are influenced by gender issues. Even so, it does not mean that modern Islamic legal scholars have the same concept. Mahmud Syaltut and Muhammad Syahrur have different concepts in interpreting *qawâmah* in the family. The concept of leadership in the family in general always refers to Surat Al-Nisa' verse 34 "*al-rijâlu qawwâmûna' alâ al-nisâ'*". When referring to the classical scholars' understanding of the verse, such as Ibn Kathir, he interprets this verse that men are the protector and maintainers of women. The man is responsible for the woman, and he is her maintainer, caretaker, and leader who disciplines her if she

deviates. It is because men excel over women and are better than them for certain tasks.[1] The thoughts of other classical scholars are not much different. According to Imam Al-Thabari, the leadership of men over women is due to the excel that Allah has given to men over women in giving dowries, fulfilling livelihoods, and the obligations provided by men (husbands) to women (wives). Al-Thabari explained that the excellence of men is in terms of strength of his mind and physical strength, so that prophecy is also a right for men.[2] Meanwhile, from the perspective of contemporary scholars, for example, in the view of Asghar Ali Engineer, the superiority of men over women is not the excellence based on sex, but rather a functional advantage, because men (husbands) earn a living and spend their wealth on women (wives). The social function carried out by men is the same as the social function carried out by women, namely carrying out domestic tasks in the household.[3] Likewise, other contemporary thinkers, such as Amina Wadud, view that man is *qawwâm* only if he meets the requirements of *qawwâm*, that is, if he can prove his strengths and use his wealth to support women.[4]

The problem that often arises is the men's position as the leader in a family, usually defined as the superiority of men over women, and the husband is described as a person in power and even has a higher dignity than the wife. Such views ultimately lead to injustice towards women's rights, marginalized women, subordination, and violence against women.[5] The understanding of men as leaders is often based on the verses of the Qur'an Surah Al-Nisâ' verse 34: *"Men are leaders for women because Allah has exaggerated some of them (men) over others (women) and because they (men) have spent part of their wealth."*[6] Regarding Surah Al-Nisâ' verse 34, Mahmud Syaltut and Muhammad Syahrur, in their thoughts, tried to explain how the concept of *qawâmah* in that verse, of course, with different thoughts and concept between Mahmud Syaltut and Muhammad Syahrur.

This article based on a libarary research, by tracing, searching, and examining materials in the form of books, including books of Mahmud Syaltut and Muhammad Syahrur as primary data, then other books, journals, and other sources as secondary and tertiary data. The research approach uses a comparative approach, namely by examining and comparing the thought about *qawâmah* in the family between Mahmud Syaltut and Muhammad Syahrur, and then identifying the similarities and differences. The data collection begins with determining the data, inventorying of data, and reviewing the data. Data analysis includes editing, classifying, verifying, analyzing, and concluding.

Mahmud Syaltut's Thought About *Qawâmah* in Family

[1] Abu Al-Fida Isma'il Ibnu Katsir Al-Dimasyqi, *Tafsîr Ibnu Katsîr* (Beirut: Dâr Al-Kutub Al-'Ilmiyyah, 1998), 256.
[2] Khoirul Anam, "Perempuan Perspektif Tafsir Klasik Dan Kontemporer," *Journal de Jure* 2, no. 2 (2010): 22, https://doi.org/10.18860/j-fsh.v2i2.2974.
[3] Ishaq Zamroni, "Diskursus Kepemimpinan Suami Isteri Dalam Keluarga: Pandangan Mufasir Klasik Dan Kontemporer," *Ummul Qura* 4, no. 2 (2014): 28, http://ejournal.kopertais4.or.id/index.php/qura/-issue/view/531.
[4] Cahya Edi Setyawan, "Pemikiran Kesetaraan Gender Dan Feminisme Amina Wadud Tentang Eksistensi Wanita Dalam Kajian Hukum Keluarga," *Zawiyah: Jurnal Pemikiran Islam* 3, no. 1 (2012): 84, https://doi.org/10.31332/zjpi.v3i1.710.
[5] Faqihuddin Abdul Kodir, *Qirâ'ah Mubâdalah: Tafsir Progresif Untuk Keadilan Gender Dalam Islam* (Yogyakarta: IRCiSoD, 2019), 29.
[6] Translator Team, *Al-Qur'an Dan Terjemahnya* (Jakarta: Almahira, 2016), 84.

Mahmud Syaltut was an Islamic scholar and thinker who have an international reputation. He was born in Maniyah, Bani Mansur, Itai al-Beirud District, Bukhairah Residency, Egypt, on 23 April 1893 and died on 19 December 1963. When he was a teenager (13 years old), in 1906, he entered a religious education institution, al-Ma'had al-Dini, in Alexandria. He was known as an intelligent student and succeeded in obtaining al-Syahâdah al-'Âlimiyyahal-Nizâmiyyah (at the level of Master of Arts) from al-Azhar University (1918), and he was noted as the best graduate. His scientific activities began as a teacher at al-Ma'had ad-Dini al-Iskandari in 1919, a year after he obtained al-syahâdah al-'Âlimiyyah. Apart from teaching at al-Iskandari and elsewhere, he also carried out publishing, preaching, and writing activities. His writings are mainly about sharia, Arabic, Tafseer, Hadith, and other Islamic religious sciences. It was at that time that he expressed his various opinions and thoughts about improving al-Azhar University.[7]

Mahmud Syaltut was appointed as *al-Shaykh al-Azhar* in 1958, and Syaltut announced his vision for reform. Mahmud Syaltut tried to prove that sharia law is not an obstacle to modern society but rather a guide in the changes brought by modern society. Mahmud Syaltut made a serious effort to portray Islam to the world as a religion of unity, flexibility, and moderation. He strongly condemned sectarianism and promoted tolerance among the Muslim population. Moreover, Mahmud Syaltut is not worried about accepting socialism, and he was very proud of his Egyptian citizenship, and at the same time, he supported Arabism. [8] So far, the Muslims in Egypt and the Muslim world believed that Ijtihad in Islamic law has ended with the existence of *madzâhib* that have become role models for Muslims in the lives. They must submit and follow one of the existing madhabs. According to Mahmud Syaltut, this is a big mistake that must be corrected immediately to correct misunderstanding and revive the broad and flexible thinking of Islamic law.[9]

The Syaltut period was the era of women's discourse in Egypt and the Islamic world in general. Issues of gender equality and women's emancipation have risen to the surface and become part of the social government transformation plan, in line with the domination of modern Western cultural currents in the Muslim world. Syaltut believed in the universality of Islamic teachings as a way of life, so he is very diligent in referring to the Qur'an and Hadith in addressing contemporary issues, including women's discourse.[10] Mahmud Syaltut always conditionalized the ongoing developments in finding a law and took opinions considered relevant value to the existing problem.[11] In his book entitled *Al-Islâm Aqîdah wa Syarî'ah*, Mahmud Syaltut divided the sources of taking Islamic law into three sources, namely the Qur'an, Sunnah, and *Ra'y wa Nadzor*.[12]

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[7] Islamic Encyclopedia Editorial Council, "Mahmud Syaltut," in *Ensiklopedi Islam* (Jakarta: PT Ichtiar Baru Van Hoeven, 1977), 342-343.

[8] Ahmad Dzulfikar, "Konsep Sabilillah Dalam Pandangan Syekh Mahmud Syaltut Dan Implementasinya Dalam Hukum Islam Kotemporer," *Journal of Islamic Civilization* 2, no. 1 (2020): 44, https://doi.org/10.33086/jic.v2i1.1428.

[9] Ahmad Badwi, "Kontribusi Syaltut Dalam Reformasi Hukum Islam," *Jurnal Hukum Diktum* 11, no. 1 (2013): 67, https://doi.org/10.35905/ diktum.v11i1.94.

[10] Mahmud Arif, "Ambivilensi Pemikiran Mahmud Syaltut Tentang Fikih Perempuan," *Al-Manahij* 5, no. 2 (2011): 208, https://doi.org/10.24090 /mnh.v5i2.613.

[11] Badwi, "Kontribusi Syaltut," 67.

[12] Mahmud Syaltut, *Al-Islâm 'Aqîdah wa Syarî'ah* (Cairo: Dâr al-Syurûq, 2001), 477.

Various thought on the concept of *qawâmah* in the family generally are always based on the interpretation of Surat Al-Nisa' verse 34:

> *"Men are in charge of women by (right of) what Allah has given one over the other and what they spend (for maintenance) from their wealth. So righteous women are devoutly obedient, guarding in (the husband's) absence what Allah would have them guard. But those (wives) from whom you fear arrogance - (first) advise them; (then if they persist), forsake them in bed; and (finally), strike them. But if they obey you (once more), seek no means against them. Indeed, Allah is ever Exalted and Grand".*[13]

The definition of *qawâmah* based on this verse, according to Mahmud Syaltut, is meaning "leader". So that in the context of this verse, "*qawwâmûna*" means man (husband) is the leader for his wife and family, so that he is responsible for leading, protecting, and fulfilling the needs of his wife and her children.[14] This position is the degree of men to guide, nurture, guard and protect, as a natural strength (*thabi'iy*) that characterizes men and distinguishes men from women. With this ability, he is obliged to work on getting wealth or property, which becomes a source of income to fulfill his wife and family's rights.[15] This husband's position is not a position that enslaves and humiliates women, because, between husband and wife, both of them must be good and fair to each other in fulfilling each other's rights and obligations, as in Surah Al-Baqarah verse 228:

> "*Wives have (rights) similar to their (obligations), according to what is recognized to be fair, and husband have a degree (of right) over them*".[16]

Based on Surat Al-Nisa' verse 34 above, there are two things that men carry: (1) With the physical strength that has been bestowed on men, men are burdened to do all kinds of heavy and difficult work; (2) Men assume the obligation to ensure household needs, including food, clothing and anything that brings happiness to children and families.[17] One of the things that must exist in domestic life is *ihsan* (good behavior), where good behavior arises from both husband and wife reciprocally. Islam has established a reciprocal relationship in the good behavior of husband and wife, and this is the influence of the universal principle that Islam has recognized regarding the freedom of every man and woman in all their responsibilities. Therefore, family responsibility is borne not only on the husband or just on the wife. Each husband and wife have rights and responsibilities as well as freedom. The relationship between responsibility and freedom between husband and wife is the equality of both before Allah in obtaining reward and good deeds and obedience, as well as receiving torture for evil deeds.[18]As Allah says in Surah Al-Nisâ' verse 124:

[13] Translator, *Al-Qur'an*, 84.
[14] Syaltut, *Al-Islâm*, 157.
[15] Mahmud Syaltut, *Tafsîr Al-Qur'ân Al-Karîm: Al-Ajzâ' Al-'Asyrah Al-Ûlâ* (Cairo: Dâr Al-Syurûq, 2004), 141.
[16] Translator, *Al-Qur'an*, 36.
[17] Syaltut, *Al-Islâm*, 157.
[18] Ibid, 160-161.

"*And whoever does righteous deeds, whether male or female, while being a believer, those will enter Paradise and will not be wronged, (even as much as) the speck on a date seed*".[19]

Husbands who lead the family and behave arbitrarily, rule freely without limits, force, and leave their wives without the slightest concern, are husbands who contradict the Islamic concept in the life of husband and wife.[20] Mahmud Syaltut based his thought on equality between husband and wife by quoting Surah Âli Imrân verse 195:

"*And their Lord responded to them, "Never will I allow to be lost the work of (any) worker among you, whether male or female; you are of one another*".[21]

The Word "*ba'dlukum min ba'dlin*" is a statement that Allah has elevated the position of women and made them equal to men. The Qur'an has also limited the arbitrariness of men over women. The equality between husband and wife is more clearly expressed in Surah Al-Nisa' verse 32, where both the husband or wife gets a share or the reward for their effort.[22] Naturally, the character between men and women is almost the same. Allah has bestowed sufficient potential and ability for women to assume responsibility, as Allah also bestowed on men and made both men and women able to carry out general and specific activities. So that the sharia also places both of them in one framework.[23] One of the results of human equality between men and women is the opportunity for women to study and work. So, at this time, we can see many women who become doctors, literary experts, devout Sufism experts, and various other fields of work that men also do.[24]

Women as wives and mothers of children have an urgent and fundamental right in their household life, namely the right to obtain a welfare guarantee, which in fiqh terminology is known as *nafaqah*. This is related to the role of women or wives as reproductive actors (pregnant, giving birth, breastfeeding/caring for children), which cannot be transferred to men as husbands. Also, there are still household duties (managing the household, serving the husband) that are the wife's responsibility. The wife's right to get a living and welfare guarantee from the husband, besides normatively stated in the text (Qur'an and Hadith), also because the wife has a prominent role and responsibility in reproduction and household management. Thus it is unfair if women as wives are also burdened with living financing problems (for the needs of food, house, clothing, health, and so on), so it is proper for husbands to be burdened with this responsibility.[25] According to the Quraish Shihab, equality, togetherness, and partnership between husband and wife are shown in Surah Ali Imran verse 195, in the sentence "*ba'dlukum min ba'dl*", where this verse also shows that men or husbands, without a partner, are imperfect (because he is only partially), until they unite and cooperate with their partners

[19] Translator, *Al-Qur'an*, 19.
[20] Syaltut, *Al-Islâm*, 159.
[21] Ibid, 76.
[22] Ibid, 224.
[23] Mahmud Syaltut, *Min Taujîhât Al-Islâm* (Cairo: Dâr al-Syurûq, 2004)., 167.
[24] Syaltut, *Al-Islâm*, 234.
[25] Rustam Dahar Kamadi Apollo Harahap, "Kesetaraan Laki-Laki Dan Perempuan Dalam Hukum Perkawinan Islam," *Sawwa*, no. 2 (2013): 366-367. https://doi.org/10.21580-/sa.v8i2.662.

(women) to become perfect. Also, women are imperfect until they unite and cooperate with their partners to become perfect.[26]

Muhammad Syahrur's Thought About *Qawâmah* in Family

Muhammad Syahrur was born in 1938 in Sahiliyah, Damascus, and Muhammad Syahrur was the fifth child of a Sunni dye. her parents sent her to primary and secondary schools in al-Midan, on the outskirts of the southern city of Damascus, which is outside the walls of the old city.[27] Shahrur's childhood was spent in a liberal atmosphere, where his father taught him that practical and moral implications are the measurement of goodness in a religion, not spiritual efficacy. Syahrur obtained his *Tsanâwiyyah* diploma from the Abdurrahman al-Kawâkib school in 1957. These times coincided with the politically unstable situation in the Syrian Arab Republic after gaining independence in 1947. Directly and indirectly, Syahrur was affected by the political turmoil between 1946 and 1956.[28]

On a scholarship from the Damascus government, he went to the USSR to study Civil Engineering (*Handasah Madâniyyah*) in Moscow. In this country, Syahrur became acquainted with and admired the thought of Marxism, even though he did not admit to being a follower of this ideology. He also admitted a great debt of gratitude to the figure of Hegel-especially his dialectic-and Alfred North Whitehead. He achieved a diploma in these studies in 1964.[29] Syahrur returned to Syria in 1964, and he worked as a lecturer of the Faculty of Engineering at the University of Damascus. Then, Syahrur decided to go to Dublin, Ireland, as a delegate from the University of Damascus to attend the Masters and Doctoral program at Ireland National University in the study of Foundation Engineering and Soil Mechanics. He received his doctorate in 1972 after his Master of Science degree in 1969. Syahrur actively teaches at the Faculty of Civil Engineering, Damascus University, in Soil Mechanics and Geology, and he has become an Engineering consultant. In 1982-1983, Syahrur was turned back by the university to become an expert at as-Sa'ud Consult in Saudi Arabia. Besides, he opened an Engineering Consultancy (*Dâr al-Istisyârât al-Handasah*) in Damascus with some of his friends in the faculty. In 1995, Syahrur was also an honorary participant in public debates about Islam in Lebanon and Morocco.[30]

It seems that Syahrur's attention to the engineering sector did not prevent him from exploring other disciplines such as philosophy, especially after he met with Dr. Ja'far Dakk Al-Bâb, a study partner in Syria at the University of Damascus. This meeting was very meaningful for his thought which was later embodied in a monumental and "controversial" work, namely *Al-Kitâb wa al-Qur'ân: Qirâ'ah Mu'âshirah*, 1990.[31]

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[26] M. Quraish Shihab, *Perempuan* (Tangerang: Lentera Hati, 2018), 165.
[27] Andreas Christmann, "The Form Is Permanent, but The Content Moves: The Qur'anic Text and Its Interpretation(s) in Mohamad Shahrour's '*Al-Kitâb wa Al-Qur'ân*,'" *Welt Des Islams* 43, no. 2 (2003): 145, https://doi.org/10.1163/157006003766956694.
[28] Muhammad Shahrur, *The Qur'an, Morality & Critical Reason: The Essential Muhammad Syahrur*, ed. Andreas Christmann (Boston: Brill, 2009), xix.
[29] Moh. Khasan, *Rekonstruksi Fiqh Perempuan: Telaah Terhadap Pemikiran Muhammad Syahrur* (Semarang: AFKI Media, 2009), 23.
[30] Peter Clark, "The Syahrur Phenomenon: A Liberal Islamic Voice from Syria," *Islam and Christian-Muslim Relations* 7, no. 3 (1996): 341, https://doi.org/10.1080/09596419608721095.
[31] Khasan, *Rekonstruksi Fiqh Perempuan*, 24.

In Islamic studies, Syahrur studied self-taught. He has no formal study experience or obtained a certificate in Islamic science, so other scholars often attacked him as a person who had no authority in the area of Islamic studies. Because Syahrur was considered a foreigner in Islamic sciences, his opportunity to appear in religious pulpits, recitation in mosques, Islamic journals, or television programs, was very limited. He wrote a book to spread his thought. Some of his books are *Al-Kitâb wa Al-Qur'ân: Qirâ'ah Mu'âshirah*, *Dirâsah Islâmiyyah Mu'âshirah fi al-Dawlah wa al-Mujtamâ'*, *Al-Islâm wa al-Imân: Mandhûmah al-Qiyâm, Nahw Ushûl Jadîdah li al-Fiqh al-Islâmiy*,and he also used compact discs as a new medium to spread his thought.[32]

Muhammad Syahrur have different explanation about *qawâmah*. If it is said "*qama 'alâ al-amri*", it means do the best (*ahsanahu*). *Qawâmah* in surah Al-Nisa' verse 34 means that men are the leaders for women. In this verse, it is as if Allah linked "*al-qiwâmah*" with different qualities, which become perfect with maturity, namely when a *dzakar* becomes a *rajul* (adult male), and an *untsâ* becomes *imra'ah* (adult female). The meaning of *al-rijâl* is men who have toughness and leader's character so that it is not merely mean male by sex. [33]

There are two aspects in the criteria of *qawâmah*. The first aspect is found in Allah's word "*bi mâ fadldlalallâhu ba'dlahum 'alâ ba'dlin*" which includes both men and women at the same time. Besides, there are women who have advantages over men in various fields and ages. Most scholars understand this verse that Allah give superiority to men over women with men's knowledge, mind, and power. Syahrur rejected this kind of understanding, by arguing that if Allah willed what they say, Allah should have said "*Al-dzukûru qawwâmûna 'alâ al-inâts*", but in reality, Allah did not say that.[34] From here, Syahrur understands that the phrase *ba'dlahum 'alâ ba'dlin* includes both men and women, so that the verse above means: because Allah gives superiority to some men and women over some other men and women.[35] This is very clear in Allah's word in Surah Al-Isra' verse 21: "*Look how We have favored (in provision) some of them over others. But the Hereafter is greater in degrees (of difference) and greater in distinction*".[36] This verse abolishes the characteristic of the natural advantages (the factor of creation) and firmly establishes the edges based on good management, wisdom, and different levels of culture and consciousness among humans. So, some men have advantages over some women. Likewise, some women have advantages over some men.[37]

The second aspect of *qawâmah* is the aspect of property or wealth, in Allah's word "*wa bi mâ anfaqû min amwâlihim*". An owner of the property or wealth certainly has leadership (*al-qiwâmah*) regardless of the skills and level of consciousness and culture. Power or leadership in the economic field is evident in individuals, families, and developed countries and has not related to culture and

[32] Muhyar Fanani, *Fiqh Madani: Konstruksi Hukum Islam Di Dunia Modern* (Yogyakarta: LKiS, 2009), 34-35.
[33] Muhammad Syahrur, *Nahw Ushûl Jadîdah Li Al-Fiqh Al-Islâmy: Fiqh Al-Mar'ah* (Damascus: Al-Ahâly, 2000), 319.
[34] Ibid, 320.
[35] Ibid, 320.
[36] Translator, *Al-Qur'an*, 284.
[37] Syahrur, *Nahw Ushûl Jadîdah*, 320.

skills.[38] It is true that Allah gives advantages to men over women with muscular strengths, and this advantage is the main axis in seeking living by hunting, farming, or trading, all of which require muscle strength. However, the development of engineering and infrastructure has outperformed these physical edges or reduced it to the lowest limit.[39]

The family needs norms that can regulate all things, guide its members and guide the household ship in the waves of life. Men have power in wealth, education, character, and leadership abilities, so do women. There is no doubt that the goodness of the family and society will be achieved if leadership is in the hands of people who have advantages or edges, whether they are male or female. This is the meaning of Surah Al-Nisa' verse 34 above, when Allah's word begun with the leadership of men over women: *ar-rijâlu qawwâmûna' alâ an-nisâ'i*, then the verse is continued with a sign of equality between men and women, and about the edges that Allah bestows on some men and women over others, then Allah ends His word with a description of the leadership of women over men: *fa al-shâlihâtu qânitâtun hâfidhâtun li al-ghaybi bi mâ hafizallâhu*. The word *al-hâfizat* means women who are proper to lead because leadership is the main theme in this verse.[40] The superiority of men over women has been mentioned, along with the reasons for their superiority. In addition, some women are superior to men. In the Quran, superior women are righteous women (*shâlihah*).[41] The criteria for women who are suitable to lead are in Allah's word in Surah Al-Nisa' verse 34 "*Fashshâlihâtu qânitâtun hâfidzâtun li al-ghaybi bi mâ hafidzallâh (So* righteous *women are devoutly obedient, guarding in [the husband's] absence what Allah would have them guard)*".[42]

Based on this verse, the characteristics of righteous women (*shâlihah*) who play the role of *qawâmah* are: (1) *Qânitât* (*al-qunût*), which means calm and consistency that is continuously maintained; (2) *Hâfidzât*, which means keeping secret things that are ordered by Allah to be kept. S*hâlihah* women must keep the secrets of their husbands and households that are ordered by Allah to be kept.[43] Thus, Surah Al-Nisâ' verse 34 contains an explanation of the characteristics that must be possessed by women who are gifted with leadership rights due to Allah's grace given to them in the form of wealth, education, or intellectual level. These characteristics are obeying and guarding the husband's disgrace. If she has these qualities, she is proper to lead. However, if the woman does not have these characteristics, she has gone out of the line of eligibility as a leader, where in verse above, it is called by *nusyûz*, namely getting out of humility and protecting her husband's disgrace.[44]

Amina Wadud, a contemporary Islamic feminist figure, has a similar opinion to Muhammad Syahrur. According to Amina Wadud, men's *qawâmah* is determined by the conditions described after the word "*bi*" (*bi mâ fadldlalallâhu*), where the first condition is men have edges or they can prove their edges, and the

[38] Ibid, 320.
[39] Ibid, 322.
[40] Syahrur, 322.
[41] Ibid, 271.
[42] Translator, *Al-Qur'an*, 84.
[43] Syahrur, *Nahw Ushûl Jadîdah*, 271.
[44] Ibid, 322.

second conditions is men support women using men's wealth. If a man does not meet both requirements, he is not a leader for women.[45]

There is an emotional connection between men and women. This relationship is a relationship of affection, love, loyalty, and commitment between husband and wife. In this case, the position of a husband is as "*libâs*" for a wife. Likewise, wives are "*libâs*" for husbands. The term "*al-libâs*" comes from the word "*labisa*" which in Arabic means participation and intervention (taking care of each other). This understanding is implied in the word of Allah in Surah Al-Baqarah verse 187: "*It has been made permissible for you the night preceding fasting to go to your wives (for sexual relations). They are clothing for you and you are clothing for them* (*hunna libâsun lakum wa antum libâsun lahunna*)". The relationship of love and affection is a complementary relationship between men and women. Both of them share the same potential feelings and tendencies, one not being more special than the other.[46]

Similarities and Differences Between Mahmud Syaltut and Muhammad Syahrur's Thought About *Qawâmah* in The Family

There are some differences thought about *qawâmah* in family between Mahmud Syaltut and Muhammad Syahrur. Mahmud Syaltut and Muhammad Syahrur both have the principle of equal position between husband and wife; whether leadership is in the hands of husband or wife, it does not elevate and demean each other's positions. Both husband or wife has equal rights, obligations, and responsibilities. They are obliged to fulfill each other's rights to create a *sakînah*, *mawaddah,* and *rahmah*. Also, the right to working outside the home, the wife has this right. The difference in their task in the family is just a form of division of functions in a family which must certainly be divided equally.

Beside those similarities, there are some differences thought about *qawâmah* between Mahmud Syaltut and Muhammad Syahrur. According to Mahmud Syaltut, *qawâmah* is owned by men because of their natural advantages which is not owned by women. Meanwhile, according to Syahrur, *qawâmah* can be owned by both men and women. This difference is due to the different interpretations of Surat Al-Nisâ' verse 34: "*Ba'dlahum 'ala ba'dl*". Syaltut understood this verse that Allah gives bounties to men over women. In contrast, Syahrur understood this verse that Allah gives bounties to some men over some women, so that Allah also gives bounties to some women over some men.

According to Mahmud Syaltut, the *qawâmah* of men is due to the men's physical advantages over women. Men are endowed with a strong physique and the ability to work hard to earn a living for their families. Meanwhile, according to Syahrur, *qawâmah* is not determined by physical factors but determined by wisdom, good management, and leadership abilities. Superior women are righteous women, namely women who have two characters: *Qânitât* (calm and consistency that is continuously maintained), and *Hâfidzât* (keeping secret things that are ordered by Allah to be kept).

Mahmud Syaltut did not completely abandon the thought of classical scholars in general about *qawâmah*, namely acknowledging that men naturally are leaders for women. Besides that, Mahmud Syaltut has the same thoughts as modern thinkers

[45] Setyawan, "Pemikiran Kesetaraan Gender," 84.
[46] Muhammad Syahrur, *Al-Kitâb wa Al-Qur'ân: Qirâ'ah Mu'âshirah* (Damascus: Al-Ahâly, n.d.), 46-47.

about the concept of equality between men and women. The dualism of Mahmud Syaltut's thoughts between classical and contemporary thought could be caused by the background of his life. Since his childhood, he lived in religious families, his educational background in *madrasah* that emphasize the thought of classical ulama, and his career in Al-Azhar as a scholar and *syaikh al-azhâr*. Muhammad Syahrur's thoughts could be caused by his life and educational background. Muhammad Syahrur has a different social and educational experience. He studied Islamic studies self-taught, and his thought influenced by his critical thinking, which is very strong with the influence of modern thinking.

The Concept of *Qawâmah* in Family in Indonesian Society

Basically, the concept of the head of the family in Indonesia is plural, especially in indigenous or traditional society, where there are differences in the concept of the head of the family in various tribes and cultures. But besides that, the concept of patriarchy still dominates Indonesian families.[47] Because the majority of Indonesian people are Muslims, then the interpretation of the verse on leadership is certainly not without consequences, but provides an unwritten rule but is deeply rooted in every Indonesian community about the family concept that husbands earn a living and wives are not breadwinners. This family concept gave birth to a new perspective that men are in the public sphere while women are in the private sphere (serving their husbands, nurturing, educating, and caring for children).[48]

Regarding the concept of leadership in the family in Indonesian society, it seems that Mahmud Syaltut's thought about *qawâmah* or male leadership in the family is the same as the concept of leadership in the family in the Islamic Law Compilation in Indonesia. The position of husband and wife in Article 79 Compilation of Islamic law stated that: (1) "The husband is the head of the family, and the wife is a housewife"; (2) "The rights and degree of the wife are balanced with the rights and the degree of the husband in household life and social life together in the community"; (3) each side has the right to take legal action". In this article, it is explained that in household life, where the rights and degree are equal, both men and women have the right to take legal actions as long as it is not detrimental to each other. This is under the principle of marriage, which explains that the rights and obligations of each side, namely husband and wife, are balanced. Islamic Law Compilation divides household duties, namely the husband as the head of the family while the wife is the housewife.[49]

The role affirmation in verse (1) above is considered by certain groups, especially feminists or women's empowerment activists, as the standardization of the patriarchal structure by strengthening the role of motherhood as a legitimate value regulating the role of women in the family. However, according to Daud Ali,

[47] Wahyuni Retnowulandari, "Kepala Keluarga Dalam Hukum Keluarga Di Indonesia: Tinjauan Perspektif Gender Dalam Hukum Agama, Adat, Dan Hukum Nasional," *Jurnal Hukum Prioris* 5, no. 3 (2016): 244, https://media.neliti.com/media/publications/82097-ID-kepala-keluarga-dalam-hukum-keluarga-di.pdf.

[48] Masthuriyah Sa'dan, "Posisi Perempuan Kepala Keluarga Dalam Kontestasi Tafsir & Negosisasi Realita Masyarakat Nelayan Madura: Kajian Muhammad Syahrur," *Jurnal Studi Ilmu-Ilmu Al-Qur'an Dan Hadis* 18, no. 2 (2017): 88, https://doi.org/10.14421/qh.2017.1802-04.

[49] Islamiyati, "Tinjauan Yuridis Tentang Relasi Suami Istri Menurut KHI Inpres No. 1/1991," *Masalah-Masalah Hukum*, no. 3 (2013): 371, https://doi.org/10.14710/mmh.42.3.2013.369-375.

the article's statement above should not be considered a reduction in the position of the wives because it is only a statement of the division of work and responsibility. This formulation should not also mean that the wife is not allowed to do activities outside the home, as long as she does not forget her function as a housewife. It is because remembering according to nature, the most suitable person to take care of household matters is the mother.[50]

Based on these things, it is clear and common in Indonesian society, it can even be said that it has become the view of Indonesian society in general, even in families where both husband and wife work together. However, when viewed from the perspective of Muhammad Syahrur, the wife as a woman holds the leadership in the family in some cases in the family in Indonesia, such as husbands who are unable to meet their needs and work because of illness, widowhood, or so on. Women and men are social beings who always interact from a social relationship. If we change social relations, we change the categories of women and men. Furthermore, it will affect the workload. In a patrilineal society, the burden of men is more dominant than that of women. And every community will be influenced by geographical objective conditions, which will determine the local socio-cultural system.[51]

Besides having a certain role in the household, women also have a role in society and the government, where they have the same rights and opportunities as men. In the current era in Indonesian society, jobs in the public sector are no longer dominated by men. Even in the government, business, banking, and economic sectors, many women as wives dominate in it, and finally, the woman helps in meeting the economic needs of her family. However, Indonesian society is dominated by the view that men are naturally the leaders of their families. This is in accordance with what has been explained in the compilation of Islamic law as a reflection of the family pattern in Indonesian society.

In the past, women in Indonesia tended to have limited access to public work, so that the public sector was dominated by men. In the millennial era, along with the development of science and technology, women and their wives have entered and worked in the public sphere, so that the main tasks that should be at home, caring for and educating their children, and guarding their husband's property in the household have instead shifted to a housemaid, or even the role of the wife is transferred to her husband. So that the wife no longer takes control of household life but takes over the husband's role as breadwinner and fulfills household needs.[52]

Equality between husband and wife in the household is equality in the aspect of maintaining the integrity of the household and complementing each other between the two, as well as meeting the needs from different roles. Sometimes the wife works to support the family's economic needs, or the wife works because of career demands because the wife has special expertise in certain fields, so that there is a cooperation between husband and wife in meeting household needs. So, the

[50] Asni, "Kedudukan Perempuan Dalam Hukum Keluarga Islam Di Indonesia: Telaah Kompilasi Hukum Islam Perspektif Kesetaraan Gender," *Al-'Adl* 1, no. 2 (2008): 14, https://doi.org/10.31332/aladl.v1i2.836.
[51] Nurliana, "Pergantian Peran Pemimpin Dalam Rumah Tangga Di Era Milineal Perspektif Hukum Islam," *Al-Mutharahah* 16, no. 1 (2019): 132, https://ojs.diniyah.ac.id/index.php/Al-Mutharahah/article/view/17.
[52] Ibid, 127.

role of the wife is still considered as a companion to the husband, not as a leader in the household.[53] This is what happens in Indonesian society, that women remain a companion to their husbands in fulfilling and helping each other to meet family needs.

Conclusion

As a contemporary scholar, Mahmud Saltut's thought about *qawâmah* in the family contains gender equality, namely equality of rights and obligations as well as equality of position between men and women. Even so, Mahmud Saltut's thought still contains the characteristics of classical thought, where there is a view that by nature, men with their physical strengths and strengths are leaders for women. There is gender equality in Muhammad Syahrur's thought and he rejects the concept of leadership based on physical strength and stipulates that *qawâmah* can be possessed by both men and women who have the characteristics of *qawâmah* so that they are proper to lead. In Indonesian society, the type of family leadership based on Mahmud Saltut's thinking is more dominant, where the husband holds the leadership of the family, even though both have the same rights and the husband and wife both have careers, work and earn a living for the family's needs. The concept of leadership in the family is certainly different in each family, where each family can determine its own leadership concept, based on the typical characteristics and needs of each family. But the most important thing is that husband and wife must complement each other and fulfill the rights that must be given to each other, there is no domination of each other so that in domestic life there is justice and peace to realize the marriage goals, namely *sakinah*, *mawaddah*, and *rahmah*.

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[53] Nurliana, 139.

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Criminal Sanctions for Robbery a Comparative Study between Fiqh Jinayah and Criminal Law in Indonesia

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Abstract:

Humans as social beings deserve to maintain safety and security in life in the world, but acts of terror in the form of robbery crimes still often occur among the community, even though Islam has provided guidance regarding the value of life and property rights over humans. Regarding efforts to prevent and deal with this crime of robbery, the law enforcement agencies of a country have a big responsibility and share in fighting these crimes, making legal provisions designed to protect its people and providing firm sanctions so that the crime of robbery is not free and provides a deterrent effect. The purpose of this study is to examine the handling of robbery perpetrators with criminal sanctions or punishments from the perspective of Islamic law and statutory law in Indonesia, which in this case the limitation used in the Criminal law book (KUHP). This study is library research. The method used is the content analysis which is used to explore the explanations, thoughts, and comments of Muslim scholars. The results of the observations prove that the sanctions for the crime of robbery in fiqh jinayah or Islamic criminal law as described in QS. Al-Maidah [5]: 33, namely: death penalty, crucifixion to death or killed after a long time the perpetrator hung, cut off his hands and feet crosswise, and the last one was exiled from the earth. The sanctions for the crime of robbery as stated in Article 365 of the Criminal law book, namely: 9 years, 12 years, 15 years imprisonment, a maximum prison sentence of 20 years, and the death penalty, or life imprisonment.

Keywords: robbery; sanctions; criminal law.

Introduction

Humans are social beings who always live hand in hand in a community of citizens, as social beings it is proper to be able to relate harmoniously with one another in peace and serenity. One of the main tasks brought by the Prophet as the recipient of the revelation of the Qur'an is to establish peace and security for mankind in the world, the meaning of the word Islam itself in addition to submission to Allah SWT also implies welfare and safety.[1] Islam is a religion of *rahmatan lil'alam>n* which plays an important role in regulating and solving the problems of the people, especially in terms of violence and crime. In the

[1] Muh}ammad Thahir Azhary, *Negara Hukum* (Bogor: Kencana, 2003), 146.

interpretation of the Qur'an itself, Allah SWT strongly condemns the perpetrators of terror in all its forms and kinds.[2] Islam from the beginning has begun to invite and fight for security in all corners of the world. Terror acts in the form of robbery often threaten the security of the community, both the right to ownership of valuables and life. The creation of a safe atmosphere and the application of sanctions against criminals and troublemakers are important points in a country, including Indonesia, in carrying out the life of the nation and state, so there must be a wise legal formulation in the applicable legislation.

Criminal law is a rule of law formulated by the state whose contents are in the form of prohibitions or obligations, those who violate them can be subject to sanctions that can be imposed strictly by the state.[3] Likewise in Islamic criminal law is a translation of the term Fiqh Jinayah. According to Zainuddin Ali, fiqh jinayah is all legal provisions regarding criminal acts.[4] These two laws have the function of prohibiting committing acts of robbery, protecting property, and providing severe sanctions against perpetrators of robbery crimes. The act of robbing is included in the category of jinayah or *jarimah*.[5] In the science of fiqh it is explained that the jarimah of robbery belongs to the *jarimah h{udud*, namely whose punishment is directly stipulated in the Koran. *jarimah h{udud* According to Zainuddin Ali,is a crime committed by one or more people, which results in the perpetrator being subject to sanction *h{ad*.[6] One action *jarimah* classified as major sins are crimes of robbery. Therefore, the Qur'an legitimizes the perpetrators of robbery or *hira>bah* as people who fight against Allah, His Prophet, and people who in fact create chaos and destruction on earth. In the Criminal Law Book (KUHP), the term robbery is not known, but it is called theft with violence, and this is classified as a crime with very heavy penalties. The laws and regulations in Indonesia, in this case the Criminal law book and Islamic criminal law, each have different sanctions for the perpetrators of the crime of robbery (theft with violence).

Result and Discussion

Al-Quran Exegesis Regarding Robbery

Hirabah or robbery have in common with *qat'ut ariq* namely a group of people who cause trouble, rob property and honor, shed blood, and cause chaos on earth.[7] The Qur'an states that robbery is a major crime, and the punishment is set out in the QS. Al-Maidah[5] : 33[8]

[2] Ilyas Hasan, *Intisari Islam Kajian Komprehensif tentang Hikmah Ajaran Islam* (Jakarta: Lentera, 2003), 549.
[3] Muh}ammad Yusuf Musa, *Islam: Suatu Kajian Komprehensif*, (Jakarta: Rajawali,1988), 240.
[4] H. Zainuddin 'Ali, *Hukum Pidana Islam*, (Jakarta: Sinar Grafika, 2007), 1.
[5] Shamsuddin Muh}ammad bin Abi Al-Abbas Ahmad bin Hamzah bin Shihabuddin Al-Manufi Al-Ramli, *Niha>yah Al-Muh}taj ila Syarh} Al-Minha>j*, Vol. 8 (Mesir: Musht}afa Al-Ba>b Al-Hala>bi wa Aula>duh, 1938), 2.
[6] Zainuddin Ali, *Hukum Pidana Islam*, 10.
[7] Sayyid Sabiq, *Fiqh al-Sunnah*, Juz 2, (Kairo: Maktabah Dar al-Turas, tth), 393.
[8] A. Rahman I Doi, *Hudud dan Kewarisan*, (Jakarta: Srigunting, 1996), 64.

إِنَّمَا جَزَاءُ الَّذِينَ يُحَارِبُونَ اللَّهَ وَرَسُولَهُ وَيَسْعَوْنَ فِي الْأَرْضِ فَسَادًا أَنْ يُقَتَّلُوا أَوْ يُصَلَّبُوا أَوْ تُقَطَّعَ أَيْدِيهِمْ وَأَرْجُلُهُمْ مِنْ خِلَافٍ أَوْ يُنْفَوْا مِنَ الْأَرْضِ ذَلِكَ لَهُمْ خِزْيٌ فِي الدُّنْيَا وَلَهُمْ فِي الْآخِرَةِ عَذَابٌ عَظِيمٌ (٣٣)

> Indeed, the penalty for those who wage war against Allah and His Messenger and spread mischief in the land is death, crucifixion, cutting off their hands and feet on opposite sides, or exile from the land. This ˹penalty˺ is a disgrace for them in this world, and they will suffer a tremendous punishment in the Hereafter.

Verily, those who fight against Allah and His Messenger and cause mischief in the earth, are recompensed by being killed or being nailed to a cross, or having their hands and feet cut off in recompense, or being expelled from the land (their place of residence). It is an insult to them in this life, they will be very tormented with a painful torment in the hereafter.[9] Interpretation of QS. Al-*Maidah*: 33 is Verily the punishment for those who violate the religious rules of Allah and His Messenger, and cause trouble in the earth by cutting roads or taking property is the death penalty for the perpetrator who kills, the cross is punished for the perpetrator who kills and robs the property. , the punishment of cutting hands and feet crosswise is imposed on perpetrators who rob and forcibly take property but do not kill, are punished by being expelled from one country to a remote area (another country) or imprisonment for people who only scare them. That punishment is a form of humiliation for them in this world, and it will be even more severe in the hereafter a very painful and severe torment, namely the torment of hell.[10]

The meaning of the verse above, that God and His Messenger are not physically fighting, but those who become objects are people who are God's lovers, namely innocent people, civil society in general who are victims, these incidents such as robbery in hotels, cafes, public places, streets, and others. The criminal law enforcement process is closely related to criminology because criminology can provide input for criminal law, especially the causes of people's crimes and the factors that cause crime, and what efforts must be made so that law enforcement officers can handle them without violating the law. Including victimology, many researchers have proposed that in order to understand crime more comprehensively, we can understand not only the factors of crime from the perspective of the perpetrator but also from the social aspect of the victim. Based on this, criminology methods and victim science are important strategic entities that find the root causes of robbery crimes and provide appropriate countermeasures.

Hirabah : The Meaning of Robbery in the Qur'an

In the view of the early Islamic world it shows that there are several terms that indicate the meaning of robbery, among those terms are *assirq, qit}t}au t}ariq, riddah, qit} t}au ssabil, al-qatlu* and *sa'au fil ard*. All of these terms have the meaning of *al-hira>bah*. In many studies, it is stated that *al-hira>bah* shows the meaning of robbery strictly and in accordance with the meaning of *hira>bah* stated in verse 33

[9] Departemen Agama RI, *Al-quran Dan Terjemahnya* (Bandung: Diponegoro, 2008), 213.
[10] Quraish Shihab, *Tafsir Al-Misbah*: *Pesan, Kesan dan Keserasian al-Qur'an*, Vol. 3, (Jakarta: Lentera Hati, 2001), 103.

in the Qur'an letter Al-Ma>idah as explained earlier. *Hira>bah* has the root word '*harb*' which translates as "war"[11] *Hirabah* is the act of an armed person or group in an area then causing chaos (terror), confiscation of property, spilling blood, destroying honor, and destroying public order. Mufassir agrees that this *hira>bah* is a major sin (*min al-kaba>ir*) which must be subject to sanctions *h}ad*. If globally and literally *hira>bah* can mean carried out by thieves, but the differentiating point is that stealing means taking the property or property of the victim secretly, while *hira>bah* is taking or seizing and controlling the property and property of the victim openly and anarchist. So *hira>bah* has the meaning and meaning of robbing, scaring and threatening a person or group in a certain location. This is in line with the opinion of Imam Hanafi stated by Abdul Qadir Audah in his book, that *hira>bah* is controlling other people's property through violence which may be accompanied by frightening people who pass through *t}ari>q/sabi>l* (on the street) or killing people.

Hira>bah actually contains the meaning of a global crime. Imam Al-Qurt}ubi explains QS. Al-Ma>idah [5]: 33 based on a number of syarahs and the opinions of scholars that he collected,[12] the meaning of the word *hira>bah* in QS. Al-Ma>idah[5]: 33 is often interpreted the same as *qit}t}au tari>q, assirqu fi ssabil, qit{t}au sabi>l*, because the act of *hira>bah* is really assumed to be very global (general meaning) and contains all definitions of the term crime mentioned above. The perpetrators of *hirabah* in this verse are closely related to the activities of a group of people who are hostile to Islam, then violate their agreement with Muslims, then ambush, confiscate, and even kill Muslims in the middle of the road or at a location. As a result of behavior *hira>bah*, Islamic da'wah is hampered, the power of oppressors and infidels is getting stronger, and finally, the destruction on earth is increasing. For this reason *hira>bah* in this verse is stated so closely with the meaning of causing "damage on earth".

According to Abi Suja' in his work Fath}u al-Qari>b al-Mujib, he explained that actually the act of *hira>bah is* synonymous with *qat}'ut}ariq* (blocking the journey) which is to carry out obstruction or forcible seizure of someone's journey in a place (road). Shaykh Salih added that they carried out the crime of seizing property frontally and bravely, not secretly.[13] And from the many interpretations at the beginning, it shows that it is very certain that the term "robbery" is indicated to be the same as the meaning of *hira>bah*. and to dive deeper into the meaning of *hira>bah* in QS. Al-Ma>idah[5]: 33, earlier scholars discussed explicitly the meaning of the sentence *yuh}aribu>na ilalla>h wa rasu>lah* / fighting Allah and His Messenger. Among the differences of opinion between them are:

[11] In Islamic criminal law, the word *hira>bah* comes from lafadz harb which indicates the meaning of attack. Muhammad Abduh explained in his commentary (al-manar) that the term harb was used in 4 formulations. First, it is aimed at someone who eats usury because he is classified as a subject who fights Allah and the Messenger of Allah by eating other people's property in an unjust manner. Second, with regard to (inland Arabs at that time) the Bedouin tribes always attacked one another to seize and control valuable objects. Third, harb is the opposite of salama (salvation). Fourth, harb means *qa>tala-yuqa>tilu* (killing each other) with *ka>firi>n* but it is not included in the definition of war and jihad. See Abdul Azis Dahlan, *Ensiklopedi Hukum Islam* Jilid II, (Jakarta: Ichtiar Baru Van Hoeve, 1997), 556. See also Muhammad Rashid Rid}a, *Tafsir Al-man>ar* (ttp, Da>r Al-fikr, tt), 356.

[12] Muh{ammad bin Ah}mad ibn Abi Bakr al-Qurt{ubi. *Al-Jami>' li Ah{ka>m Al-Qur'an,* Vol. 7 (Cairo: Muasisah al-Risa>lah), 433.

a. Imam Hanafi stated that actually the confiscation must be in a remote place, so if it is in a city or crowded place, it does not fall into the category *yuh}a>ribu>n*.[13]
b. Imam Shafi'i, Al-Laist and Abu Thaur are of the view that robbing in a quiet place or in a crowded city is the same. Both have the determination to loot or rob. In books with nuances *fiqhi there is* not much information about sea pirates called *lanu>n* (pirates). Of course it can also be understood that *lanu>n* (pirates) are also included in the circle of people who fight against Allah and the Messenger of Allah as well,[14] because the perpetrators of *lanu>n* disrupt the safety of human passage at sea, and can be more brutal than robbery on land.
c. Imam Malik interprets it by holding up weapons to plunder other people's property, and this is not based on enmity between the robber and the robbed of his property. And this incident occurs anywhere, whether it takes place in crowded or quiet and remote areas.

As for the operational scheme of the meaning of *hira>bah* in this verse, there are several possibilities. First, the perpetrator left with the aim of taking (controlling) the property directly and frontally and looting the property (property) but not committing murder. Second, the perpetrator acts with the aim of taking possession of the property boldly and frankly and committing terror or intimidation, but does not rob the property and does not kill the victim. Third, the perpetrator came out with the aim of looting, then committed murder but did not control the victim's property. Fourth, the perpetrator came out with the intention of robbing and then acted to rob the property and kill the owner.[15]

Hira>bah In the Study of *Asba>b al-uzu>l* and Munasabah QS. Al-Ma>idah[5] : 33

The redaction of *asba>b al-nuzul* in the 33rd verse described by Imam al-Qurt}ubi in his commentary shows the existence of lafadz فأنزل الله [16] which is *fa>' ta'qi>biyah* where in the study ofscience *asba>b al-nuzul* this is included in the category of *asba>b al-nuzul* which is *s}ari>kh.* Scholars have different opinions about the reason for the revelation of this verse Al-Ma>idah [5]: 33. The opinion agreed upon by the majority of scholars indicates that this verse was revealed in connection with the Urainah people who committed theft and murder.[17] Starting from this group of people from 'Urainah who were originally non-Muslims who came to Medina to meet the Messenger of Allah. and asked for an explanation of Islamic religious information, in short they immediately embraced Islam. After some time they developed a stomachache or some reports suffered from body aches because the temperature in Medina did not match with their bodies. Then the Messenger of

[13] Shihab, *Tafsi>r Al-Misbah} 'Pesan, Kesan dan keserasian Al-Qur'an'*, 79.
[14] Syihab al-Di>n Sayyid Mah{mu>d al-Alu>si, *Ruh{ al-Ma'ani> fi> Tafsi>r al-Qur'an al-Az{im wa al-Sab al-Mathani* (Beirut: Dar Ih}ya> al-Turas al-'Arabi, t.t), 118.
[15] A. Djazuli, *Fiqh Jinayah*, (Jakarta : Raja Grafindo Persada, 1997), 97.
[16] قال أبو قلابة : فَهؤُلاء قَوْمٌ سَرقُوا وقَتَلُوا وكفرو بعد إِيمَانهم وحَارِبوا اللهَ وَرَسولُه وفي رواية : [فَأَمر بِمسَامير فَأحميت فَكَحلهم وَقَطع أَيْدِيهم وَأَرجلهم وَمَا حَسمهُمْ] وفي رواية : [فَبَعثَ رسولُ اللهِ صَلّى اللهُ عَلَيه و سلم في طلبهم قَافة فَأَتي بهم قَالَ : فَأَنْزل اللهُ تَبَاركَ وَتعَالَى في ذلك :(إنما جزاء الّذِيْن يحاربون اللهَ وَرَسُولُه وَيَسْعَوْن في الأرض فَسَادا)
[17] Al-Qurt}ubi, *Tafsi>r al- Qurt}ubi al-Jami>' li Ah}kam al-Qur'an,* 431.

Allah ordered them to go to the camel, which was pregnant and about to give birth, to drink its milk, and they carried out the order. After they recovered from their illness, they did *wrong* by killing the camel herder of the Messenger of Allah and taking the red camel away. The news of the crime they had committed did not take long to reach the Messenger of Allah the next day.

When the news reached the prophet as explained in the hadith [18] that the Messenger of Allah immediately sent an army (trackers) to track, chase and arrest them. When the group that carried out the *hirabah* was caught, the messengers of the Messenger of Allah cut off their hands and punished them by piercing their eyes with hot irons, as they had done with the camel herders they had stolen. then left the *hira>bah* group in Harrah's field, until they finally died.

The next explanation is in the narration of Abu Daud from Abu Zinad quoted by Hamka [19] and is also in accordance with the opinion of Imam al-Shaukani [20] that the verse of QS. Al-Ma>idah[5]:33 this came down not long after the tragedy of cutting hands and stabbing by people who acted tyrannically *hira>bah* (plundering and murder). From this, it is known that the crime of *hira>bah* in this verse is specifically related to robbery and looting, as well as persecution and murder at a certain location. Understanding the context of the verse, in addition to studying the *asba>b al-nuzu>l*, is also very necessary to study the *muna>sabah al-aya>t*. Interrelation *muna> sabah this al-aya>t* is known as a prominent alternative in exploring the context of a text of the Qur'anic verse that has a relationship between one verse and another[21] and is based on the interrelation of meanings between the Qur'anic and the interconnection between the preceding and following verses, which in this case has a focal point in the QS. Al-Ma>idah[5]: 33. The study of the munasabah of this verse shows the existence of a major theme of thought related to the behavior of *hira>bah* which is related to several previous verses starting from QS. Al-*M*a>idah[5]: 27 to QS. Al-Ma>idah[5]: 31, namely Allah SWT explains the story of the two sons of the Prophet Adam AS, namely Qa>bil and Habil, which involves the term *hira>bah.* This is focused on the story of the cruel character (character) of the Bani Adam in the terror incident. murder.

Stories or stories in QS. Al-Ma>idah[5]: 27-31 shows that Qa>bil killed Habi>l motivated by lust and jealousy to seize the favors contained in the possession of his brother (other) by forcing with z}alim which led to murder of his own brother, habil. This cruelty continues in the verse after QS. Al-Ma>idah[5]: 32 regarding a concept of "killing acts" that this kind of killing, even though it is aimed at one individual, has actually carried out the killing (genocide) of many people and many parties. In the sense that it will have consequences on the lives of other humans around it, descendants, families and disturbances to those who have something to do with it.

Study of *muna>sabah al-aya>t* shows the sustainability of the consequences of actors *hira>bah* with the perspective of legal handling which is considered in the

[18] HR. al- Bukhari no. 3956, dan , Sunan Kubra an-Nasa'i 8/282, terdapat juga dalam Ibnul Jarud dalam al-Muntaqa hlm. 846 dan lainnya
[19] Hamka, *Tafsi>r Al-Azhar,* Vol. 6 (Jakarta: Pustaka Panjimas, 1982), 289.
[20] Imam Al-Shaukani, *Tafsir Fath}ul Qa>dir*, (Kairo: Da>r al – Hadith), 50.
[21] Muhammad Quraish Shihab, *Kaidah Tafsi>r,* Cet. 1 (Tanggerang: Lentera Hati, 2013), 244.

form of sanctions (which are executed) agains tactors, *hira>bah* which is explained in the QS. Al-Ma>idah[5]: 33. The aspect of handling and enforcing the law is an indication of an act of courage in warding off the crime of *hirabah* which seems to be running freely in all parts of the world. Enthusiasm in handling the law against the crime of robbery is a positive thing in reducing all kinds of variations of trouble and crime on earth, which has the function of inhibiting at least minimizing the increase in robbery in the community. Understanding the context of the QS verse. Al-Ma>idah[5]: 33 when viewed with munasabah in the following verse (Surah Al-Ma>idah[5]: 34) is aimed at the perpetrators of the crime *hira>bah* which ends with regret to realize that the act of *hira>bah* This must be avoided by every human being, before being persuaded by a lust so that he is trapped to join in committing crimes. It looks so clear in the sentence *illa lladhina ta>bu> min qabli antaqdiru> alaihim*. The sentence according to Ibn Kathir shows the repentance of a person who is received from the punishment described in the QS. Al-Ma>idah [5]: 33 and it should be underlined that the case is before the court process.[22] And this happened to Ali al-As'adi when he was in the Umayyad regime. He frightens, commits murder and takes property but then repents after knowing the sentence *illa lladhina taboo> min qabli antaqdiru> 'alaihim*. He entered the mosque and performed the morning prayer then headed for Abu Hurairah. And at that time the ruler was Marwan ibn al-Hakam, Marwan came to the mosque and declared "This person (Ali al-Asadi) has come to meet me and repented truly, so there is no right for anyone to arrest and punish him"

Application of Punishment Against Perpetrators *Hira>bah* In the Qur'an,

Mufassir discusses a lot about the application of this form of crime punishment *hira>bah* based on the QS. Al-Ma>idah[5]: 33, the scholars have many differences in the interpretation of the lafadz "*au*" which is located between the interpretation of one sentence and another in sequence in the verse. Fragmentary scholars interpret lafadz *au* to indicate the intention of selecting the punishment options that have been determined, so that legal determination is in the order of the priest or leader.[23] Of course, it involves considerations with experts who weigh the severity of the burden of punishment for crimes that have occurred.

The forms of punishment in the verse *muha>rabah* interspersed with the lafadz *au* are :

1. ان يقتلوا, which is a form of punishment to be killed without mercy.[24] This case contains the paradigm that the *muharib* committed a great injustice, namely carrying out a robbery with the intentional killing of the victim which cannot be justified for any reason.
2. يصلبوا , which is a form of punishment by being crucified on a wooden cross, the perpetrator is raised on the cross, punished and left alone until he dies.[25] Some literature describes being killed after some time he was hanging from

[22] Ibnu Kathir, *Tafsi>r al-Qur'an al-Az}im*, Vol. 2, (Mesir: Da>r al-Ba>b al-H{alabi, t.t.), 52.
[23] Ah{mad Wardi Muslich, *Hukum Pidana Islam*, Cet. 1 (Jakarta: Sinar Grafika, 2005), 18.
[24] Jala>l al-di>n al-Suyuti dan Jala>l al-di>n al-Mah}alli, *Tafsi>r al-Jalalain*, terj. Bahrun Abu Bakar, *Terjemahan Tafsi>r al-Jalalain*, (Bandung: Sinar Baru Algesindo, 1997), 465.
[25] Hamka, *Tafsi>r Al-Azha>r*, Vol. 6, 295.

the cross. This penalty applies if the *muharib* commits a murder accompanied by the confiscation of property the size of the theft nis}ab or greater. The Maliki school of thought is of the view that after the crucifixion, it is either killing or being killed. The Shafi'i school of thought initiated the execution of the murder followed by the crucifixion. This matter contains general prevention, namely showing the verdict to the community so they don't imitate their actions.

3. تقطع ايديهم وارجلهم من خلف, which is a form of punishment by cutting his legs and arms crosswise. This sentence is applied if the perpetrator confiscates the property of a minimum level of the theft nis}ab and the perpetrator do not commit murder so that the perpetrator may still be allowed to live with this punishment.
4. ينفوا من الارض, which is punished by being banished from the earth.[26] The purpose of this sentence is exile or imprisonment. This punishment is applied if the perpetrators *hirabah* scare the victim, intimidate and cause trouble and the perpetrator does not take property and does not commit murder.

Although with the law in the world as described above al-Baidhawi reminded that in QS. Al-Ma>idah [5]: 33 confirms that there are two torments that will surely be accepted by the perpetrator, namely the torment in the world in the form of humiliation and disgrace that is more nuanced in learning or education, and the second is the torment of the hereafter, namely a very painful punishment, in accordance with the sin -sins ever committed.[27] The punishment in the hereafter is certainly more severe and very just, even so, the punishment in this world must still be carried out for injustice to the victims of robbery. Al-Sha'rawi describes the punishment in this world as a reproach, humiliation, or disgrace,[28] because robbery is so cruel and is strongly condemned by the Qur'an.

Sanctions for the Crime of Robbery Perspective of Islamic Criminal Law

The word *hirabah* in the explanation of Islamic criminal law has the meaning of attacking and taking property.[29] he sentence imposed on the perpetrators of the crime of robbery when viewed from the perspective of Islamic criminal law certainly refers to the interpretation of the QS. Al-Ma>idah[5]: 33 as previously explained. The handling of the legal provisions for the crime of robbery in Islamic law is the same as discussing the fiqh of jinayah, where the law is broadly discussed by the imams of the schools of thought, namely Maliki, Shafi'i, Hanafi, and

[26] Scholars differ on the interpretation of lafadz yunfau min al-ard}. According to Imam Ahmad, exile is carried out by expelling the perpetrator from his country forever or until he repents truly. Imam Maliki's opinion that exile is sentenced to prison in a place outside the area where the robbery took place, while Imam Hanafi is similar to Imam Malik that exile in question is a prison sentence, but the location does not have to be outside the location of the area where the robbery tragedy occurred. As for Imam Shafi'i interpreting with detention, both in his own country, but he prioritizes to be carried out in other areas. see Sayyi>d Sa>biq translate, Nabhan Husein, *Fiqih Sunnah*, (Bandung: Al-Ma'arif, 1984), 187.

[27] Nas}r al-Di>n Abi al-Khaer 'Abdullah bin 'Umar al-Baid}awi, *Anwar al-Tanzi>l wa Asra>r al-Ta'wil>*. Vol. 2, (Mesir: Must}afa al-H{alabi, 1958), 321.

[28] Syaikh Mutawalli al-Sha'rawi, *Tafsi>r al-Sha'rawi*, Vol. 6, (Mesir: Akhba>r al-Yaum, t.t), 3103.

[29] Rasyid Ridla, *Tafsir Al-manar* (ttp, Dar Al-fikr, tt), 356.

Hambali priests. Differences of opinion among fiqh scholars are a necessity, including this crime of robbery. Hanafiyah, Syafi'iyah and Hanabilah scholars as quoted by Wahbah Zuhaili[31] state that the level of punishment for h}ad robbers or robbers must be in line with the order of sanctions that have been described in the muha>rabah verse (QS. Al-Ma>idah (5) : 33) and see the motive or form and weight of the crime committed in the robbery.

The scholars of the Abu Hanifah school stated that if the perpetrator only took or confiscated his property, then the punishment was to have his legs and arms cut off on a cross. And if the perpetrator only commits murder, then he is sentenced to death. However, if the perpetrator commits both crimes, namely killing and seizing the victim's property at the same time, then the priest can choose the punishment, between cutting his legs and arms crosswise and then being sentenced to death or crucifixion, or not being sentenced to having his legs and hands cut off but immediately being executed with the death penalty or crucified. And if the crime is only frightening without killing and confiscation of property, then the punishment is an exile from the earth, namely being imprisoned and sentenced to ta'zir.

The Hanabilah and Shafi'iyah scholars state that if the perpetrator of a robbery confiscates his property, the punishment that applies is to have his legs and arms cut off on a cross. And if the perpetrator kills the victim and is not accompanied by confiscation of property, then he is sentenced to death without having to be crucified. However, if you commit murder as well as confiscation of property, then the punishment is death and crucifixion. If the perpetrator intimidates by simply frightening him, then he is punished by being expelled from his country or exiled. The Maliki school of thought is of the opinion that the handling of robbery by determining the sentence *h}ad* that was sentenced to the perpetrator of this crime must refer to the ijtihad and considerations (estimation and evaluation) of the imam and be accompanied by considerations (input comments and criticisms) from the fuqaha> (legal experts), so that it can be wisely determined the sanctions or *h}ad* that are imposed with precise and efficient accuracy, this matter needs to be emphasized that the executive decision must not be based on the individualistic egoism of the priest.

Differences in interpretation that arise among scholars in deciding the form of sanctions for actors *hira>bah* are due to differences in interpreting the word *"au"* in the QS. Al-Ma>idah [5]: 33. that is, some interpret it with "or". In Arabic grammatical rules, the lafadz "*au*" can provide the purpose of description and explanation as is the terminology of lafadz *au* well-known, namely *baya>n wa al-tafs}il*.[30] Imam Shafi'i's opinion, the word "*aw*" in the verse is an explanation and detail, namely the quantity of punishment contained in four along with the details as described earlier. However, Maliki's opinion quoted by Al-Shaukani[31] understands that the word "*aw*" means *li al-takthir,* namely to choose. So Imam Malik is of the view that the enumeration of these four forms of punishment is an

[30] Rahmat Hakim, *Hukum Pidana Islam (Fiqih Jinayah)*, (Bandung: Pustaka Setia, 2000), 89.
[31] Muh}ammad bin 'Ali bin Muhammad al-Shaukani, *Fath} al-Qa>dir*, Vol.2 (Beirut: Dar al-Fikr, t.t), 37.

alternative preference option and the Imam will determine the sanctions according to policy and benefit.

Handling of Robbery Perspective of The Criminal Law in Indonesian

Handling of all forms of criminal acts in the country of Indonesia refers to and is guided by the Criminal law book (KUHP) where the rules and explanations in the Criminal law book itself do not recognize the term "robbery" but can be identified with the term theft with violence. Matters regarding the crime of robbery are listed in Chapter XXII Article 365 of the Criminal law book concerning theft. Then Article 365 of the Criminal law book contains the term theft accompanied by violence, namely theft in a substantial form, namely ordinary theft (article 362) which is added to the factor of violence. Therefore, to apply the provisions of Article 365 of the Criminal law book (KUHP), one must meet the requirements of Article 362 of the Criminal law book (KUHP) concerning Ordinary Theft and have aggravating circumstances as stipulated in Article 365 of the Criminal law book.

The definition of theft with violence according to Sudradjat Bassar, namely special theft or forced theft (*geweld*) which adds a special or special element on the basis of ordinary theft is the use of violence or the threat of violence. First, the goal is to prepare for theft, i.e. violence or threats of violence before the item is taken. For example, tying up house guards, beating people, etc. Second, the intention is to facilitate theft, which is to facilitate the taking of goods by means of violence or threats of violence. For example, hold the victim's hand so that he is still and cannot move, while other thieves immediately take things from the house.[32] The violence or threats of violence that occur must actually be proven to be carried out against the victim. And such violence or threats can be carried out before or after the theft occurs, namely in the context of preparing for theft or facilitating the confiscation of stolen goods. The violence that occurs is basically directed at the physical which is severe enough to make the victim feel sick and helpless.

Sanctions for the Crime of Robbery in the Criminal Law Book (KUHP)

The crime of theft accompanied by violence as regulated in Article 365 of the Criminal law book shows the meaning of theft in its essential form, namely ordinary theft plus the notion of violence. Among the average Indonesian (public at large), this type of violent theft is called robbery. The punishment for the crime of robbery or theft with violence as contained in Article 365 of the Criminal law book has a variety of sanctions in terms of the consequences incurred due to the criminal form of the robber. The sanctions that must be accepted are 9 years in prison, 12 years, 15 years, or imprisonment for a maximum of 20 years, and the death penalty, or life imprisonmen.[33] Robbery (*hira>bah*) has a different scope from ordinary theft, because theft has the meaning of taking property secretly, while robbery is carried out openly.[34] Although there is little indication that the robbery also has some

[32] M. Sudradjat Bassar, *Tindak-Tindak Pidana Tertentu di Dalam Kitab Undang-Undang Hukum Pidana*, Cet. I, (Bandung: Remadja Karya, 1984), 71.
[33] Wirjono Prodjodikoro, *Tindak-Tindak Pidana Tertentu di Indonesia*, Cet. 3, (Jakarta-Bandung: Eresco, 1980), 25.
[34] Abdul Qadir Audah, *Al-Tasyri' Al-Jina'i Al-Islam*, (Beirut: Mu'assasah Al-Risalah, 1992), 638.

hidden factors, such as the actions of the perpetrators hiding from the police in certain areas or from certain security officers. Regarding this, the scope of the meaning of the *sariqah* does not include robbery except with other explanations, therefore robbery is known as grand theft.

Djazuli in his fiqh jinayah explains that the differentiation between thieves and robbers is seen in the process of taking their property. theft is carried out by stealth, while the robbery is carried out in a frontal and open manner even accompanied by blusters of intimidation and violence.[35] So, the theft of goods or property is followed by violent violence, and this form of threat is called robbery, the sanction of which is nine years if the perpetrator of the theft acts in a preceded, followed, and accompanied by violence or threat of violence.[36] he purpose of being preceded, followed, and accompanied by violence is all ways to facilitate the actions of the perpetrators, and if surrounded and cornered, they are able to escape, even the tactics of the band of robbers so that other members of the herd can still take the stolen property.

The meaning of "preceded" by violence or intimidation by threats is the use of violent crimes before the theft, while the meaning of "accompanied by" violence or threats of violence is an effort to facilitate and launch the theft. The purpose of "following" by violence or threats of violence is a form of violence carried out with the aim of opening opportunities for oneself or other members of the herd to escape.[37] The term violence means to act with physical movements whose concretization is in the form of deliberate beatings, either bare-handed or armed, binding, stabbing, detaining, and holding the victim.

The stipulation of a sentence of 12 years in prison is sentenced to the perpetrator of the crime of theft with violence (robbery) if the theft is carried out at night and is carried out in the residence of the house or in a closed yard. Regarding this matter, R. Soesilo added that the sanctions could be increased and increased if the theft with violence was carried out accompanied by other crimes such as breaking walls or breaking security, making false orders, and so on.[38] A sentence of 15 years in prison for perpetrators of violent theft, which in this case means robbery, is imposed if the act of theft results in the loss of a person's life. As for the death penalty and 20 years imprisonment along with life imprisonment, it is considered if the act of theft with violence, namely robbery, results in serious injury or death to the victim, and this criminal crime is carried out by the cooperation of two people or in greater numbers.

Further explanation of the specifics of this crime is detailed in paragraph 3 of Article 365 of the Criminal law book which discusses the implementation of theft with violence accompanied, preceded, or followed by violent treatment of others. And this crime resulted in the death of a person. So that this incident can be

[35] Djazuli, *Fiqh Jinayah*, 86.
[36] SR. Sianturi. *Tindak Pidana di KUHP Berikut Uraiannya*, (Jakarta: Alumni AHM-PTHM, 1983), 609-610.
[37] H.A.K. Moch. Anwar, Hukum Pidana Bagian Khusus (KUHP Buku II), Jilid I, (Bandung: Alumni, 1986), 26.
[38] R. Soesilo, *Kitab Undang-Undang Hukum Pidana (KUHP) Serta Komentar-Komentarnya Lengkap Pasal Demi Pasal*, (Bogor :Politeia, t.th), 254.

juxtaposed with the criminal law in Article 339 of the Criminal law book, namely the act of murder is accompanied, preceded, and followed with the intention of preparing and launching the crime. This shows that both (KUHP articles 339 and 365) have two events of the same form[39] namely first, the crime of theft, and second, resulting in the victim being killed.

As for what needs to be considered in the two articles above (365 of the Criminal law book and 339 of the Criminal law book), namely in the application of the Criminal law book article 339, the murder of the victim is the desire and intentional intention of the perpetrator, while in applying the Criminal law book article 365, it must be proven by the actual killing of the victim not the will of the perpetrator from the start. the beginning, but the impact of the violence that occurred. Therefore, the provisions for criminal sanctions carried out in handling robbery or theft with violence are different.

Comparative Analysis

Comparative analysis of the applicable law in Indonesia, namely the Criminal law book legislation with Islamic criminal law (*fiqh jinayah*) shows a paradigmatic existence, including in the Criminal law book robbery is called theft accompanied by violence, namely theft in substantial form (ordinary theft) equipped with the presence of violence factor, while in Islamic law it is included in a crime or *jarimah*, where robbery (*hira>bah)* is categorized as a criminal act of theft in the form of the definition *majazi*, because robbery is an open and coercive taking of property. So *hirabah* (robbery) can be labeled the term heavy theft (*sira>qah kubra*).

The definitive comparison of these two laws (state and religion) is that the meaning of robbery in criminal law in Indonesia means theft that is preceded, followed, or accompanied by violence or intimidation by threats by the perpetrator to the victim. The purpose of robbery (*hira>bah*) in Islamic criminal law is to depart with the aim of seizing property, or killing, or intimidating terror, and scarring victims with various threats, holding on to strength, and far from help or assistance. Regarding the point of similarity between the two, they both control the victim's goods without rights and are carried out by force and violence. The basic analysis of taking Islamic criminal law (*fiqh jinayah*) in the robbery is based on the QS. Al-Ma>idah[5]: 33. While the Indonesian statutory law (KUHP) is based on:

Article 365

(1) Threatened with imprisonment for a maximum of nine years theft which is preceded, accompanied or followed by violence or threats of violence, against people with the intent to prepare or facilitate theft, or in the case of being caught red-handed, to enable the escape of themselves or other participants, or to retain possession of the stolen goods.
(2) By a maximum imprisonment of 12 years:
    1. If carried out at night and in a house or a closed yard with a house, or in a train or tram that is running or on a public road;
    2. If the action is carried out by 2 or more people working together;

[39] Prodjodikoro, *Tindak-Tindak Pidana Tertentu di Indonesia*, 26.

3. When entering a place of committing a crime by destroying or dismantling or by using a false key, a false order, or a false official attire.
4. If the act causes serious injury.

(3) (3) If the act results in the loss of life, the maximum sentence is 15 years in prison.

(4) Threatened with a death sentence or life imprisonment or maximum imprisonment of 20 years, if the act results in serious injury or death and is carried out by two or more people in cooperation, accompanied by one of the things described in no. 1 and 3.[40]

If viewed from the explanation above, theft with violence can be punishable by a criminal offense as referred to in paragraph 4 of Article 365 of the criminal law book with several provisions, namely:

1. Acts resulting in serious injury or
2. Dead;
3. It is carried out by two or more people

Thus, the comparison with Islamic law becomes clearer, which in Islamic criminal law the provisions for violent theft are:

1. It is carried out on a public road or outside the victim's settlement;
2. Conducted openly;
3. There are indicators of violence or forms of terror threats;
4. Ownership of property that is not their right
5. There is an element of intentionality.

The conclusion from the above provisions shows that in Islamic criminal law there are no conditions that must be carried out by 2 or more people, and there is no provision that criminal acts result in serious injury or death. The fundamental and elementary advantages of Islamic criminal law for handling robbery perpetrators are seen in the sanctions given, in addition to the strictness of Islamic criminal law which provides a deterrent effect, it also provides 2 sanctions at the same time, namely sanctions in the world and punishments in the hereafter which are more severe. Meanwhile, the lack of statutory laws in Indonesia that refers to the Criminal law book shows a less assertive side, namely, it does not result in a deterrent effect and forms of world sanctions, namely death, imprisonment, or a fine.

Conclusion

This article concludes that the handling of the perpetrators of the crime of robbery is regulated in QS. Al-Ma>idah [5]: 33 in which scholars and commentators have different views in interpreting the word "aw" in the verse to impose sanctions on the perpetrators. The meaning that can be drawn by the red line is to indicate the choice of sanctions or sanctions sequentially according to the type and form of the crime committed. Then it is regulated in the Jinayah Fiqh in Chapter h}udud, namely the crime of hira>bah including sira>qah kubra> (heavy theft). As for the punishments in the form of: death penalty, crucifixion until killed or killed after a long time the perpetrator was crucified, punishment for cutting off

[40] Moeljatno, *KUHP (Kitab Undang-Undang Hukum Pidana)*, (Jakarta: Bumi Aksara, 2014), 147-149.

his legs and hands on a cross, and exile from the country or imprisoned. The criminal sanctions for robbery according to statutory law in Indonesia have stated in Article 365 of the Criminal law book which sanctions are in the form of imprisonment for 9 years, 12 years, 15 years, or imprisonment for a maximum of two 20 years and a death penalty, or life imprisonment depending on the circumstances. model of the crime committed.

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The Existence of al-Aql in Quran and Its Articulation with the Text of Revelation in Islamic Law Interpretation

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Abstract:

Humans are gifted with *al-aql* thus, they are special for Allah SWT as they have ability to think. Ironically, in the Islamic thinking discussion, *al-aql* and text of revelation are faced *vis a vis*. It is, as if using *al-aql* in text interpretation is considered religious crimes. The authors reveal the existence of *al-aql* in Quran and trace the interrelation with text of revelation in creating the prescription of Islamic law according to sharia purposes. This article's outputs are: *first*, *al-aql* existence with activity of reason is urgent. The proof is, the Quran highly appreciates it. No other *samawi* books appreciate *al-aql* as Quran does. Those dissipating *al-aql* will be tormented in hell. *Second*, the articulation of text of revelation and the activity of reason in interpreting Islamic law find its momentum when the Quran text composition shows imbalanced numbers, dominated by various *zhanni* texts more than the *qath'i* ones. Some roles of *al-aql* in activity of law deduction from text of revelation are 1) text comprehension combined with *maqashid al-syariah*, so the interpretation product is not vague, 2) the integration of text and context, in which *mufassir* is not only demanded to understand *nash*, but also has sensitivity over social reality surrounding the issues to discuss, 3) the use of reverse logical understanding (*mafhum al-mukhalafah*).

Keywords: *al-aql*; interpretation; Islamic law; text of revelation.

Pendahuluan

Humans are created perfectly by Allah SWT. This is a fact written in Surah at-Tin [95], exactly verse 4: "*We have certainly created man in the best of stature.*" [1] Through this verse, we know that human is a disctinctive creature of Allah compared to other creatures such as animals, plants, and so forth. One proof differentiating human and other creatures is the existence of *al-aql*. With *al-aql*, humans are able to think, imagine, and control their lust so they do not fall into misbehavior. It is dissimilar with animals which are only gifted with instinct and lust without *al-aql*, so they cannot differentiate between the good and the bad. Hence, ulama agree on including *al-aql* in one of five basic principles which are urgent in sharia (*maqasid as-syariah/ ad-dharuriyah al-khamsah*).

As explained by the authors before, that human is gifted with *al-aql* which makes them special compared to other Allah's creatures. Ironically, *al-aql* and the

[1] Q.S. At-Tin [95]: 4.

holy text of revelation (In. *teks wahyu*) are faced *vis a vis*. It is as if, using *al-aql* in interpreting text is considered as religious crimes. There even some people who claim that to understand the holy text does not need the role of *al-aql* or logic (*ra'yu*). It is enough by reading and connecting one verse to another. This kind of thinking method is a result of paradigm "*al-Qur'an yufassiru ba'dluhu ba'dla* (Quran texts intepretes each other)".[2] Understanding Quran with *al-aql* (*ra'yu*) is often assumed as a deviation in religion, thus, it is dangerous. People claiming this often quote a hadith by The Prophet Saw:

مَنْ فَسَّرَ الْقُرْآءنَ بِرَأيِه فَلْيَتَبَوَّأ مَقْعَدَه مِنَ النَّارِ

"*Those interpreting Quran with their aql, the hell is prepared for them.*" [3]

That this hadith is famous lets people to make it, textually, as a religious doctrine which must be accepted as it is. Unconsciously, this hadith creates intellectual crisis within Muslim society. Such condition inhibits the growth of knowledge and stagnates the civilization. As time goes on, Muslim will be left behind. No wonder did Syakib Arslan in his book entitled "*Limaadza Ta'akhara al-Muslimun wa Limadza Taqaddama Ghairuhum*", say that the disappearance of *al-aql* role and blind fanatic on certain opinion are factors of deterioration and slump of Muslim from other people.[4]

This article tries to reveal back the existence of *al-aql* in Quran discussion, as well as to trace the extent of the interrelation of text of revelation in creating the prescription of Islamic law according to the purposes of the noble sharia. It is because the law is not made for empty spaces, but to govern the life of humans on earth and the hereafter. The articulation between *al-aql* and text of revelation will determine to which extent it can appreciates the noble principle in a legal dictum to match its basic purposes. In this context, this simple article exists to discuss the relation terms between *al-aql* and *wahyu* (revelation).

Method

This study is a library research. The methodology is a qualitative one. It is a research which aims to understand the phenomena experienced by the research subject holistically by describing in written or spoken words on a certain natural

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[2] This paradigm is inspired by statement of previous *ulama*, one of them is Ibnu Katsir al-Dimasyqi, stating that the best *tafsir* (interpretation/exegesis) is done by interpreting Quran with Quran. Al-Dzahabi even tells about Imam Ibnu Katsir as a figure who is highly motivated to start the Quran-with-Quran *tafsir* activity. **See:** Ibnu Katsir, *Tafsir Ibn Katsir; Ikhtishar Muhammad Ali al-Shabuni* Juz I (Jeddah: Maktabah Jeddah, n.d.), 12; Muhammad Husain al-Dzahabi, *al-Tafsir wa al-Mufassirun* Juz I (Cairo: Maktabah Wahbah, n.d.), 255.

[3] This hadith is *takhrij* (extracted) by Imam al-Tirmidzi in *Kitab Tafsir al-Qur'an*, exactly in Chapter *Ma Ja'a fi al-ladzi Yufassiru al-Qur'an bi Ra'yihi*. **Read:** Abu Isa Muhammad ibn Isa al-Tirmidzi, *Sunan al-Tirmidzi; Tahqiq Duktur Mushthafa al-Dzahabi* (Cairo: Dar al-Hadis, 1999), Juz. 4, p. 43; Muhammad Afifuddin Dimyathi, *Ilmu Tafsir; Ushuluhu wa Manahijuhu* (Malang: Maktabah Lisan Arabi, 2017), 47.

[4] Syakib Arslan, *Limadza Ta'akhara al-Muslimun wa Limadza Taqaddama al-Akharun* (Baerut: Dar al-Maktabah al-Hayat, n.d), 75

context.[5] The primary data of this study is verses in the Quran discussing about the use of *al-aql*. Meanwhile, the secondary data are from *kitab* (Islamic classic books), books, and journals related to the theme. The data is analyzed by thematic *tafsir* method. The data obtained from the Quran verses that have similar theme were then composed to be an organized and systematic structure. After that, those were comprehended in various perspectives. Besides verses from the Quran, some hadiths which have similar theme are also presented to get the comprehensice understanding.[6]

Result and Discussion

Al-Aql in Linguistics Perspective

The word *al-'aql* in English Linguistics is translated into several terms i.e. *reason, intelligence, intellect, understanding*, and *intellectual powers*. In French, it is *raison, intelligence,* and *intellect*. Meanwhile, Latin language calls it as *ratio* and *intellegentia*. Those many word matchings used to translate *al-'aql* show the complexity of the word meaning, so it cannot be represented only by one word.[7] In Indonesia, the word *al-'aql* is usually translated as "*akal*" that it is considered as standard term and is accepted absolutely without reserve. However, in a normal translation activity, "*akal*" does not represent the meaning of its original word.[8] For example, in Indonesian context, the word is always connected with rational reasoning or intellectual activity, or showing someone's comprehension potential. So, the term "*berakal* (Eng. ingenious)" is frequently used to describe someone who is able to grasp the situation or problem, and to communicate with others. At this point, the after effect of that activity sometimes is unclear. *Al-aql* in Indonesia only covers cognitive aspect and does not relate at all to any subject outside the intellectual activity.

It is different with Arabic – the original language –, *al-'aql* has various meanings based on its derivation. For example, the original word (*'aql*) means preventing (*al-hijr*) and wise (*al-nahyu*). In another form (following the pattern of *wazan ifti'âl*), it means prohibiting, stopping, interfering, hampering, and holding. In different side, it also means fine (*al-diyah*), master (*al-sayyid*), the most generous (*al-akramu*).[9] The word *'aql* which means holding and the like, was first used for camel, as a control to always follow the direction of its rider or shepherd, as written in an

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[5] Lexy, J. Moleong, *Metode Penelitian Kualitatif* (Bandung: Remaja Rosdakarya, 2009), 6.

[6] Miftah Khilmi Hidayatulloh, " Konsep Dan Metode Tafsir Tematik (Studi Komparasi Antara Al-Kumi dan Mushthofa Muslim*)", Al-Bayan: Jurnal Studi Al-Qur"an dan Tafsir* Vol.3 No. 2 (December 2018): 130-142.

[7] Jamil Shaliba, *al-Mu'jam al-Falsafi bi al-Alfadz al-arabiyyah wa al-Firansiyyah wa al-Inkliziyyah wa al-Latiniyyah* (Baerut: Dar al-Kutub al-Bannani, 1982), Juz II, p. 84; Hodri, "Penafsiran akal dalam al-Qur'an", *Mutawatir: Jurnal Keilmuan Tafsir Hadis*, Vol. 3, No. 1(Juni 2013): 2.

[8] John Walbridge, *The Science of Mystical Life: Quthb al-Dîn Shîrâzî and the Illuminationist Tradition in Islamic Philosophy* (Harvard: Harvard University Press, 1992), 58.

[9] Muhammad Bin Makram Bin al-Mandzûr, *Lisân al-'Arab* Vol. 11 (Beirut: Dâr al-Fikr, n.d.), 458- 466.

expression *'aqal al-ba'îr* yang maksudnya *thanâ wadzîfuh ma' dzirâ'uh fasyuddahumâ fî wast al-dzirâ'* and it is explained that *dzalika al-hablu huwa al-'iqal*. The use of this word (*al-'aql*) has expanded meaning in different segment based on the spirit of the word.

From the aforementioned meanings, the understanding is improving that the meaning of *'aql* is not based on the material, but its potential and function. The Quran never writes *al-'aql* in the noun (*isim*) form. We can find Arabic expressions using *'aql* in the verb (*fi'il*) form which shows process, potential, and function at once. The function of *'aql* which means holding, preventing, or prohibiting is usually connected with controlling, managing, or directing to achieve the goals that are believed to be good and positive, for example: realizing *mashlahah*. The word is rarely used for negative-effect purposes, for example exploitation (*mafsadah*) and repression. However, in reality, the binding potential is not only seen on the good things but it might also be attached to bad things when *'aql* is not functioned optimally and perfectly.

Besides having various meanings, the word *'aql* also means "to understand the reality" and "to be able to differentiate" (*idrâk kulli syai' 'alâ haqîqatihâ wa mayyaza*).[10] On the other words, *'aql* can be understood as *potential preparedness* (*al-quwwah al-mutahayyi'ah*) – after one knows something and differentiates it, one can give positive effect to the subject. Another source states that *al-aql* is related to self-potential which is always prepared to accept knowledge, and sometimes it is also related to knowledge obtained by humans with their mind/intellect ability (*al-'aql yuqâl li al-quwwah al-mutahayyi'ah li qabûl al-'ilm*, *wa yuqâl li al-'ilm al-ladzi yastafiduhu al-insân bi tilka quwwah al-'aql).*[11] To conclude, linguistically, the word *'aql* shows potential and function of knowing something and ability to identify and to classify which affects to the activity of controlling and directing. Meanwhile, philosophy wise, when it is used in humans' activity, the word *'aql* shows the potential of intellectual reason that can stimulate or give feedback on the attempt of self-control based on the obtained knowledge. In this position, there is a functional metaphor between the word *'aql* which is used for camel and the one related to humans.[12]

The Position of *Al-Aql* in the Quran

The Quran contains a phenomenal lesson i.e. an advice to optimize the role of *al-aql* in every human. The positive effect of this advice is that Muslim start to think about the universe and everything in it which are proofs of the greatness of Allah SWT (*al-ayah al-kauniyyah*). It is the main source of knowledge that is rapidly developing. From this reality, we can understand that the source of knowledge in Islam is not only from the text of revelation (*al-ayah al-qauliyyah*), but also from the empirical fact (*al-ayah al-kauniyyah*) both of which are actually from Allah SWT.[13]

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[10] Ibrâhîm Mustafâ (ed.), *al-Mu'jam al-Wasît* Vol. 2 (Cairo: Dâr al-Ma'ârif, 1973), 616- 617.

[11] Muhammad Abû al-Qâsim al-Husain. *Fî Gharîb al-Qur'ân* (Beirut: Dâr al-Ma„ârif, n.d.), hlm. 444.

[12] Jamîl Salibâ, *al-Mu'jam al-Falsafî bi al-Alfâdz al-'Arabîyyah wa al-Firansîyyah wa al-Injliziyyah wa al-Lâtînîyyah*, 84.

[13] According to Babbie, there are two realities in this life. *First*, the agreement reality i.e. the thing considered real which is found in life. *Second*, a reality based on our own

When we read the Quran, we easily find verses commanding us to think and maximize the function of *al-aql*. Even, some word forms – a derivation of *'aql* such as *la'allakum ta'qilun*, or another word with similar meaning e.g. *la'allakum tatadabbarun, la'allakum tatafakkarun* – are frequently found in the Quran.[14] Besides, there is also another word form i.e. *na'qilu* and *aqaluhu*, each is mentioned once.[15] The Quran highly appreciates knowledgeable people that their degree is guaranteed to raise. This is as what has been stated by Allah SWT in the Quran:

> "*O you who have believed, when you are told, 'Space yourselves' in assemblies, then make space; Allah will make space for you. And when you are told, 'Arise' then arise; Allah will raise those who have believed among you and those were given knowledge, by degrees. And Allah is Acquainted with what you do*."[16]

Even, someone dissipating *al-aql* will get torment in hell, as written in Q.S. al-Mulk [67]:

> "*And they will admit* their *sin, so [it is] alienation for the companions of the Blaze.*" [17]

Using *al-aql* will bring the potential of intellectual to reach an understanding on certain thing, which later can make someone to have noble behavior. This category is called *al-'aql al-wazi'*, that is *aql* of booster. Besides, *al-aql* is functioned to observe and analyze something to reveal the hidden secrets to get the scientific conclusion and lesson. The activity of *al-aql* here results in the emergence of knowledge as well as lesson that makes the owner to obtain insight and to apply it. This is then what we call by *al-'aql al-mudrik*, that is *al-aql* of seeker (of knowledge).[18] In relation with the comprehension ability, *'aql* and *qalb* have significant divergent meaning. The focus of *'aql* is more on empirical-rational/concrete which optimizes the thinking ability of something, meanwhile *al-qālb* is more on emotional-rational prioritizing the power of *zikr* in understanding the spiritual reality. Both are spiritual skills of human to understand the truth. When both merges in one understanding to seek the truth by using each instrument, they will get the power of thought and *zikr*.

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experience (experienced reality), or others' experience that is claimed as reality. See: Babbie Earl, *The Practice of Social Research* (California: Wadsworth Publising Company, 1989), 5.

[14] Both are written in the Quran as much as 22 and 24 times respectively. **See:** Muhammad Fu'ad Abd al-Baqi', *Mu`jam* al-*Mufahras li Alfadz* al-*Qur'an* al-*Karim* (Beirut-Lebanon: Dar Al-Ma'rifah, 2008), 1016, 367; Muhammad Quraisy Shihab, *Logika Agama* (Bandung: Lentera Hati, 2000), 57.

[15] Muhammad Fu'ad Abdu al-Baqi, *Mu`jam* al-*Mufahras li Alfadz* al-*Qur'an* al-*Karim, 687*

[16] Q.S. Al-Mujadalah [58]: 11.

[17] Q.S. Al-Mulk [67]: 11

[18] Muhammad Amin, "Kedudukan Akal dalam Islam; The Position of Reason in Islam, *Tarbawi: Jurnal Pendidikan Agama Islam,* Vol. 3, No. 1 (January-June, 2018), p. 83; Dadang Mahdar, "Kedudukan Akal dalam al-Qur'an dan Fungsinya dalam Pendidiakan Hukum Islam", *Adliya*, Vol. 8, No. 1 (Januari-Juni, 2014), 60.

So, we can say that there is *zikr* inside of thought, and there is thought inside of *zikr*.[19]

Because of the urgency of these skills for human, the Quran highly appreciates it. No other *samawi* books give similar appreciation or even higher for *'aql* as the Quran does. This is because *'aql* is a thinking skill in human's self by which everything is reachable. It is a gift from Allah SWT and no other creatures of Allah possess it. With it, human can differentiate right and wrong, clean and dirty, *mashlahah* and *mudharat*, good and bad. Abbas Mahmud al-'Aqqad states that *'aql* has full control on lust, to understand mandate and obligation, comprehension and thinking which constantly change based on the problems we face, and to classify the guidance and the digression, as well as to achieve inner consciousness which can cover beyond eyes' vision.[20]

Sometimes in the Quran, *'aql* is related to the word *lub* (a singular form of *al-albab*). So, the word *ulu al-albab* can be defined as "people who has intellectual (*aql*)". This can be found in the Q.S. Ali Imran [3]: 190-191:

> "*Indeed, in the creation of the heavens and the earth and the alternation of the night and the day are signs for those of understanding. Who remember Allah while standing or sitting or [lying] on their sides and give thought to the creation of the heavens and the earth, [saying], 'Our Lord, You did not create this aimlessly; exalted are You [above such a thing]; then protect us from the punishment of the Fire.*"[21]

From the above verses, we understand that people who has *al-aql* (*ulu al-albab*) is the ones who combine two things, i.e. *tadzakkur* which means remembering (Allah) and *tafakkur* which means thinking about Allah's creatures. Meanwhile, Imam Abi al-Fida Ismail[22] explains that the term *ulu al-albab* is every human whose mind is perfect and clean with which one can uncover various privileges and nobility of something, unlike the dumbers who cannot use their mind. When someone thinks, they can get the hidden wisdom behind the activity of *tadzakkur* and *tafakkur*, that is to know, to understand, and to deepen, that behind the natural events and everything in it are the proofs of The Creator's existence. Through the understanding gained by the *mufassir* on the mentioned verses, we can clearly comprehend the position and the function of *'aql*. The objects understood by *'aql* in the verses cover several things, those are: **first**, *al-khalq* which means limitation and determination showing harmony and foresight. **Second**, *al-samawat* means every entity on the sky and is visible to people's eyes. **Third**, *al-'ardl* means the habitat (place) of human and animate creatures. **Fourth**, *ikhtilaf al-lail wa al-nahar* means the regular alternation of the day and the night. **Fifth**, *al-ayat* means *dalil* (evidences) which represent the existence of Allah and His power.

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[19] Harun Nasution, *Aqal dan Wahyu dalam Islam,* (Jakarta: UI Press, 1986), 47
[20] Abbas Mahmud Aqqad, *Al-Insan fi al-Our'an al-Karim*. (Cairo: Dar al-Islam, 1973), 18
[21] Q.S. Ali Imran [3]: 190-191.
[22] Abi al-Fida Ismail Ibn Katsir al-Qurasyi al-Damasyqi, *Tafsir Ibnu Katsir* Jilid I (Makkah al-Mukarramah: Al-Maktabah al-Tijariyah, 1986), 184.

Al-Aql Articulation and Text of Revelation in Islamic Law Interpretation

The previous discussion explains that *al-aql* and its activity of reason is human characteristics, which differentiate them with other creatures. In Islamic thinking history, human's reason and God's revelation (*wahyu*) are often faced *vis a vis*. In fact, in several verses, Allah SWT has delegated human's common sense/reason in solving various issues which are profane. The logic conquest under the revelation authority once reached its climax in the mid century. This can be proven by the rise of blind imitation (*taqlid*) that the use of *ijtihad* reason is considered *haram* (forbidden).[23] As a result, the role of religion is isolated from the social life of community.

On the contrary, the position of reason is central and strategic in the current digital era, and it is beyond the justification of religious values. A series of industrial revolution since generation 1.0 until generation 4.0 in this digital era has changed the special position of religion so that it is equal to the ordinary social phenomena. As a result, the presence of modernity in certain limitations can distort the ethical and moral problems that are highly upheld by Islamic teaching. Thus, in this disruption era, a glimpse of hope to put the identity of religion back to its more rational performance occurred. The authority of the holy revelation is incorporated with the interpretation of objective reason in order to respond to the rapid advancement of era, which is unavoidable.[24] This attitude is necessary to be implemented to instigate a self-actualization for overcoming any problems regarding religion or Islam, primarily the foremost legal segment. Therefore, the exquisite bond of the text of revelation and al-aql-logics becomes very interesting to be theologically understood to create long-awaited public legal dictums.

The function optimization of al-aql for the absolute legal advancement is essential since the texts of revelation occurred in its diverse performances, namely: **first,** it is *nash-nash juz'iyyah tafshiliyyah* that specifically manages particular problems directly, such as the essential of compulsory prayers, the prohibition (*haram*) of adultery, and other problems. **Second,** it is *nash* in form of general principles (*qawa'id kulliyyah*) as what the word of Allah the Almighty says: *"Allah intends ease for you, not hardship.."*[25] The principle of giving ease (*wujud al-taisir*) is the basic principle of Islamic law in general. For example, in economic sector, the action of ignoring the aspect of ease in a transaction will inhibit the economic growth in the macro scale. Al-Khaladi affirms that the economic wheel will be unstable and a bigger negative impact will be created if there is no effort to nurture

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[23] Syah Waliyullah ad-Dahlawi states that Muslim in the first and second century did not agree on *taqlid* (imitation) of certain *mazhab* (Islamic scholars). In the next two centuries, there was a system to follow (to believe in *mazhab* of) certain *mujtahid*. Very few people did not follow the *mazhab* and this is an obligation. **See:** Syah Waliyullah ad-Dahlawi, *al-Inshaf fi Bayan Asbab al-Ikhtilaf* (Baerut: Dar al-Nafais, 1977), 65.

[24] This is in line with al-Syathibi's message conveyed in his wise words below:

اجْعَل الشَّرْعَ في يَمِيْنِك والعَقْلَ في يَسَرِك

"Put Islamic law on your right hand and al-aql on your left hand"

See: Abu Ishaq Ibrahim bin Musa al-Syathibi, *al-I'tisham* Juz III (Baerut: Dar al-Fikr, 1984), p. 408

[25] Q.S. Al-Baqarah [2]: 185.

people's buying power through a facilitating policy.[26] Another example is reflected on the word of Allah the Almighty: *"Surely the most noble of you in the sight of Allah is the most righteous among you. Allah is truly All-Knowing, All-Aware."*[27]The aforementioned verse is the foundation of the principle of equality before the law (*al-taswiyyah/al-musawah*) among all human beings. According to Muhammad Ibn Asyur, this principle is derived from the origins of the creation of human. He asserts that the all human beings are equal because of the existence of humanity aspect. Therefore, no one has the right to discriminate against another, whether it concerns skin color, race, ethnicity, or nation.[28]

Third, the general *nashs* become the reference of secondary *dalil* (evidence) within the *istinbat* (the power of decision making of Islamic law) of Islamic law such as *nash* regarding *ijma'* (consensus of the Muslim community) and *qiyas* (analogical reasoning). **Fourth,** the general *nash* becomes the reference of *maqashid al-syari'ah*. As a result, the general *nashs*, that become the reference of both secondary evidence and *maqashid al-syari'ah*, are the legal sources that will prevail throughout the ages. However, the elaboration requires the creativity power and hard work of humans' reason and *al-aql*. Without the immersion of humans' *al-aql*, those *nashs* will not possibly function as how it should be. Among the interrelation between reason, *al-aql* and revelation is visible through the interpretation of activity or the establishment of law based on the *nash* (*istinbath al-ahkam min al-nushush*). It is an urgency that all *mufassirs* (the interpreter of the Quran) or *mujtahids* relate every *nash* they studied to *maqashid al-syari'ah*. Abdul Wahhab Khallaf states that the study of *lafal* (articulation) that has interrelation with *maqashid al-syari'ah* can produce a legal prescription that is conforming to the objectives of its conception, which are humans' justice and welfare.[29]

Beside those abovementioned four texts of revelation, there is a typology of text of revelation that is mostly dominated by the *nashs* that are *dzanni* (speculative). As expressed by Abdul Wahhab Khallaf, there are at least four types of nash, as reviewed from the quality of the evidence. **First**, it is *nash* that is *qath'i* (definitive) as seen from the *wurud* aspect (the validity is trustworthy) and its *dalalah* (the meaning is firm/has monointerpretation). **Second**, it is *nash* that is *qath'i al-wurud* but is also *dzanni al-dalalah* (the meaning is not firm/has multiinterpretation). **Third**, *nash* that is *dzanni al-wurud* (the validity is assumed to be strong), but it is *qath'i al-dalalah* (the meaning is firm). **The fourth**, it is *nash* that is *dzanni* both in its *wurud* or *dalalah* aspects.[30] As the logical consequence of the presence of the text of revelation, which is a combination between *nash-nash qath'i* and *dzanni*, and between *juz'i* and *kulli*, the acknowledgement of the role of *al-aql* within the Islamic law interpretation activity is undoubted. Sometimes, the role of *al-aql* is not too

[26] Abdul Majid al-Khaladi, *Maqshad Rawaj al-Amwal wa Madzahirihi fi Uqud al-Mu'amalat* (Aljazair: Jami'ah al-Amir Abdul Qadir li al-Ulum al-Islamiyyah, 2016), 223.
[27] Q.S. Al-Hujurat [49]: 13.
[28] Muhammad Thahir Ibn Asyur, *Maqashid al-Syariah al-Islamiyyah* (Egypt: Dar al-Salam, 2007), 280
[29] Abdul Wahhab Khallaf, *Ilmu Ushul Fiqh* (Kuwait: Dar al-Qalam, 1978), 117
[30] Abdul Wahhab Khallaf, *Ilmu Ushul Fiqh*, 42

significant; however, it becomes too dominant in particular situations. It greatly depends on the *nash* of revelation that is going to be studied and the problems that will be discussed.

The articulation of the text of revelation and the activity of the reason of Islamic law interpretation is getting closer to its momentum when the composition of the Quranic text shows an imbalanced number, which is dominated by various types of *dzanni* text rather than the *qath'i* text. Yusuf Qardlawi, one of the contemporary Islamic scholars, affirms that less than ten percent of the holy teaching text are provided in form of constant *qath'i* legal postulates. This segment is immutable (it is not able to adapt to the changes) and should be accepted as it is (*taken for granted*). The basic issues related to the pillars of Islam are also included in this segment. Meanwhile, the rest (90%) is presented in form of texts of revelation containing the global regulations that are *dzanni*. This second segment has an adaptable characteristic (opens up to the access of change) as long as it still appertains to the moral messages that are globally conveyed in the holy teaching. The typology of this segment also comprises the operational laws that are directly associated with the social phenomena.[31]

The combination of *nash* typology demands a blend of several things. **First,** those are *nushush al-syari'ah* and *maqashid al-syari'ah* that are needed for the establishment of the ideal legal products.[32] These are mentioned in the interpretation of the Quran verses concerning the persuasion to do Jumah prayer as follows: *"O believers! When the call to prayer is made on Friday, then proceed diligently to the remembrance of Allah and leave off your business. That is best for you, if only you knew."*[33] The aforesaid verse does not merely talk about the prohibition or demand to leave off the buying and selling activity when the time for Jumah prayer comes, just exactly like how the *dzahir* meaning says,[34] but it also prohibits all kinds of other transaction activities, such as working in the office, doing manual labor, and others. Without noticing the *maqashid* (purposes) in interpreting the *nushush* (marital discord), we will not be able to understand the prohibition of doing works during the Jumah prayer time.

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[31] Yusuf Qardlawi, *al-Ijtihad wa Tajdid baina al-Dlawabith al-Syar'iyyah wa al-Hayah al-Mu'ashirah*, translated: *Dasar Pemikiran Hukum Islam* (Jakarta: Pustaka Firdaus, n.d.), 75

[32] Muhammad bin Husain al-Jizany, *Manhaj al-Salaf fi al-Jam'i bayna al-Nushush al-Maqashid wa Tathbiqatuha al-Mu'ashirah* (Riyadl: al-Mamlakah al-Arabiyyah al-Su'udiyyah Wizarah al-Ta'lim al-Aly, 2010), 42.

[33] Q.S. Al-Jumu'ah [62]: 9.

[34] Etymologically, -according to mutakallimin *mazhab- al-dzahir* is the *lafal* (articulation) containing a clear meaning that does not need any interpretation; on one hand, - according to hanafiyyah *mazhab*- this contains meaning that can be understood by only listening and no effort to have a thorough thinking is needed since the topic it contains is clear. **See:** Badruddin bin Bahadir bin Abdullah Zarkasyi, *al-Bahr al-Muhith fi Ushul al-Fiqh: Ta'liq al-Duktur Muhammad Tamir: Kulliyyah Dar al-Ulum Qism al-Syari'ah* (Baerut: Dar al-Kutub al-Ilmiyyah, 2000), Juz III, p. 25; Abu Bakar Muhammad bin Ahmad bin Abi Sahl Al-Sarakhsi, *Ushul al-Sarakhsi Tahqiq Abi Wafa' al-Afghani* Juz I (Baerut: Dar al-Kutub al-Ilmiyyah, 1993), 163-164.

Second, it is the incorporation of text and context. A *mufassir* is required not only to understand *nash*, but also to possess a sensitivity towards social reality surrounding the problems that are going to be solved.[35] It is understandable that any dilemma that has *qath'i al-wurud* and al-*dalalah* evidence does not need any involvement of the interpretation of reason. However, the thing that does not need or is even forbidden to do is the interpretation of reason in the *takhrij al-manath* segment (the legal implementation of the holy revelation). On one hand, the role of reason is still absolutely needed for the *tahqiq al-manat* segment (the legal implementation on the reality) since the legal implementation in the real life needs some scientific, political, sociological, and psychological considerations so that the legal implementation will not seem black and white or vague.

Therefore, a *mufassir* is required not only to have a great understanding about *fiqh al-nushush*, but also to master *fiqh al-waqi'* (social reality). These also include diverse field of studies related to the law that will be implemented, such as political, economic, and health science.[36] If, unexpectedly, a *mufassir* does not possess any competence in these fields of study, then it is natural that the experts of each field of study are needed. Accordingly, a mutualistic symbiosis involving a *mufassir* and *khubara'* (other experts of studies) is then created. The following is the example of the role of the reason interpretation in a real case: a thief should have his/her hand cut; it is done because the evidence is clear and steady. However, the question whether the hands of this person stealing a bunch of vegetables must be cut or not requires a study. The study has to cover the motive of stealing, what situation that instigates the person to steal, how much the bunch of vegetables cost, and whom the vegetables belong to.

Moreover, the role of reason is frequently used to interpret and understand several texts of revelation. One of the approaches representing the function of *al-aql* in the activities of legal conclusion drawing is the understanding of reverse logic (*mafhum al-mukhalafah*). Basically, understanding only some parts of the Quranic texts should not solely rest upon the textual approach, but also upon an implicit understanding underneath the external meaning. An instance of the reverse understanding of the Quranic text is a verse saying "*if they are pregnant, then maintain them until they deliver.*"[37] The meaning of this verse indicates the obligation of a man to provide living expense for the wife, who is given a *thalaq* (divorce), if she is pregnant. Nonetheless, this verse contains an implicit meaning as a form of its reverse, which is the absence of obligation to provide living expenses for the wife if she is not pregnant when the *thalaq* is pronounced.[38]

Although the use of reverse logics is unavoidable during the action of interpreting several texts of revelation, some *ulama* or Islamic scholars have different opinions about this *mafhum mukhalafah* (the contrary understanding), primarily on the detailed operational level. Hence, a more intensive discussion is

[35] Abdurrahman al-Zayudiy, *al-Ijtihad bi Tahqiq al-Manath wa Sulthanih fi al-Fiqh al-Islamy; Dirasah Ushuliyyah Fiqhiyyah Muqaranah Tabhatsu fi Kayfiyah Tanzil al-Ahkam al-Syar'iyyah 'ala al-Waqi'* (Cairo: Dar al-Hadis, 2005), 193-196.
[36] Abdurrahman al-Zayudiy, *al-Ijtihad bi Tahqiq al-Manath,* 193-196.
[37] Q.S. Al-Thalaq [65]: 6.
[38] Saifuddin Abu al-Hasan Ali bin Abu Ali bin Muhammad al-Amidi, *Al-Ihkam fi Ushul al-Ahkam* Juz III (Baerut: Dar al-Kutub al-Ilmiyah, 1980), 100.

required to discover the ins and outs of the use of this logic. Principally, *mafhum al-mukhalafah* is the opposite of *mafhum al-muwafaqah* approach (the implied meaning of a pronunciation). Etymologically, the word *mafhum* is derived from Arabic language that means an understanding or something that can be understood, whereas, the word *mukhalafah* possesses the opposite meaning. Terminologically, *mafhum al-mukhalafah* is the ruling of *lafal* to determine the law that is not mentioned implicitly, and that law is contrary to the law that is mentioned explicitly through the *lafal*.[39] It is named *mafhum al-mukhalafah* because the implicit meaning is opposed to the explicit meaning. Al-Syaukani asserts that this approach is also called *dalil al-khithab* since what leads to *mafhum al-mukhalafah* is one of the types of utterances (*khithab*) or because *khithab* provides the same understanding as what *mafhum al-mukhalafah* contains.[40]

The study of text interpretation methodology comprises several types of *mafhum al-mukhalafah*. *First,* it is *mafhum al-shifah* which mentions a name that is still general and is accompanied with the special characteristic or another understanding that confines a *lafal* containing numerous meanings (*musytarak*) and another *lafal* in particular. The example of the Quranic verse is as follows: *"But if any of you cannot afford to marry a free believing woman, then let him marry a believing bondwoman possessed by one of you"*.[41] The character stated in the Quranic verse is "devout." Thus, its *mafhum al-mukhalafah* is an irreligious bondwoman that is prohibited to be married to. The *ulama* of Syafii, Hambali and Maliki *Maddhab* also declare that this verse conveys the prohibition to marry bondwomen who are not devout Muslims.[42] *Second,* it is *Mafhum al-Syarthi*, which is a *lafal* that contains a legal indication related to a particular requirement. This *lafal* points out the opposite law that prevails when that particular requirement is not found. This is shown in the word of Allah the Almighty below: *"If they are pregnant, then maintain them until they deliver.."*[43]

The legal indication of this verse is the obligation of a man to provide living expense for the wife, who is given a *thalaq,* if she is pregnant. Therefore, the *mafhum al-mukhalafah* indicates that the husband has no obligation to provide living expenses for the wife if she is not pregnant when the husband pronounces a *talaq*.[44] *Third,* it is *Mafhum al-Ghayah*, which is a *lafal* that has a legal indication connected

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[39] Syamsuddin Muhammad bin Ahmad Al-Mahalli, *Syarh al-Mahalli 'ala Matn Jam' al-Jawami'*, simultaneously printed with: al-Allamah al-Bannani, *Hasyiyah al-Bannani* Juz I (Egypt: Musthafa al-Bab al-Halabi wa Awladuh, 1937), 245.

[40] Muhammad bin Ali Al-Syaukani, *Irsyad al-Fukhul ila Tahqiq al-Haq min Ilmi al-Ushul ;Tahqiq wa Ta'liq Sya'ban Muhammad Ismail* (Egypt: Mathba'ah al-Madani, 1992), Juz II, p. 56; Abu Hamid Muhammad bin Muhammad al-Ghazali, *al-Mustashfa min Ilmi al-Ushul* (Baerut: Dar al-Kutub al-Islamiyyah, 2014), 413.

[41] Q.S. al-Nisa' [4]: 25

[42] The verse above contains another meaning that can be considered as a consequence of the *mafhum al-mukhalafah* approach, which is a prohibition for men, who are able to marry devout and independent women, to marry bondwomen who are devout Muslims. **See:** Wahbah al-Zuhaili, *Ushul al-Fiqh al-Islamy* Juz II (Damascus: Dar al-Fikr, 2019), 350; al-Zuhaili, *al-Wajiz fi Ushul al-Fiqhi* (Damascus: Dar al-Fikr, 1995), 172. \

[43] Q.S. Al-Thalaq [65]: 6

[44] Saifuddin al-Amidi, *Al-Ihkam fi Ushul al-Ahkam* Juz III, 100.

to particular time restraint. This *lafal* points to the opposite law that will prevail whenever the time restraint has ended as depicted by the word of Allah the Almighty: *"And eat and drink until the white thread of dawn becomes distinct to you from the black thread (of night)"*.[45] The legal indication of the aforementioned verse is the flexibility to eat and drink at night, for Muslims who are fasting, before the dawn comes. Hence, its *mafhum al-mukhalafah* is the prohibition, applied for the fasting people, to eat and drink as the dawn ascends. Another example illustrated through the word of Allah the Almighty is shown below: *"And if he has divorced her (for the third time), then she is not lawful to him afterward until (after) she marries a husband other than him"*.[46]

The legal indication of the verse above is the prohibition for the ex-husband to remarry a woman whom he has given *talaq* to and whose waiting period (*iddah*) has ended unless she has previously married to another man. Thus, its *mafhum al-mukhalafah* is the *halalness* (permission), for a man, to remarry his ex-wife who has been given *talaq* for the third time if she got divorced from her second husband.[47] *Fourth,* it is *Mafhum al-Adad,* which is a *lafal* that has a legal indication associated with certain counting numbers. This *lafal* points to the absence of law beside any laws within those total numbers as what Allah the Almighty pronounces: *"As for female and male fornicators, give each of them one hundred lashes*.."[48] The *Mafhum al-mukhalafah* of the verse's meaning is the prohibition to punish the fornicators by lashing them for less or more than a hundred times.[49] *Fifth,* it is *Mafhum al-Laqab*, which is connecting the legal indication to a name such as the utterances: "*Brother Ahmad is coming*" or "*Muhammad is the Messenger of Allah the Almighty*". Accordingly, the reverse understanding that can be made is that anyone except Ahmad is not coming or anyone except Prophet Muhammad PBUH is not the Messenger of Allah the Almighty. This type of *Mafhum al-mukhalafah* is actually considered ineligible to be determined as the evidence of law. It is caused by the fact that it is not impossible that anyone beside Ahmad is coming, and it is not only Rasulullah that becomes the Messenger of Allah the Almighty because He has many Messengers. Consequently, the ulama reject the implementation of this type of reverse logic, but a few ulama such as Abu Bakar al-Daqqaq, Malik, Dawud, and some members of the Syafiiyyah group accept this.[50] *Sixth*, it is *Mafhum al-Hashr* that is the restraint of the law to prevail on particular problems. For instance, ما (*no*) is put alongside the *lafal* إلا (*except*) such as the one found in a sentence ما قام إلا محمد (*no one is standing except Ahmad*). It's *mafhum al-mukhalafah* is that the law of

[45] Q.S. Al-Baqarah [2]: 187
[46] Q.S. Al-Baqarah [2]: 230
[47] Muhammad Afifuddin Dimyati, *Mawarid al-Bayan fi Ulum al-Qur'an* (Sidoarjo: Lisan Araby, 2014), 88; Jalaluddin al-Suyuti, *al-Itqan fi Ulum al-Qur'an* Juz II (Baerut: Dar al-Fikr, 2008), 342.
[48] Q.S. Al-Nur [24]: 2
[49] Wahbah al-Zuhaili, *Ushul al-Fiqh al-Islamy*, Juz II, 352; Saifuddin al-Amidi, *Al-Ihkam fi Ushul al-Ahkam*, Juz III, 101.
[50] Al-Syaukani, *Irsyad al-Fukhul ila Tahqiq al-Haq min Ilmi al-Ushul; Tahqiq wa Ta'liq Sya'ban Muhammad Ismail*, Juz II, p. 66- 67; Abu Hamid Muhammad bin Muhammad al-Ghazali, *al-Mustashfa min Ilmi al-Ushul*, 421; Saifuddin al-Amidi, *Al-Ihkam fi Ushul al-Ahkam*, Juz III, 100 & 137.

"standing" is applied only for Ahmad. Another example involving *lafal* إنما (*truly*) is inscribed in the Quranic verse: *"Of all of Allah's servants, only the knowledgeable of His might are truly in awe of Him. Allah is indeed Almighty, all-Forgiving…"*[51] The *Mafhum al-mukhalafah* shows that no human community, except the ulama, fears Allah the Almighty.[52]

The discourse regarding its *mafhum al-mukhalafah* shows us the urgency of the role of *al-aql* alongside the activities of reason in attaining a law from the holy texts of revelation. Nonetheless, the jurists of the Mutakallimin and Ahnaf groups have an argument concerning the interpretation of each Quranic verse containing legal contents, as recorded in the history. On one hand, the fact that Mutakallimin ulama acknowledge the existence of *mafhum al-mukhalafah* as an evidence needs to be appreciated. This acknowledgement can broaden the horizon and insight of thinking to be more creative and dynamic in interpreting texts and attaining law (*istinbath al-ahkam*) based on the expressions written in the Quran. In a substantive point of view, the ulama of the Ahnaf group do not instantaneously deny this approach. As a proof, a few cases grounded in the same source of revelation, in fact, generate the same legal conclusion. The only difference is the fact that the Ahnaf group uses another evidence such as *al-bara'ah al-ashliyyah* or *istishhab*.[53]

Conclusion

The existence of *al-aql* alongside the activity of reason is urgent. It is proven by the high appreciation the holy Quran gives them, and no other Samawi holy books show a bigger appreciation that is greater than Quran. It happens because Quran is humans' thinking skill tool, which makes everything possible to accomplish. Also, the act of uselessly employing al-aql will lead someone to get punished in the underworld. Using al-aql, humans will be able to differentiate the correct and the decent things, the clean and the dirty things, *maslahat* and *madharat* (harm), as well as the good and the evil things. The interrelation between revelation and the reason of thinking within the Islamic law establishment process is truly undoubted. Some of the articulations within the interrelation between al-aql and revelation in the process of making legal conclusion based on the texts of revelation are as follows: (1) It is the text understanding, which is combined with *maqashid al-syari'ah* (the objectives of Islamic law) so that the product of interpretation does not seem to be vague; (2) It is the incorporation of text and context. A *mufassir* is indeed required not only to be able to understand *nash*, but also possess sensitivity towards social reality surrounding the problems that need to be dealt with; (3) It is the implementation of reverse logic understanding (*mafhum al-mukhalafah*).

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[51] Q.S. Fathir [35]: 28
[52] Abu Hamid Muhammad bin Muhammad al-Ghazali, *al-Mustashfa min Ilmi al-Ushul*, 423.
[53] For the detail, see: Abu Bakar Ahmad bin Ali al-Jashshash al-Razi, *Ushul al-Jashshash; al-Furu' fi al-Ushul* (Baerut: Dar al-Kutub al-Ilmiyyah, 2000), Juz I, 154.

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Determination Dawn of Shadiq in Masalembu Island by Using Image Processing Sobel Edge Detection Technique

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Abstract:

The value of the sun's elevation -20 below the horizon as criteria for Subuh prayer began to be reviewed again by researchers and fuqaha. The results of some research were different with Ministry Religion Affairs and raise doubts for some Muslims then need to require re-verification. Astrophotography and image processing techniques are introduced to solve this problem. The rising of morning twilight can be detecting and analyze by image processing because the image before and after will have different pixel values. Capturing image as the data of this research started when the altitude of the sun is -23˚below the horizon. The duration of capturing the picture every once in a minute. After the image has been collected in 7 days, Sobel image processing utilizes to identify the edge of the horizon when the dawn light appears. Combining proper setting camera calibration with nice weather, the Sobel operator's edge detection successfully detects dawn shadiq as the beginning of subuh prayer. The value of the sun's altitude obtained in this research based on image processing is -19.7128 with a standard deviation (σ) of 1.114429.

Keywords: Dawn of Shadiq, Sobel Edge Detection, Subuh Prayer.

Introduction

The criteria of the beginning of dawn time set by the Ministry of Religious Affairs of the Republic of Indonesia began to be doubted by Muslims since Mamduh Farhan Al Buhairi and Agus Hasan Bashori stated that the dawn in Indonesia is too early until 24 minutes. [1]. The utilization of sun's altitude -20° below the horizon as a criterion of beginning subuh prayer from Ministry Religion Affairs is considered only following the historical opinion of Saadoe'din Jambek. Saadoe'din Jambek's opinion comes from Shaykh Muhammad Thahir Jalaluddin's

[1] Al-Bukhairi Mamduh Farhan and Agus Hasan Bashori, *Koreksi Awal Waktu Shubuh*, 2010.

thoughts[2]. In addition, some researchers also stated a value of -20 not based on the results of adequate research and observation but based on historical [3] [4].

The legal basis to analyze the astronomical characteristics beginning of subuh prayer found in Al Baqoroh [2]: 187:

وَكُلُوا وَاشْرَبُوا حَتَّىٰ يَتَبَيَّنَ لَكُمُ الْخَيْطُ الْأَبْيَضُ مِنَ الْخَيْطِ الْأَسْوَدِ مِنَ الْفَجْرِ

Meaning: *"And eat and drink until it becomes clear to you the white thread from the black thread from the dawn*".

The word "white thread" and "black thread" are figurative words. "White thread" represents the rising of dawn *shadiq*, on the other hand, the word "black thread" represents the darkness of the night. Based on this verse, it can be concluded that the starting subuh prayer begins when a beam of light rises like a black thread on a white thread. In fact, *Fuqaha* have agreed that the phenomenon of the arrival *shadiq* dawn is the beginning of the subuh prayer [5] as explained in the following hadith:

عَنِ ابْنِ عَبَّاسٍ رَضِيَ اللهَ عَنْهُمَا قَالَ: قَالَ رَسولُ الله صلى الله عليه وسلم: الفَجْرُ فَجْرَانِ, فَجْرٌ يُحَرّمُ الطّعَامَ وَتَحِلّ فِيهِ الصّلاَةُ, وَفَجْرٌ تَحْرُمُ فِيهِ الصّلاَةُ, أَيْ صَلاَةُ الصّبْحِ, وَيَحِلّ فِيهِ الطّعَامُ رَوَاهُ ابْنُ خُزَيْمَةَ وِالحَاكِمُ, وَصَحّحَاهُ,

Meaning: *"There are two dawns; (First) the dawn in which food is forbidden and prayer is permitted, the (second) dawn in which food is permitted and the Fajr prayer is forbidden."* (Sahih al-Bani in Sahih Al-Jami no. 4279).

Based on the hadith above, there are two types of dawn. The first dawn, namely the *shadiq* dawn, is when fasting getting forbidden and prayer is permitted. While the second type of dawn, namely *kadzib* dawn, is the dawn where fasting getting lawful but praying is forbidden. However, until now, no observatory has been able to formulate the value of the sun's altitude for the beginning of dawn. Some information and research even tend to write based on the author's reference[6].

Praying is not valid when they are not performed according to its right time[7]. However, determining a false time for the dawn prayer can have an impact on several issues of the law worship for Muslims [8]. Some of them are the obligation to

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[2] Arwin Juli Rakhmadi Butar-Butar, "Kontribusi Syaikh Muhammad Thahir Jalaluddin Dalam Bidang Ilmu Falak," *MIQOT: Jurnal Ilmu-Ilmu Keislaman* 42, no. 2 (2019): 300, https://doi.org/10.30821/miqot.v42i2.553.

[3] Bahali Kasim, "Measuring the Sun Depression Angle of Dawn with a DSLR Camera" 47, no. 11 (2018): 2877–85.

[4] Dhani Herdiwijaya, "Sky Brightness and Twilight Measurements at Jogyakarta City, Indonesia," *Journal of Physics: Conference Series* 771, no. 1 (2016): 1–5, https://doi.org/10.1088/1742-6596/771/1/012033.

[5] Nihayatur Rohmah, "The Effect of Atmospheric Humidity Level to the Determination of Islamic Fajr/Morning Prayer Time and Twilight Appearance," *Journal of Physics: Conference Series* 771, no. 1 (2016): 16–19, https://doi.org/10.1088/1742-6596/771/1/012048.

[6] Molvi Ahmed Yaqub Miftahi, *Fajar and Isya Times & Twilight*, 2005.

[7] Ahmad Sarwat, *Waktu Shalat* (Jakarta: Rumah Fiqh Publishing, 2018).

[8] Abdul Mughits, "Problematika Jadwal Waktu Salat Subuh Di Indonesia Pendahuluan Akhir-Akhir Ini Jadwal Waktu Salat Subuh Di Indonesia Telah ' Digugat ' Oleh Sebagian Dari Kalangan

fast for women after menstruation or nifas when their blood stop between these times. On the other side, one of the sunnah from prophet Muhammad to eating sahur at the end of the time is inappropriate. It was also mentioned that if someone has doubts about their time of prayer, even though it is already in time, then the prayer is still invalid [9]. So it is necessary to review the beginning of subuh prayer in the morning.

Table 1. Previous research that related to the criteria of dawn time summarized

No	Researcher	Location	Sun Altitude
1.	Arumaningtyas et al. (2012)[10]	Bandung and Jombang	-10 °
2.	Rohmah (2016) [11]	Central Java (Juwiring, Pati, Yogyakarta), East Java (Kaibon), and West Java (Bandung)	-18.5°
3.	Noor & Hamdani (2018) [12]	Central Java (Tayu Pati Beach)	-17°
4.	Saksono & Fulazzaky (2020) [13]	West Java (Depok)	14° ± 0.6
5.	Basthoni (2021) [14]	East Java (Banyuwangi) and Central Java (Karimunjawa)	-20±0.2
6.	Rusli [15]	East Java (Malang)	-20°

Correcting or verifying the validity of subuh prayer's criteria is not enough based only on the observation of true dawn in one or two locations. It is necessary to observe long-term in Indonesia by paying attention to the variations and

Umat Islam Karena Dinilai Masih Terlalu Pagi , Terutama Setelah Terbitnya Beberapa Tulisan y" 48, no. 2 (2014).

[9] Wahbah az Zuhaili, *Al-Fiqh al-Islami Wa Adillatuh*, 3rd ed. (Beirut: Dar Al-Fikr, 1989).

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[14] Moch Basthoni, "A Prototype of True Dawn Observation Automation System (Prototipe Sistem A Prototype of True Dawn Observation Automation System (Prototipe Sistem Otomatisasi Observasi Fajar)," *Jurnal Sains Dirgantara* 18, no. December 2020 (2021): 33–42, https://doi.org/10.30536/j.jsd.2020.v18.a3475.

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properties of each region. [16]. The combination of technology with field observation is expected to facilitate research at the beginning of dawn. Image processing techniques were introduced to help humans getting better interpretations and improve more image information[17]. Differences in two consecutive images due to the appearance of dawn that cannot be detected by the naked eye can be detected through image processing techniques[18]. In the image of dawn, there is a change in light between data with one another. The results of changes in light, color, shadow, and texture are called in image processing called edges [19].

There are a variety of edge detection techniques in image processing, some of which are canny, prewitt, and sobel. Canny is the best technique, sensitive, and has a low error value. How canny works by detecting the edge of an image vertically, horizontally, or diagonally.[20]. So canny edge detection will become very sensitive, although there is a disturbance in the form of light pollution. On the other side, the Sobel operator has high edge detection accuracy. It works by detecting edge objects from vertical and horizontal directions. So in this study, the Sobel edge detection method can be chosen for the initial determination of the beginning of *shadiq* dawn.

A research method to correcting the value of sun altitude use astrophotography techniques. The research data are digital images that capturing when the sun's altitude is around -23° below the horizon or about 15 minutes before dawn. The duration of capturing a picture is every once in a minute. This duration was selected because the scheduling of prayers is done every minute. The *shadiq* dawn can be detected in areas with a night sky brightness of more than 21 mpsas[21]. It shows that the location has low light pollution. Masalembu island has 22 mpsas a night sky brightness, so it can be expected that dawn *shadiq* can be visible. Masalembu is located in Sumenep Regency, East Java with coordinates -05° 32' 14" South Latitude and 114° 24'50" East Longitude.

[16] Basthoni, "A Prototype of True Dawn Observation Automation System (Prototipe Sistem A Prototype of True Dawn Observation Automation System (Prototipe Sistem Otomatisasi Observasi Fajar)."
[17] Achal Sharma, "Analysis of Sobel Edge Detection Technique for Face Recognition," *International Journal of Advanced Research in Computer Engineering & Technology (IJARCET)* 4, no. May 2015 (2015).
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[19] Rajshree Kumari et al., "A Review on Comparative Study of Different Edge Detection Techniques," 2020, 748–54.
[20] Kumari et al.
[21] Basthoni, "A Prototype of True Dawn Observation Automation System (Prototipe Sistem A Prototype of True Dawn Observation Automation System (Prototipe Sistem Otomatisasi Observasi Fajar)."

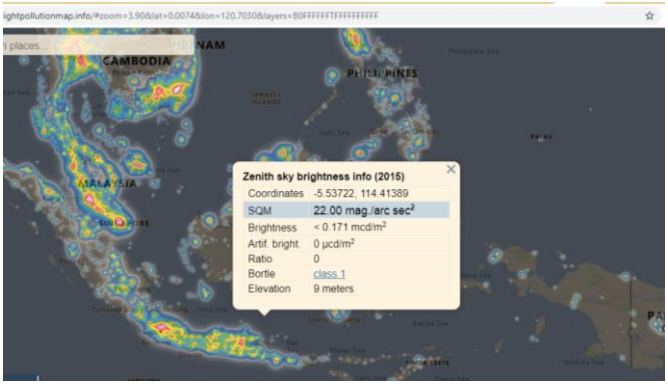


Figure 1: The brightness of the sky at the research site, Masalembu

Figure 2: *Shadiq* Dawn on Masalembu Island

This study used the Canon EOS Kiss X7 along with a camera tripod as the main instrument. The processing of this research data by using Matlab Software version 2017a. The data processing algorithm is described as follows:

a. Capturing image every minute
b. Changing RGB image type to grayscale
c. Processing image with sobel operator
d. Analyzing image to know the beginning of dawn *shadiq*
e. Analyzing and calculating the value of the sun's altitude
f. Declaring the conclusion value of the sun's altitude by using statistics

On the other side, calculating the value of the sun's altitude by the flow chart below**:**

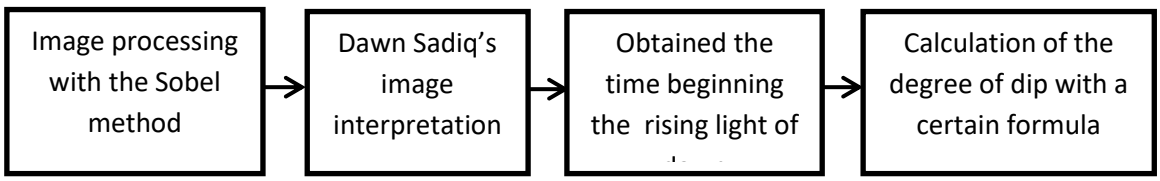


Figure 3: Flowchart of the calculation of the sun's altitude

While the formula for calculating the sun's altitude is:

$$\sin h = (\cos t + \tan \rho \tan d) \cos \rho \cos d \quad (1)$$

$$h = \arcsin (\cos t + \tan \rho \tan d) \cos \rho \cos d \quad (2)$$

Where ρ is the latitude of the place.
d is the sun's declination.
t is the solar time angle.
h is the height of the sun.

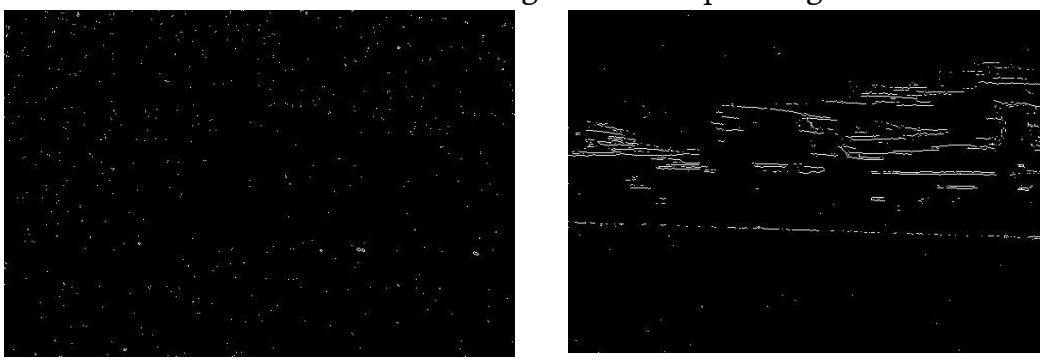
The beginning rise of light is characterized by the detection of an elongated outline on the eastern horizon. Based on the results obtained, data is collected in Microsoft Excel for analyzing and declaring conclusions. The last, sun altitude's data will be analyzed by collecting them all using statistics to formulate parameter beginning of dawn shadiq.

Result and Discussion

Image processing using sobel operator edge detection can be used to detect dawn *shadiq*'s light on the eastern horizon in Masalembu Island. Edge detection operators can be optimized to see horizontal, vertical, or diagonal edges of the image. But, detecting dawn only based on horizontal and vertical directions to reduce noise like light pollution. Using horizontal and vertical direction to detect the edge of beginning dawn because the light's dawn of *kadzib* rising vertically upwards. On the other hand, the dawn of *shadiq*'s light spreading from north to south. So, using horizontal and vertical directions got a better result.

The result of image processing by using sobel edge detection show in the table below. The images before and after dawn are different because the light of sunrise makes the horizon's line visible. It represents just like a line in the middle. The horizon's line can be visible because of the light of dawn spreading on horizon.

:



(a) (b)

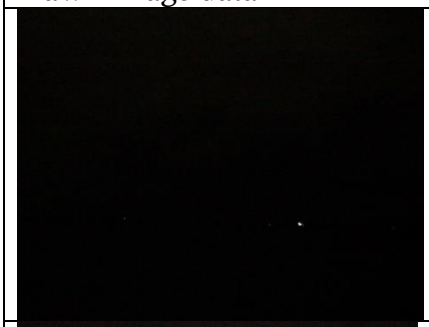
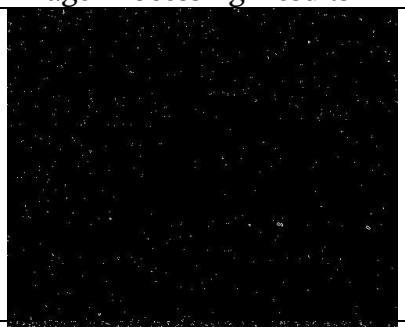
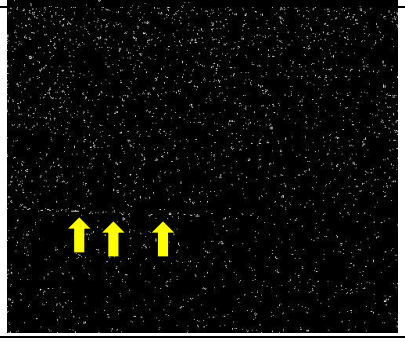
Figure 4: The results of processing the dawn image using the sobel operator. Picture 4(a) is the image before dawn *shadiq* appears, and picture 4(b) is after dawn *shadiq* appears

The result of image processing using edge detection shows white thread on black thread phenomena because of the sunrise's light. The rising of the sun representation white thread on a black thread, according to the definition of dawn.

It's in accordance with the interpretation of the verse Q.S Al-Baqoroh [2]: 187. As shown in the picture (3), the horizontal dawn light of *shadiq* stretches across the eastern horizon like a white thread. Whereas because there is no light other than light coming from the rising of the sun, the edges of other objects are indistinguishable. This is in accordance with the principle of human vision, the edges of objects can be seen and can be distinguished from each other when there is a light.

Before dawn *shadiq* appears, first begins with the appearance of the dawn *kadzib*. Fajr *kadzib* is the result of the scattering of sunlight by interplanetary dust. But the dawn of *shadiq* phenomena comes from the scattering of sunlight by the Earth's atmosphere. The appearance of *kadzib* dawn begins from a weak beam of light then overlapping with the dawn light of *shadiq*. It can be seen in Figure 3a that there is no outline of the horizon as shown in Figure 3b.

The basic idea of image processing using the edge detection method is the change of pixels due to the appearance of a beam of light then make the border between objects become visible. In the context of this study, the beginning of dawn light is still weak, but pixel changes will make the horizon boundary of the research location in offshore beaches will be visible. For more details, the image processing results are shown in the image below::

Dawn image data	Image Processing Results	Information
		Image processing before dawn *shadiq* detected
		The beginning of the dawn. The horizon line is starting to be detected, although it is very weak.

		The light of dawn had completely appeared.

Figure 5: Image processing results on September 28, 2020

After analyzing the image of the appearance of dawn in the morning, then the value of sun altitude below the horizon is calculated. It's will be a very important thing because sun altitude value is used in the future for calculating the prayer schedule. Collecting Imagery data is conducted for one week from the middle until the end of September 2020. The time of collection is not carried out continuously due to weather considerations and noise from moonlight. After doing image processing, the results of data processing are shown in the following table:

Table 2. The results of research data in Masalembu Island.

No	Date	Morning time Ministry of Religion	Morning time research results	Dip	Average dip (˚)	Standard deviation(σ)
1	18-09-2020	3:57	3:57	-20.6265	-19.7128	1.114429
2	19-09-2020	3:56	4:06	-18.2648		
3	21-09-2020	3:55	3:55	-20,7502		
4	22-09-2020	3:55	3:56	-20.3761		
5	27-09-2020	3:52	3:53	-20.3616		
6	28-09-2020	3:52	3:56	-19.4895		
7	29-09-2020	3:51	4:01	-18.1212		

After processing the data, it can be concluded that the results of the average dip are -19.7128 with a standard deviation (σ) as big as 1.114429. Standard deviation is important to measure that how much variation or dispersion of the mean value. A low standard deviation indicates that the data value very close to the mean, while a high standard deviation value indicates the opposite. A smaller standard deviation indicates that the data are clustered tightly around the mean; normal distribution will be higher. Because the standard deviation (σ) btained in this study in the range of 1, so it can be concluded that the data is collected around the mean value. It means that the sun altitude value of this research is centered around the average value. The standard deviation value is 1.114429 states that 68% of the calculated results are in the statistical range between -18.59˚ and -20.82˚. The value of -18.59841384˚ is obtained from the results of the average added to the standard deviation value (-19.7128˚ + 1.114429). Meanwhile, the value of -20.82727188˚ was obtained from the average dip subtracted by the standard deviation value (-19.7128˚ -1.114429).

Conclusion

The application of image processing disciplines, especially edge detection sobel technique, is one of the innovations that can be used to detect early entry of dawn time prayer. Sobel operator can detect the edge of the eastern horizon in the research location as the appearance of the dawn rays of *shadiq* very well. After taking and processing data for 7 days, it can be concluded that the sun's altitude value (dep) in Masalembu is -19.7128˚ with a standard deviation (σ) of 1.114429. The standard deviation value of 1.114429 indicates that 68% of the calculated results are in the statistical range between -18.59˚ and -20.82˚.

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Legal Interpretation: Critical Reasoning for the Development of an Islamic Paradigm that is Friendly to Women And Children

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Abstract:

At this time there are still many misinterpretations about the teachings of Islam that related to the position of women and children. Cultural construction and interpretation of religious experts who use inappropriate mindsets in viewing and understanding religious texts is also a crucial factor as the cause of inequality in relations between groups in the social order of Muslims. The characteristics of Islamic teachings are also humanist, which can be seen from the efforts to protect human rights as can be seen in terms of their vision, mission, and goals. Islamic teachings in the context of granting human rights to women, fully recognize and respect the position of women as creatures of Allah SWT. Islam has removed all forms of injustice that befell women and raised their status as human dignity. Islam does not limit and restrain women's steps in developing their potential. In the context of providing protection and rights for children, the seriousness of Islam in dealing with the status of children is increasingly legitimate with the many verses of the Al-Qur'an that discuss the status of children. Islam's alignment with child protection is a priority. The instruments related to this seem to have been neatly arranged to create a generation of good and compassionate people.

Keywords: Islamic teaching; gender; woman.

Introduction

Crimes against women and children are now exposed as real facts, both on a national and international scale. We can read about this social phenomenon about crimes against women and children from many national and international mass media. Various social problems for women and children can be found every year. Examples include the widespread cases of rape against women and children, exploitation of children, discrimination against women, human trafficking, and domestic violence which places women and children as victims.[1] Cases of crimes

[1] Sulistiyowati Irianto, *Perempuan Dan Hukum* (Jakarta: Yayasan Obor Indonesia, 2006).

involving women and children continue to occur every year in Indonesia. One of the latest criminal cases that occurred involved 15 years old Mawar (pseudonym) and 16 years old Melati (pseudonym) who were victims of human trafficking and sexual exploitation of minors utilizing job offers on social media Facebook. with five other adult women. These seven victims were framed with the lure of jobs which were then involved in the prostitution business. During the practice of the forbidden transaction, the seven victims were placed in a hotel room under strict supervision. They were not allowed to leave the room without the permission of the bodyguard who was hired by someone else because their cell phones were confiscated.[2]

Cases of crimes against women and children do not stop there. There are hundreds of other crimes such as cases of violence against women and children recorded in Indonesia. Data on cases of violence against women in Indonesia from year to year has increased dramatically. If in 2012 there were more than 600 cases, in 2013 there were 992 cases. Of the number of cases, the dominant ones are cases of domestic violence as many as 372 cases and cases of dating violence totaling 59 cases (official data from LBH APIK Jakarta).[3] Meanwhile, based on the report on the SIMPONI PPA of the Ministry of Women's and Children's Empowerment, there were 3,122 cases of violence against children that occurred until June 3, 2021. From this data, the number of sexual violence still dominates.

In the case of another crime (human trafficking crime) that places women and children as oppressed parties, it is also recorded in the records of several organizations and institutions in Indonesia. The International Organization for Migration (IOM) noted that during 2020 the number of cases of Trends, Patterns, and Mechanisms for Handling the Crime of Trafficking in Persons (TIP) received by IOM increased to 154 cases, and interestingly, TIP does not only occur across countries, but the number of TIP cases in Indonesia country also rose. The majority of victims of exploitation received by IOM throughout 2020 were sexual exploitation. The Ministry of Women's Empowerment and Child Protection (KPPPA) recorded an increase in TIP cases during the pandemic, from 213 cases (2019) to 400 cases (2020). Data recorded by IOM in Indonesia also highlights the increasing number of victims of child trafficking in 2020, 80 percent of whom are sexually exploited.[4]

Broadly speaking, the factors that cause crime can be divided into two parts, the first from within the individual (internal) which is further divided into general internal factors and specific internal factors. The second factor is the factor that comes from outside the individual (external). Crime can occur due to several factors such as a person's personality traits, motivation, intelligence, internalization of the wrong, inner conflict, fantasy, and psychopathological tendencies, which means

[2] Rizka Nur Laily M, "Modus Tawaran Kerja Dominasi Kasus Perdagangan Anak Di DIY, Keluarga Perlu Waspada," Merdeka.Com, 2021, Https://Www.Merdeka.Com/Jateng/Modus-Tawaran-Kerja-Dominasi-Kasus-Perdagangan-Anak-Di-Diy-Keluarga-Perlu-Waspada.Html.

[3] Busriyanti., "Islam Dan Kekerasan Terhadap Perempuan," *Religió: Jurnal Studi Agama-Agama* 2, No. 2 (2012): 118–3.

[4] Bilal Ramadhan Citra Listyarini, "Kasus Perdagangan Orang Di Indonesia Naik Pada 2020," Republik.Co.Id, 2021, Https://Www.Republika.Co.Id/Berita/Qr7v1l330/Kasus-Perdagangan-Orang-Di-Indonesia-Naik-Pada-2020.

crime or evil actions, namely reactions to psychological problems. In addition, crime can occur because of the psychology of a criminal.[5]

Giving the right understanding and interpretation related to the substance and universal values that are essential in this case, namely the understanding of religion is one of the things that can be a solution in changing the internal factors of an individual that can reduce a person's potential in committing a crime. Based on data from the World Population Review, the current Muslim population in this country (2020) reaches 229 million people, or 87.2% of the total population of 273.5 million people.[6] Islam as the majority religion in Indonesia has an important role in reducing crimes against women and children and creating a friendly environment for both. This means that the provision of understanding in the form of an appropriate interpretation of the values contained in the teachings of Islam can be one solution to the formation of a social environment that places women and children in the right position according to their dignity as human beings.

At this time there are still many misinterpretations of the teachings of Islam related to the position of women and children. Cultural construction and interpretation of religious experts who use inappropriate mindsets in viewing and understanding religious texts is also a crucial factor as the cause of inequality in relations between groups in the social order of Muslims. This misinterpretation eventually gave birth to the view that men by nature have been given the highest position in the construction of the social order of society compared to other groups, especially women. Many interpretations of religious texts then place women as number two creatures. Women and children are then considered as the property of men which can be treated as they wish, including in ways that are not following the pure essential values of Islam. Given the large role of Islam as an aspect that can reduce the potential for violence through the internal thoughts of individuals, the authors in this article try to provide an explanation of the essential values of Islamic teachings in viewing and giving high rights and respect to women and children as human beings. Allah SWT. dignified in efforts to develop an Islamic paradigm that is friendly to women and children.

Result and Discussion

Protection of Women and Children According to Positive Law

The protection of women and children in Indonesia is a social phenomena that always attracts attention from various circles. The emergence of cases that place women and children as victims makes the conditions and security and safety of people and children at an alarming point. As the cases that surfaced involving children, among others; biological parents who have the heart to abuse and rape their children to satisfy their lusts, as happened in Sidoarjo last January.[7] In addition, many children are also exploited on the streets, on trains, on buses, and in

[5] Aditya Ghulamsyah, "Tinjauan Kriminologi Tindak Pidana Pencurian Dengan Kekerasan 'BEGAL'" (Universitas Muhamadiyah Malang, 2017).

[6] Kormen Barus, "Jumlah Penduduk Muslim Indonesia Meningkat, Powercommerce Asia Tangkap Peluang, Luncurkan Halal Plaza," Industry.Co.Ic, 2020, Https://Www.Industry.Co.Id/Read/65748/Jumlah-Penduduk-Muslim-Indonesia-Meningkat-Powercommerce-Asia-Tangkap-Peluang-Luncurkan-Halal-Plaza.

[7] Hilda Meilisa, "Bejat! Ayah Di Sidoarjo Perkosa Anak Kandung, Ancam Bunuh Jika Lapor Ke Ibu," detikNews, 2021, https://news.detik.com/berita-jawa-timur/d-5593352/bejat-ayah-di-sidoarjo-perkosa-anak-kandung-ancam-bunuh-jika-lapor-ke-ibu.

other places. Other cases also continue to emerge such as cases of sexual abuse against children, cases of child trafficking (trafficking), and cases of pedophilia such as the one that happened at the Jakarta International School (JIS), as well as cases of physical violence, psychological violence, sexual violence, and other cases of economic violence. This is an indication of how weak the implementation of legal protection for children is.

In addition, the Central Statistics Agency (BPS) also recorded the number of cases of violence against women in 2017 as many as 12,550, in 2018 as many as 16,214 cases and in 2019 there were 13,821 cases. Unfortunately, with such a large number of cases, cases that received further treatment had a relatively small number or percentage. The number of cases that received treatment in the form of law enforcement in 2017 was 1,154 cases, in 2018 there were 1,177 cases and as many as 773 cases in 2019.[8] Meanwhile, BPS also recorded the prevalence of violence against girls (by type of violence) in 2013 there were 1,180 cases of physical violence (11.8%), 410 cases of sexual violence (4.1%), cases of emotional violence as many as 940 (9.4%).[9] Cases of these crimes continue to be recorded to this day.

The ongoing crimes that place women and children as the oppressed have been responded to by policymakers both at the global and national levels. On a global scale, the Declaration of Human Rights, which stands as the main pawn of international instruments that protect human rights, is capable of being the parent that gives birth to several other instruments engaged in the provision and protection of rights for women and children around the world, such as the United Nations Standard. Minimum Rules For The Administration Of Juvenile Justice, United Nations Rules For The Protection Of Juvenile Deprived Of Their Liberty, United Nation Guidelines For The Prevention Of Juvenile Delinquency, Convention On The Political Rights Of Women (UN 1952) ratified by Indonesia with Law no. 68 of 1958 concerning Approval of the Convention on the Political Rights of Women, the Convention on The Elimination of Discrimination of All Forms of Discrimination Against Women (UN 1979) which was implemented by Indonesia through Law no. 7 of 1984, and the Declaration On The Elimination Of Violence Against Women (UN 1973).[10]

On a national scale, if you look deeper into the legal instruments for the protection of the rights of women and children, long before the birth of the Declaration of human rights, conventions, and other international legal instruments, Indonesia has pledged to establish the 1945 Constitution, namely, in the Preamble which reads *"Indeed independence it is the right of all nations and therefore colonialism in the world must be abolished, because it is not in accordance with humanity and justice".* This pledge to protect and grant rights is also reaffirmed in the body of

[8] Badan Pusat Statistik, "Jumlah Kasus Dan Persentase Korban Kekerasan Terhadap Perempuan Yang Mendapat Layanan Komprehensif 2017-2019," N.D., Https://Www.Bps.Go.Id/Indicator/34/1823/1/Jumlah-Kasus-Dan-Persentase-Korban-Kekerasan-Terhadap-Perempuan-Yang-Mendapat-Layanan-Komprehensif.Html.

[9] Badan Pusat Statistik, "Prevalensi Kekerasan Terhadap Anak Perempuan Menurut Jenis Kekerasan (Persen), 2013," 2017, Https://Www.Bps.Go.Id/Indicator/27/1822/1/Prevalensi-Kekerasan-Terhadap-Anak-Perempuan-Menurut-Jenis-Kekerasan.Html.

[10] Mugiyati Sapardjaja, Komariah Emong, Sutriya, *Kompendium Tentang Hak-Hak Perempuan* (Jakarta: Badan Pembinaan Hukum Nasional, Departemen Hukum Dan Hak Asasi Manusia Ri, 2008), p.56.

the 1945 Constitution in Chapter XA on "Human Rights" and in Law no. 39 of 1999 concerning Human Rights.[11]

In the context of international law that specifically provides protection and respect for women, several legal instruments clearly state women's human rights. For example, regarding the right to be seen as equal before the law, Article 15 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) reads:

1. *States Parties shall accord to women equality with men before the law.*
2. *States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.*
3. *States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.*
4. *States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile."*

Women's rights in the form of protection and freedom from all forms of discrimination in the household have also been regulated in Article 16 paragraph 1 *Convention on the Elimination of All Forms of Discrimination against Women*: *States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:*

(a) *The same right to enter into marriage;*
(b) *The same right freely to choose a spouse and to enter into marriage only with their free and full consent;*
(c) *The same rights and responsibilities during marriage and at its dissolution;*
(d) *The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount; (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;*
(f) *The same rights and responsibilities with regard to guardianship, wardship, trusteeship, and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases, the interests of the children shall be paramount;*
(g) *The same personal rights as husband and wife, including the right to choose a family name, a profession, and an occupation;*
(h) *The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment, and disposition of property, whether free of charge or for a valuable consideration*."

In the context of child protection in Indonesia, it develops and turns into a shared obligation and responsibility, namely the state, government, and society. Each of these elements has its share, duties, and responsibilities in protecting

[11] Sapardjaja, Komariah Emong, Sutriya.

children. The purpose and objective are so that children can live, grow, develop and participate optimally following human dignity, and get protection from violence and discrimination. Therefore, for each child to assume responsibility as a budding, potential and young generation, the successor to the ideals of the nation's struggle, children need to get the widest opportunity to live and develop optimally, physically, mentally, socially, and morally noble. So to realize this, it is necessary to take preventive measures to protect and provide guarantees for the fulfillment of their rights. In this context, the state and even the international community have formulated rules on child protection.

The legal aspect of protecting children is realized by the presentation and recognition of Law no. 23 of 2002 concerning Child Protection as stated in Article 2 which states that child protection is carried out based on the Pancasila principle and based on the 1945 Constitution of the Republic of Indonesia and concerning the basic principles of the convention on children's rights. Furthermore, Article 59 of Law no. 23 of 2002 also states that special protection must be given to children. Article 64 paragraphs 1 and 2 of Law no. 23 of 2002 also states that children in positive law perspective are children who conflict with the law and child victims of crime. In addition, the protection of children has also been guaranteed constitutionally in the 1945 Constitution as the constitutional basis.[12]This aspect further strengthens the basis of child protection. Continuously, the efforts to protect children are a necessity of the various elements and elements that exist in this country. So that the welfare of children will be maintained, considering that children are one of the valuable assets for the progress of a nation in the future.

In terms of quality, protection for children should have the same degree and level as protection for adults. Everyone has the same position before the law (equality before the law). The state must play an active role together with the whole community to realize and provide adequate protection to children from various forms of violence and manipulation by irresponsible people who use children as vehicles for their crimes so that children as the next generation of the nation can stand firmly in entering an increasingly harsh life in the future.

The Development Of An Islamic Paradigm That Is Friendly To Women And Children

Islam has opened a space for universalism about basic human rights. Islam has broken down the gates and freedwomen and children from the shackles of ignorance, where women and children are treated as property, without the slightest right to themselves. The basic Islamic concept of Human Rights (HAM) has existed for a long time even before the concept of human rights in Western countries was born. The concept of basic rights already exists in the body of Islam itself, as taught by the Prophet Muhammad. The concept of respect for humans can be found in Islamic sources, namely the Al-Quran and Al-Hadith.[13] Al-Qur'an and Hadith are sources of Islamic teachings that have characteristics that cover all aspects of human life. It not only regulates human relations with Allah SWT but also regulates human relations with each other and with the natural environment.

[12] Yesika, "Eksploitasi Anak Dalam UU Perlindungan Anak Menurut Perspektif Hukum Islam.", p.3.

[13] Nazar Naamy, "Hak Asasi Perempuan Dalam Islam," *Qawwam* 12, No. 2 (2018): 103–12, Https://Doi.Org/10.20414/Qawwam.V12i2.792.

Islamic teachings are comprehensive and universal for the welfare of all human life. Muslims are obliged to obey all the teachings of Islam, as a consequence of their faith and Islam.[14]

The characteristics of Islamic teachings are also humanist. It can be seen from the efforts to protect human rights as can be seen in terms of its vision, mission, and objectives, namely that Islam has the characteristics of not only prospering the life of the world or the hereafter but also prospering physically and spiritually as well as individual and social universally. Islamic teachings aim to maintain and protect all human rights, namely the right to life (*hifdz al-nafs*), the right to religion (*hifdz ad-din*), the right to think (*hifds al-aql*), the right to have offspring (*hifds al-nasl*), and the right to obtain, own and use property (*hifds al-mal*).[15]

The verses of the Qur'an in the context of protecting and respecting the rights of women as creatures of Allah SWT have clearly shown that Islam as a religion places all human groups in a balanced position. These verses are contained in Surah al-Isra verse 70 which means: *"And indeed We have honored the children of Adam. We raised them on land and sea, We gave them sustenance from the good and We gave them a perfect advantage over most of Our creations." (Q.S. al Isra: 70)* and also contained in the Qur'an surah al-Hujarat verse 13 which means "*O mankind, We created you from male and female and We made you into tribes and nations so that you may know each other. Verily, the most honorable of you in the sight of Allah is the most pious of Him*." *(Q.S. Al Hujurat: 13).*

The two verses above explain the nobility and equality of human dignity regardless of their background, skin color, gender, language, and so on. All humans in Islam are seen as equal and the superiority that humans have over other humans is only in the aspect of their closeness to Allah SWT.[16] Another statement in the Qur'an which explains most explicitly about the equality of rights and obligations between men and women is found in Surah al Ahzab verse 35 which means: *"Indeed, Muslim men and women, believing men and women, keep in obedience, men and women who are righteous, men and women who are patient, men and women who are humble, men and women who give charity, men and women who fast, men and women who keep their honor, men and women who mention (name) a lot.) Allah, Allah has provided forgiveness and a great reward." (Surat al-Ahzab: 35).*

From the historical aspect, women (especially in the Arabian Peninsula) in the era before the arrival of Islam had a low and contemptible position. In Ancient Egyptian society, the preferred woman was a woman who was scantily clad so that everyone could see her nakedness. At this time too, many women served as belly dancers for welcoming parties. Intercourse between women and men is also not bound by norms so that many women are harmed and their self-esteem is lowered. Then in the next period, namely in Babylonian culture, a woman must feel sleep with her king. How the glory of a woman is abolished, the wife also has to work full-time in her husband's house and when the wife is old and unattractive then the husband is invited to find a new wife.[17]The absence of giving rights and glorifying

[14] Supriyadi, "Kasus Perlindungan Hak Pendidikan Anak Dalam Tinjauan Hukum Islam Dan Ham," *Jie (Journal Of Islamic Education)* 3, No. 2 (2019): 221, Https://Doi.Org/10.29062/Jie.V3i2.102.

[15] Supriyadi.

[16] Naamy, "Hak Asasi Perempuan Dalam Islam.", p.103-112.

[17] Mashur Malaka, "Keterlibatan Perempuan Di Berbagai Aspek Dalam Perspektif Islam," *Shautut Tarbiyah, Ed. Ke-31 Th. Xx, November 2014*, No. November (2014): 65–79.

women's degrees continued until finally Islam came down and began to be spread in 610 AD.

Islamic teachings in the context of granting human rights to women, fully recognize and respect the position of women as creatures of Allah SWT. dignified. Islam was revealed as a carrier of mercy to all the world The fundamental values that underlie Islamic teachings such as peace, liberation, and egalitarianism include equality between all human groups, and this is reflected in many verses of the Qur'an. Stories about the important role of women in the time of the Prophet Muhammad, such as Khadijah, Siti Aisyah, and others put women in an equal position. The same applies to his attitude which respects women and treats them as partners in the struggle.[18] According to Faqihuddin Abdul Kodir, that Friends of Umar bin Khattab r.a. stated on various occasions that *"By Allah, we at the time of Jahiliyah never took women into account. Then Allah sent down some verses about them and gave them rights. We realized then that it turns out that they also have autonomous rights in which we can no longer intervene."* (Hadith of Bukhari, book 77, chapter 31, no. 5843).[19] Islam has removed all forms of injustice that befell women and raised their status as human dignity. Equality between humans, both male, and female, ethnicity, nation, and lineage is the essence of Islamic teachings and the only difference between Muslim all around the world in front of Allah is their piety. Islamic teachings essentially give great attention and respect to women. Unfortunately, the position of women in the view of Islamic teachings currently are not practiced by society.

However, until now there are still many Muslims who are trapped in misinterpretations and perspectives regarding the position of women in Islam. There are still many who think that women are placed in a position below men based on interpretations and understandings that are based on teachings on the procedures and ethics of women in the household like women need to ask permission from their husbands when they want to leave the house while husbands are not burdened with the same thing. , women are obliged to obey their husbands while husbands do not need to obey their wives, divorce is in the hands of the husband, not the wife, and other forms of obligations in the household. These things are finally interpreted and generalized that women in the eyes of Islam will always be in an inferior position compared to men. Whereas this kind of interpretation cannot be justified because the superiority of a man is only found in domestic matters for the sake of harmony in the family.

Regarding problems and other aspects of social life, Islam does not limit and restrain women's steps in developing their potential. For example, women's rights in politics, women's rights in choosing a livelihood, as well as women's rights to education and other women's human rights have been clearly stated that rights are fully in the hands of women. One of the verses that are often raised by Islamic thinkers about gender equality and women's human rights is taken from the Qur'an Surah at-Taubah verse 71: which means *"The believers, both men, and women, are allies of one another. They enjoin good, forbid evil, establish Prayer, The believers, both men, and women, are allies of one another. They enjoin good, forbid evil, establish Prayer, pay Zakah,*

[18] Lili Zakiyah Munir, *Memposisikan Kodrat Perempuan Dan Perubahan Dalam Perspektif Islam* (Bandung: Mizan, 1999).

[19] Naamy, "Hak Asasi Perempuan Dalam Islam.", p.103-112..

and obey Allah and His Messenger. Surely Allah will show mercy to them. Allah is All-Mighty, All-Wise.".[20] In general, this verse is understood as a description of the obligations for men and women in various fields of life as outlined in an order to do what is right and prevent what is evil.

In the context of providing protection and rights for children, the seriousness of Islam in dealing with the status of children is increasingly legitimate with the many verses of the Qur'an that discuss the status of children. Islam's alignment with child protection is a priority. The instruments related to this seem to have been neatly arranged and arranged to create a generation of good human beings and be merciful *Lil 'Alamin*. Therefore, the protection of children has also been taught from an early age, namely by giving the right to life to the fetus that is in the mother's womb before it is born. This is illustrated in the word of Allah Q.S. Al-An'am verse 140 means *"Indeed those who kill their children lose because they are ignorant and do not know and they forbid what Allah has provided for them by merely inventing against Allah. Verily they have gone astray and they have not been guided." (Q.S. al-An'am: 140).*

The Qur'an is full of stories about children, especially pious children who are descendants of the Prophets. There is the story of the little Prophet Ismail in the letter Asshoffat, the story of the little Prophet Yusuf in the letter Yusuf, and the story of Luqman's advice to his son in the letter Luqman. All of these stories convey messages about education and child protection. A child will be a gift or a favor when his parents succeed in educating him to be a good and devoted person. If parents fail to educate the child, it is not a gift or a favor but a disaster for the parents. Allah SWT in the Qur'an has mentioned the child as the jewel of the world's life, as a cooler for the eyes or the jewel of the heart of his parents. At the same time, Allah also reminds us that the child is a test for his parents, and sometimes the child can even turn into an enemy of his parents. In the Qur'an, there are four typologies of children:[21]

a. Children as Jewelry Living in the World
   Children are jewelry in domestic life. In the Qur'an Surah Al-Kahf verse 46, it is stated which means *"Wealth and children are the adornments of the life of the world, but* eternal *and righteous deeds are better in reward with your Lord and better for hope." (Q.S. Al-Kahf: 46).* This verse states, that the child serves as a decoration that beautifies a family. The cry of a baby, the whimper of a child asking for something, his funny chatter, the limping of a child's steps are beautiful sights in a family. Husband and wife always feel less than perfect life, if they do not have children. The perfection and beauty of the household can only be felt if there are children in it.
b. Children as Cooling
   The Qur'an also states that the child is a cooler for the eyes of the heart (*qurrata a'yun*). It is said so because when the eyes look at a child there will be a feeling of happiness. Children are a priceless treasure for parents. Allah also mentions the human child as a cooler of the heart and teaches us a prayer so that the child who is born becomes a cooler for his parents in QS: Al-Furqan:

[20] Djamila Usup, "Kedudukan Dan Perlindungan Hukum Terhadap Perempuan Dalam Islam," 2005, p.5.
[21] Zaki Ahmad, "Perlindungan Anak Dalam Perspektif Islam," *ISLAMICA: Jurnal Studi Keislaman* 4, no. 1 (2014): 143, https://doi.org/10.15642/islamica.2009.4.1.143-153.

74 which means *"Our Lord, bestow upon us our spouses and our descendants as a conditioner and make us leaders of those who are pious." (Q.S. Al-Furqan: 74).*

c. Child as a Test

Al-Qur'an Surah Al-Anfal verse 28, Allah says which means *"Know that your wealth and your children are only a test." (Q.S. Al-Anfal: 28)* Also in QS: Al-Munafiqun verse 9, Allah reminds every believing parent which means *"Do not let your wealth and your children distract you from the remembrance of Allah." (Q.S. Al-Munafiqun: 9).* Children in the perspective of the Qur'an, function as jewelry for life and conditioning the heart, in fact, they are a test for their parents. With the favor of children, parents are tested by Allah SWT, whether to take their children to the road to hell or the road to heaven. If parents succeed in educating and fostering their children to be pious and devoted children, it means that their parents have passed the test. On the other hand, if his parents love their children so much that they neglect to remember Allah, it means that they have failed the test that Allah has given them. Failure must be accounted for before God later.

d. Children as Parent's Enemy

If parents are wrong and wrong in educating their children, then the child will become an enemy to his parents. This is what the Qur'an Surah At-Taghabun verse 14 implies which means *"O you who believe, verily among your wives and your children are enemies to you, so be careful with them." (Q.S. At-Taghabun: 14).* According to this verse, children can become enemies of their parents when they no longer obey their parents or their religious rules. For example, children are already deeply involved with crime and are difficult to stop. When parents advise, the child does not listen and even opposes. A child who apostates because he married someone of a different religion, is also an enemy to his parents. A child who has been influenced by immoral acts, such as alcohol, drugs, gambling, adultery, becomes a friend to Satan and an enemy to a believing parent. When that happens, children have become a source of disaster for a family and society. So that children no longer bring happiness, but cause suffering to their parents.

Strictly and clearly, Islam has given instructions to its people to protect their children. More specifically, Islam never mentions and mentions gender differences and the sex of a child. That is, all children get the same portion and rights to be protected for the development and growth of children naturally, both physically and mentally, and socially. This is intended so that later in life the parents do not leave weak offspring.[22] Therefore, the seriousness of Islamic law on child protection is absolute and is a very original sacred teaching originating from divine revelation long before the emergence of the foundation or foundation of positive legal instruments related to the protection of children throughout the world.

Children in Islamic teachings have a "special" position. Children have a broad meaning and scope, namely children are entrusted by Allah to their parents, society, nation, and the state as heirs of Islamic teachings which will prosper the

[22] D W I Hilana Yesika, "Eksploitasi Anak Dalam UU Perlindungan Anak Menurut Perspektif Hukum Islam," 2014.

world as *rahmatan lil 'alamin*.[23] Therefore, children's rights must be recognized and believed in and secured as the implementation of practices accepted by children from their parents, society, nation, and state. In the context of interpreting obligations and granting rights to children, Islam has regulated it in such way. This is described in the hadith of the Prophet Muhammad which means *"From Zabri he said, I heard Anas bin Malik say; An old man came to the Prophet sallallaahu 'alaihi wasallam and people slowed down to widen the path for him, so the Prophet sallallaahu 'alaihi wasallam said: "It is not from our group who does not love our little children and does not respect our parents (adults)."* (HR. Tirmidhi No. 1842).

Allah commands his servants not to leave their children weak because basically, they have rights that must be fulfilled by their parents. Broadly speaking, children's rights are grouped into seven types:[24]

a. Children's rights before and after birth
b. Children's rights in the sanctity of descent. This is the most important thing because the clarity of lineage will greatly affect developments in the next period. As in QS Al-Ahzab verse 5 which means *"Call your adopted sons after their true fathers; that is more equitable in the sight of Allah. But if you do not know their true fathers, then regard them as your brethren in faith and as allies. You will not be taken to task for your mistaken utterances, but you will be taken to task for what you say deliberately. Allah is Most Forgiving, Most Compassionate."(Q.S. Al-Ahzab: 5).*
c. The right of the child to give a good name.
d. The right of the child to receive breastfeeding. As in QS. Al-Baqarah verse 233 means *"If they (i.e. the fathers) wish that the period of suckling for their children be completed, mothers may suckle their children for two whole years. (In such a case) it is incumbent upon him who has begotten the child to provide them (i.e. divorced women) their sustenance and clothing in a fair manner. But none shall be burdened with more than he is able to bear; neither shall a mother suffer because of her child nor shall the father be made to suffer because he has begotten him. The same duty towards the suckling mother rests upon the heir as upon him (i.e. the father). And if both (the parents) decide, by mutual consent and consultation, to wean the child, there is no blame on them; if you decide to have other women suckle your children there is no blame upon you, provided you hand over its compensation in a fair manner. Fear Allah and know well that Allah sees all that you do." (Surat al-Baqarah: 233).*

This responsibility is truly the responsibility of parents as God's command to protect themselves and their families from the fire of hell. As the Word of God in QS. At-Tahrim verse 6 which means *"O you who believe, protect yourselves and your families from the hellfire whose fuel is people and stones; guardians of the angels who are harsh, harsh, and do not disobey Allah in what He commands them and always do what is commanded." (Surah At-Tahrim: 6).*

Based on the above verses, parents must love their children and the parent's right is to get respect. Talking about rights, there must be obligations on the other

[23] Iman Jauhari, *Advokasi Hak-Hak Anak Ditinjau Dari Hukum Islam Dan Peraturan Perundang-Undangan* (Medan: Pustaka Bangsa, 2008).
[24] Yesika, "Eksploitasi Anak Dalam UU Perlindungan Anak Menurut Perspektif Hukum Islam.", p.11.

side. Children's obligations are respect for both parents and their right is to get love. This principle is ideally inseparable.[25]

However, there are still many cases where parents have the heart to kill their biological children because of economic factors. Islam in this case has taught that children must be cared for properly, which is why it is forbidden to kill their children under any circumstances, especially for fear of suffering (poor). As mentioned in the Qur'an Surah Al-An'am verse 151 which means *"Say to them (O Muhammad!): 'Come, let me recite what your Lord has laid down to you: that you associate nothing with Him; and do good to your parents, and do not slay your children out of fear of poverty. We provide you and will likewise provide them with sustenance, and do not even draw to things shameful - be they open or secret, and do not slay the soul sanctified by Allah except in just cause; this He has enjoined upon you so that you may understand.". (Q.S. Al-An'am: 151).*

Children in the view of fiqh, are both a gift and a trust. Therefore, parents must take care and maintain it properly. Islam denounces the jahiliyyah tradition of killing their children because of economic hardship. Allah SWT says in QS. al-An'am verse 151 which means *"Do not kill your children for fear of poverty. We will provide sustenance to you and them; And do not approach the abominable deeds, both visible and hidden, and do not kill the soul which Allah has forbidden (killing it) except with what is right." That is what your Lord has commanded you so that you may understand. (his)." (Surat al-An'am: 151).*

Hanafi and Maliki scholars say that raising, caring for, and educating children is the right of the mother or her representative, she may abort this right even without compensation. According to the majority of scholars, hadanah is a shared right between both parents and children. According to Wahbah al-Zuhaili in the Encyclopedia of Islamic Law, the right of hadanah is the right of association between mother, father, and child. If there is a conflict between the three, then the priority is the rights of the child being cared for.[26] The Prophet sallallaahu 'alaihi wasallam said: *"From Abdullah bin Amr: There was a woman asked the Messenger of Allah, "O Messenger of Allah, my son used to come out of my stomach, my milk was as a spray for him, and this mare was for him as property. His father has now divorced and wants to ask for it." this child from me." The Messenger of Allah then said to the woman, "You are more entitled to your child as long as you are not married."* (Narrated by Abu Dawud).

If the child does not receive care from his parents, relatives, or substitute family, the last alternative is care based on a child social welfare institution that acts as a temporary substitute for parents for children who are placed in institutions and fulfills their rights. From this situation, it is feared that the child's condition is threatened if left unchecked, then the law to take it is *fard kifayah* in the opinion of the majority of scholars. If the child is taken by one of the community members, then the sins of the people fall. if all of them let it. Then all of them will sin. This is because saving abandoned children is included in the case of good deeds that are highly demanded by Islamic teachings.[27]

[25] Supriyadi, "Kasus Perlindungan Hak Pendidikan Anak Dalam Tinjauan Hukum Islam Dan Ham.", p.8.

[26] Yesika, "Eksploitasi Anak Dalam UU Perlindungan Anak Menurut Perspektif Hukum Islam.", p.15.

[27] Yesika.

Conclusion

Islamic teachings place great emphasis on equality and justice in viewing all human groups. Historical research can also be a reflection of how the arrival of Islam at that time changed the paradigm regarding the position of women and children in the construction of the social order of pre-Islamic Arab society at that time which still considered women and children to be only "objects" of ownership of men who could be treated as they pleased. heart. For this reason, even harder efforts are needed to show and build a paradigm that Islam does not place women and children in a subordinate position or an inferior position compared to other social groups. It takes the efforts of scholars, religious experts, and Muslims themselves in forming a construction of the wheel of social life that can become a picture and a reflection that in essence, Islam is a religion that is gracious to women and children.

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Yusuf al-Qardawi and Hybrid Methods in Determination Beginning of the Months in Islamic Calendar

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Abstract:

Based on the opinion of the majority of scholars, both from the mutaqaddimin and mutaakhirin circles, they agree that determination of the entry of the new month in the Islamic calendar must be based on the results of observations of the new moon or better known as ru'yat al-hilal. Yusuf Qardawi is one of the scholars who agree with the above opinion, but what is interesting is that on another occasion he was of the opinion that Hisab falaki can also be used as the basis for determination of the entry of the new month in the Islamic calendar. It is Yusuf al-Qardawi, one of the scholars and thinkers of contemporary Islamic law who contributed his thoughts and views on this issue. As an adherent of moderate ideology, he tried to combine reckoning and rukyah in determination of the entry of the new month in the Islamic calendar. The conclusion from his view is to keep ru'yah as the first and main reference in determination of the entry of the new month in the Islamic calendar and use hisab when in certain cases (cloudy) and make it a tool to deny the existence of impossible ru'yah claims based on considerations of imkan al-ru'yah (visibility of the moon) agreed upon by astronomers

Keywords: Islamic calendar; astronomy; hybrid method.

Introduction

The importance of *hisab-rukyat* activities for Muslims is increasingly felt, especially when it is associated with the implementation of Worship. For example, to get the accuracy of the times of entering and leaving prayer times, determining the direction of the Qibla, the beginning of the calendar of Ramadan, Syawal and Zulhijah. Where in these calendars, Muslims perform the obligation of fasting Ramadan, celebrating Eid al-Fitr, and celebrate Eid al-Adha, even with falakiyah activities it can be predicted when an eclipse will occur to perform eclipse prayers.

Meanwhile, the reality on the ground, regarding issues related to differences in the initial determination of the entry of the new month in the Islamic calendar, especially the three important months in Islam; Ramadan, Shawwal and Zulhijah are problems of accuracy and data calculations that need to be carried out simultaneously with scientific and shari'ah approaches.

It can be said that the problem of determination of the entry of the new month in the Islamic calendar is a classic problem that has not been resolved until now. Previously in the era of the 70-80s the debate on the determination of the entry of the new month in the Islamic calendar only occurred in the two largest religious organizations in Indonesia, namely NU and Muhammadiyah where the difference in the determination of first day of the month Ramadan, Syawal and Zulhijah was usually only one day apart, but now the difference in the determination of the beginning of these months has become more than 3 different days. This is because there are many schools and religious organizations in Indonesia that have different methods and criteria for determination of the entry of the new month in the Islamic calendar and each claiming and believing that their method is the most correct and in accordance with the guidance of the Qur'an and the Prophet's Hadith.

Indonesia is a country that is rich in diversity, including in the determination of the entry of the new month in the Islamic calendar, especially three important months in Islam; Ramadan, Syawal and Zulhijah which are different. On the one hand, this difference may be an indication that the development of astronomy or *hisab-ru'yat* in Indonesia is experiencing development and progress because there is a scientific dialogue that has been built in society, but on the other hand it could be an indication that people who understand astronomy are also fiqh or Islamic law, especially fiqh *hisab-rukyat* is rarely found in Indonesia.

Based on the opinion of the majority of scholars, both from the *mutaqaddimin* and *mutaakhirin* circles, they agree that the determination of the entry of the new month in the Islamic calendar must be based on the results of observations of the new moon or better known as *ru'yat al-hilal.* Yusuf Qardawi is one of the scholars who agree with the above opinion, but what is interesting is that on another occasion he was of the opinion that *Hisab falaki* can also be used as the basis for determining the beginning of the months in Islamic calendar. This is what attracted researchers to conduct research on Yusuf Qardawi's views on the determination of the entry of the new month in the Islamic calendar, which according to the initial assumptions of the researchers was moderate and took the middle way by combining *hisab* and *ru'yat*. And this is what is then expected to be a solution for the unification of the early Islamic calendar in Indonesia.

Results and Discussion

Two Approaches to the Unification of the Beginning of The Months in Islamic Calendar

Efforts to unify the determination of the entry of the new month in the Islamic calendar there are at least two approaches that can be taken: First, the method formulation approach. In the context of efforts to unify the determination of the entry of the new month in the Islamic calendar, especially Ramadan, Syawal and Dhulhijjah, actually since the birth of these differences, compromises have been made and the formulation of methods that can be agreed upon by all parties, whether from the reckoning group, *rukyah*, global region or *wilayat al-hukmi*, but until At this moment there is no agreement on the method used. As long as each party continues to prioritize their ego, it is difficult to find them in a method that can be agreed upon or it will not even be possible to find a single agreement until now.

However, even so, efforts to find the right method and criteria to be accepted by all parties and remain in the corridor of *syar'iyah* (religious guidance) and scientific must still be carried out. One of the efforts made by the government in this case, the Ministry of Religion of the Republic of Indonesia through the BHR (Badan Hisab Ru'yah) to bridge these differences is to create a criterion called Imkan al-Ru'yah (Hilal visibility). In the calendar of Zulqadah 1418 coinciding with March 1998 the scholars of *hisab* and *rukyah* and representatives of Islamic community organizations held a meeting on the criteria for *imkan al-rukyah* for Indonesia where the decision of the deliberation was determined on Monday 7 Jumadil Akhir 1418 H/ 28 September 1998.[1] The results of the decision are as follows:[2] (a) Determination of the entry of the new month in the Islamic calendar is based on the essential reckoning system of *tahkiki* and or *rukyah*, (b) Determination of the entry of the new month in the Islamic calendar related to the implementation of *mahdhah* worship, namely the beginning of Ramadan, Syawal and the beginning of Zulhijah is determined by taking into account the hisab the essence of *tahkiki* and *rukyah*, (c) *rukyah* testimony can be accepted if the height of the new moon is 2 degrees and the distance of ijtima to the sun set or the age of the new moon is at least 8 hours, (d) the witness of the *rukyah* of the new moon cannot be accepted if the height of the new moon is less than two degrees then the beginning of the months in Islamic calendar is determined based on *istikmal*, (e) If the height of the new moon is two degrees or more, the beginning of the months in Islamic calendar can be determined, (f) the criteria for Imkan al-Rukyah mentioned above will be carried out further research. Calling on all leaders of Islamic community organizations to socialize this decision, (g) In carrying out the *isbat* session, the government listens to the opinions of Islamic community organizations and experts.

The existence of the *Imkan al-Rukyah* criteria in Indonesia was actually adopted from the decision of the MABIMS Alignment of Rukyah and Islamic Taqwim committee (Ministers of Religion of Brunei, Indonesia, Malaysia and Singapore). The criteria for *Imkan al-Rukyah* is an offer from the Government in order to unite differences of opinion in *hisab rukyah* in Indonesia (in this case the Determination of the entry of the new month in the Islamic calendar specifically of Ramadan, Syawal Zulhijah).

The need for the *Imkan al-ru'yah* criteria aims, among others, to:[3] First, for *rukyah* experts, to eliminate the possibility of seeing the *Hilal* incorrectly. As in the 1998/1418 case: Based on the MABIMS criteria, PBNU rejected the testimony of Cakung and Bawean whose hilal was too low (calendar height 54', age ~ 3 hours). Case 2006/1427: Based on the criteria of *imkan ru'yah* Lajnah Falakiyah NU did not take Cakung and Madura because the *hilal* was too low of 1 degree.[4]

[1]Murtadho, Imkân al-Rukyat Dalam Penentuan awal Bulan Qamariyah: Perspektif Syariah dan Astronomi Manhaj Nahdlatul Ulama, El-Qisth Jurnal Hukum, (2007), 293-294
[2]Ahmad Izzuddin, Problematika Hisab Rukyat di Indonesia, makalah dipresentasikan pada Pendidikan keterampilan Khusus Bidang Hisab Rukyat, Ditjen Pendis Departemen Agama RI 2007
[3]T. Djamaluddin, Menuju Kreteria Hisab Rukyat Indonesia. Presentasi dalam Seminar Nasional HISSI 15 Januari 2010
[4]Thomas Djamaludin, Astronomi Memberi Solusi Penyatuan Umat, (Lembaga Penerbangan dan Antariksa Nasional: 2001), 11. Thomas Djamaluddin, Astronomi Memberi Solusi Penyatuan Ummat (Indonesia: Lembaga Penerbangan dan Antariksa Nasional (LAPAN), 2011), 18, dan

Second, for the reckoning expert, to be able to determine whether to enter the beginning of the months in Islamic calendar or not from the results of the calculation of the position of the new moon. Such as the 1998/1418 case: Muhammadiyah based on the criteria for form of hilal stipulates Eid al-Fitr on January 29, 1998. Exactly following the MABIMS criteria for establishing Eid al-Fitr on January 30, 1998. Case 2006/1427: Muhammadiyah based on the criteria for manifesting the hilal on Eid al-Fitr on October 23, 2006. Exactly on the basis of the criteria for manifesting the hilal The new moon throughout Indonesia set Eid al-Fitr 24 October 2006. Although this decision has been made jointly, there are still differences in Determination of the entry of the new month in the Islamic calendar. This approach does require a long process and time and it should be noted that the main factor of success through this approach is mutual openness and understanding of the thoughts and opinions of all parties by putting aside the egoism of each group.

Second, the Single Authority Approach. The easiest and fastest solution for the realization of the unification of the determination of the first 3 calendars is to use a single authority approach or the existence of a single authority agreement in the determination of the entry of the new month in the Islamic calendar specifically 3 important months. In this case, the government is considered and can have the authority to determine the first 3 calendars through the Ministry of Religion. Without limiting the space of thought and opinion of each group, the government must not be authoritarian in its decision to determination of the entry of the new month in the Islamic calendar specifically 3 important months, so there needs to be a procedure that must be passed, namely an open session attended by all elements and Islamic groups in Indonesia which results in mutually agreed decisions. , this has actually been done by the government by holding an *Istbat* session before setting 1 Ramadan, Syawal and Zulhijah. It was from the results of the *Itsbat* trial that the government determined of the entry of the new month in the Islamic calendar, but it became strange when not all groups obeyed and implemented the decision. This is what needs to be understood by all, especially astronomers and astronomers and especially the general public, that when a dispute or difference occurs, the government has the authority to resolve it in accordance with fiqh rules, which means that the ruler's decision can eliminate disputes.[5] So that people are not confused by differences, there needs to be an agreement that the only one who has the right to determine 1 Ramadan, Syawal and Zulhijah is the Government and the only one who must be followed. People will feel more calm and solemn when carrying out worship when the realization of unity and unity in the determination of the entry of the new month in the Islamic calendar and this is what is expected. This calm and humility is a *maslahah* that should be embraced and realized rather than putting forward opinions: differences are grace (*ikhtilaf ummati rahmah*). And it would be better to unite than to be different because getting out of differences is loved or sunnah in accordance with the rules of fiqh, which means that getting out

Keputusan Menteri Agama Republik Indonesia tentang Pembentukan Pengurus Badan Hisab dan Rukyah Kementerian Agama (Nomor 56 Tahun 2010),Muchtar Ali et al., Buku Saku Hisab Rukyah, (Jakarta: Kementerian Agama RI, 2013), 396

[5]Ali ibn Muhammad al-Amidiy, al-Ihkam fi Ushul al-Ahkam, Juz.4, (Beirut : Dar al-Kitab al-Arabiy, 1404 H), 313. Lihat juga Lihat Wahbah Zuhaili, Al-Fiqh al-Islamiy wa Adillatuh, juz 3 (Damaskus: Dar alFikr, tt), 39

of disputes takes precedence.[6] Therefore, in this case the concept of *maslahah* will be more appropriate when put forward in resolving this polemic.

Yusuf al-Qardawiy's views on *Rukyat* and *Hisab*

Islami has made it easy for its people to carry out various rituals of worship and intermediary according to the level and context.[7]Included in the determination of the entry of the new month in the Islamic calendar as intermediary to know when to start and end Ramadan fasting[8] and the time of performing *wukuf* in Arafah for pilgrims. In this case, Islam provides the easiest and contextual way, namely by using *rukyat al-hilal*[9] by seeing the sighting of the new moon directly, as a way to find out the end of the calendar of Syaban and the entry and end of the month of Ramadan and when it is time to perform *wukuf* in Arafah.[10]

If Islam at that time dictated reckoning as a way of knowing and determining the beginning of the months in Islamic calendar related to the implementation of the worship of the people, it would certainly be burdensome because of the context that the people at the beginning of Islam at that time did not know the science of astronomy or reckoning. Even astronomy at that time was better known as astrology, which in society had a negative connotation because it was related to predictions that had mystical and non-logical nuances. One of the lessons of tasyri' in determination of the entry of the new month in the Islamic calendar with *rukyat al-hilal* according to Yusuf al-Qardawiy is a form of mercy for the people so that the people at that time are not given demands that are beyond their ability to *mafhum mukhalafah* when they are given a burden that they cannot control. it is feared that they will flee from Islam and return to the religious beliefs of their ancestors.[11]

Along with the changing times, science and technology also develops and progresses, including in the field of astronomy or astronomy where astronomy has become an independent scientific discipline. With a long course of time, people make observations or ru'yat, of course, then people can make conclusions and concepts or theories related to the results of their observations. Analysis and predictions about the movement of celestial bodies in the next tens or even hundreds of years can be obtained easily and have a very high level of precision. So that reckoning experts consider it sufficient to use reckoning as a determinant of the entry of the new moon, because if it is proven then the reckoning results are very accurate and almost close to or even the same as the empirical reality resulting from the observation or ru'yah process.

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[6]Abd al-Rahman ibn Abi Bakr al-Suyuthi, Al-Asybah wa al-Nadha'ir, (Beirut : Dar al-Kutub al-Ilmiyah, 1403H), 136

[7]Yusuf al-Qardawi, Kaif Nataʻamal Maʻa al-Sunnah al-Nabawiyyah: Maʻalim wa Dawabit, (Virginia: IIIT, 1990) 146. lihat juga Yusuf al-Qaradawi, Sunnah: Sumber Ilmu dan Peradaban, terj. Muhammad Firdaus, (Selagor Darul Ehsan: International Institute of Islamic Thought dengan Thinker's Library SDN.BHD., 2000), 32

[8]Yusuf al-Qardawi, Kaif Nataʻamal Maʻa al-Sunnah al-Nabawiyyah, 146-154

[9]Muhammad ibn Ismail Abu Abd Allah al-Bukhariy, Sahih al-Bukhariy, Vol. 2 (tt: Dar Tauq al-Najah, tt), 27. Hadith Nomor 1909

[10]Yusuf al-Qardawi, al-Hisab al-Falaky wa Ithbat Awa'il al-Shuhur, makalah diarmbil dari situs Yusuf al-Qardawi www.qaradawi.net. Yusuf al-Qardawi, Siyasah Al-Shari'iyah, (Mesir: Maktabah Wahbah, 1419 H), 56

[11]Yusuf al-Qardawi, al-Hisab al-Falaky wa Ithbat Awa'il al-Shuhur

And the existence of reckoning is actually the result of a process that begins with observation. With the discovery of the Spherical Trigonometry formula in mathematics, it is easier for people to be able to accurately predict when the beginning of the months in Islamic calendar will enter. Supported by advances in computing technology, it is easier for people to know and determine the entry of the new moon. This then makes people think practically to determine when the date change will occur so that they (read: reckoning experts) are content with the results of their calculations.

According to Yusuf al-Qardawi, because of the extraordinary development of astronomy, Muslims certainly cannot turn a blind eye. Therefore it is appropriate to consider the reckoning in determination of the entry of the new month in the Islamic calendar. The hadith previously stated was very contextual where at that time the people were still unfamiliar with the science of astronomy or reckoning.[12]The context, it used to be different from now where not a few people who understand and understand the science of reckoning. The question is whether it is not permissible to use reckoning in determination of the entry of the new month in the Islamic calendar.

On the one hand al-Qardawi provides a great opportunity for reckoning in determining the beginning of the months in Islamic calendar on the pretext of contextual interpretation of hadith, but on the other hand al-Qardawi argues that *hisab* can be used only in certain cases, for example in cloudy conditions, on the basis of the hadith narrated by Abu Dawud.[13] This opinion actually follows the opinion of Mutarrif ibn al-Shikhkhir, one of the leaders of the Tabi'in.[14] Or *hisab* can be used only to the extent of denying the recognition or claim of ru'yat al-hilal where astronomically or the celestial moon is impossible or impossible to see.[15]

The first impression from the reading of al-Qardawiy's view on the determination of the entry of the new month in the Islamic calendar, it appears that Yusuf al-Qardawiy is inconsistent with his own opinion. It can be seen from the efforts to interpret the hadith contextually where reckoning should be prioritized in determination of the entry of the new month in the Islamic calendar for today, but on the other hand he remains on the *jumhur* opinion regarding the determination of the entry of the new month in the Islamic calendar with *rukyat al-hilal*.

However, according to the researcher's analysis, al-Qardawiy actually wants to accommodate *hisab* in determination of the entry of the new month in the Islamic calendar even though in certain limits and cases there are clouds or fog by practicing other hadiths whose stressing point is on *faqduru* which he understands with *hisab*. And also *hisab* is used as a supporter of *rukyat* activities whose function is to deny the existence of ru'yat claims when according to astronomy or astronomy it is impossible to see the new moon. More firmly he said that reckoning was used only to deny the impossible claim of *rukyat* and not to establish (*ithbat*) the

[12]Yusuf al-Qardawi, al-Hisab al-Falaky wa Ithbat Awa'il al-Shuhur
[13]Stresing point pada lafaz faqduru dimaknai dengan hisab, lihat Abu Dawud Sulayman ibn Dawud ibn al-Jarud al-Tayalisy al-Basriy, Musnad Abi Dawud al-Tayalisy, Vol.3 (Mesir : Dar Hijr, 1999), 351
[14]Abu al-Walid Muhammad ibn Ahmad ibn Rushd al-Qurtuby, Bidayat al-Mujtahid wa Nihayat alMuqtasid, (Kairo : Dar al-Hadith, tt), 46-47
[15]Yusuf al-Qardawi, al-Hisab al-Falaky wa Ithbat Awa'il al-Shuhur

beginning of the months in Islamic calendar.[16] From here again Yusuf al-Qardawi is inconsistent with his statement where previously in the case of cloudy conditions, he agreed with Muttarif's opinion that reckoning could be a determinant of determining (*Ithbat*) of the entry of the new month in the Islamic calendar by considering *imkan al-rukyah* (*hilal* visibility). Apart from the controversy above, according to the researcher, Yusuf al-Qardawiy's view deserves attention and appreciation from all parties because basically what he expresses is in an effort to find a middle way[17] and synergize or combine *hisab* and *rukyat* in determination of the entry of the new month in the Islamic calendar.

Regarding the opinion and views of Yusuf al-Qardawiy regarding the determination of the entry of the new month in the Islamic calendar or *hisab rukyat*, according to the researcher, the absolute validity of *hisab* as a determinant in determination of the entry of the new month in the Islamic calendar is very possible so that views on the interpretation of the hadith regarding the determination of the entry of the new month in the Islamic calendar need to be studied in accordance with the context of the times and the situation. This is according to the researcher with the consideration that: first, there is the dynamics of the development of science and technology. Along with the changing times, science and technology also develops and progresses, including in the field of astronomy or astronomy where astronomy has become an independent scientific discipline. With a long journey of time, people make observations or ru'yah, of course, then people can make conclusions and concepts or theories related to the results of their observations. So that reckoning experts consider it sufficient to use *hisab* as a determinant of the entry of the new moon, because if it is proven then the reckoning results are very accurate and almost close to or even the same as the empirical reality resulting from the observation or *rukyat* process. And the existence of *hisab* is actually the result of a process that begins with observation. With the discovery of the Spherical Trigonometry formula in mathematics, it is easier for people to be able to accurately predict when the beginning of the months in Islamic calendar will enter. Supported by advances in computing technology, it is easier for people to know and determine the entry of the new moon. This then makes people think practically to determine when the date change will occur so that they (read: reckoning experts) are content with the results of their calculations. So it is not impossible that theoretical scientific data will be the same and in accordance with empirical facts in the field and even difficult to distinguish between one another.

Second, the existence of scientific facts about changes in natural conditions. Based on scientific facts that the movement of celestial bodies in their trajectory or orbit changes. Including the moon which is the object of determination of the entry of the new month in the Islamic calendar, where the moon turns out to be getting further away from the earth by $\pm$ 2-3 cm. If it is then accumulated from centuries of calculations, it will certainly be seen that the moon's journey away from our earth is significant. With such conditions, it will be difficult for people to make observations or *rukyat al-hilal* because the position of the new moon is getting further away from

[16]Yusuf al-Qardawi, al-Hisab al-Falaky wa Ithbat Awa'il al-Shuhur
[17]Where he is known as an adherent of the moderate manhaj or the middle way, bringing together two opposing things as long as they can still be synergized, see Al-Qardawy, Fatawa Mu'asyirah, (al-Qaherah: Dar al-Qalam, 2000), 19-20.

the earth. Coupled with the fact that the pollution on earth and in outer space is getting worse, so that observations of celestial bodies from the earth are not as clear as before the amount of pollution. Whereas in the success of *rukyat al-hilal*, one of the determining factors is natural or weather conditions. The *hilal* on the first day is so thin that it is very difficult for ordinary people to see (the naked eye), let alone the height of the *hilal* is less than two degrees. In addition, when the sun sets (sunset) on the western horizon, it still emits light in the form of a red light (*al-shafaq al-ahmar*). red light is what makes it difficult to see the moon itself in a new moon condition. The brightness or strength of the first phase of the new moon is less than 1% compared to the light of a full moon. The light of the new moon is very weak compared to sunlight and evening light, so it is very difficult to be able to observe the new moon whose light strength is less than that. In the air there are many particles that can block the sight of the new moon, such as fog, rain, dust, and smoke from urban lights. These disturbances have an impact on the view of the new moon, including reducing light, blurring the image and blurring the light of the new moon. Thus weather conditions are the dominant factor influencing the success of *rukyat al-hilal*. If the determination of the entry of the new month in the Islamic calendar is based on continuous ru'yah, then it is not impossible that the number of days for all calendars is istikmal 30 including Ramadan, Syawal and Zulhijah. The Messenger of Allah (SAW) for 10 years fasted Ramadan for 30 days only 1 or 2 times, the rest he carried out 29 days.

Conclusion

The problem of differences in the determination of the entry of the new month in the Islamic calendar, especially Ramadan, Syawal and Zulhijah, has not yet been completed and has ended. Various kinds of efforts and methods have been carried out by various groups, especially Islamic scholars and thinkers from time immemorial until now. It is Yusuf al-Qardawi, one of the scholars and thinkers of contemporary Islamic law who contributed his thoughts and views on this issue. As an adherent of moderate ideology, he tried to combine *hisab* and *rukyat* in determination of the entry of the new month in the Islamic calendar. The conclusion from his view is to keep ru'yah as the first and main reference in determination of the entry of the new month in the Islamic calendar and use *hisab* when in certain cases (cloudy) and make it a tool to deny the existence of impossible ru'yah claims based on considerations of *imkan al-rukyah* (visibility of the moon) agreed upon by astronomers and astronomers.

Recomendation

Yusuf Qardawi's views as described in this study, although not fixed and actually still debatable, should be taken into consideration in resolving differences in the determination of the entry of the new month in the Islamic calendar for the time being at this time. It would be right and wise that Yusuf al-Qardawiy's views could be accepted by all groups so that the unity and unity that became the symbols of Islam were getting stronger which in the end the religious rites performed by Muslims were more valuable and weighty (*khusyu'*).

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المعاصرة في قانون الأسرة

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الولايات المتحدة الأمريكية

مؤتمر

التفسير القانوني المعاصر : تعددية الآفاق

كلية الشريعة - جامعة مولانا مالك إبراهيم الإسلامية

مالانج - إندونيسيا

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بسم الله الرحمن الرحيم

تقديم

الحمد لله رب العالمين ، والصلاة والسلام على سيدنا محمد رسول الله ، وعلى آله وصحبه أجمعين ، وبعد: فبناء على الطلب من سعادة عميد كلية الشريعة -جامعة مولانا مالك إبراهيم الإسلامية - مالانج - أندونيسيا ، المتضمن طلب الاشتراك ببحث لمؤتمر " التفسير القانوني المعاصر : تعددية الآفاق " فقد اخترت موضوع:

" المعاصرة في قانون الأسرة "

لبيان ما صدر من العلماء والفقهاء المعاصرين في موضوع أحكام الأسرة المسلمة المعاصرة ، لما يمتاز به هذا الموضوع من **الأهمية** من ناحيتين ، **الأولى** : أن أحكام الأسرة تحتل مكاناً مرموقاً في المجال الشرعي، بدءاً من القرآن الكريم الذي عرض أحكامه في آيات كثيرة جداً ، لتنظيم شؤون الأسرة في الحياة ، واعتمادها الركيزة الأساسية للمجتمع المسلم ، فبين أحكام النكاح مفصلة ، ثم أحكام الطلاق وما يشبهه ، والأحكام المتفرعة عن النكاح والطلاق ، وفي مقدمتها رعاية الأولاد ، والنفقة ، وحتى الميراث ، وجاءت السنة الشريفة لبيان ذلك ، والإضافة إليه ، نظرياً وعملياً في الأحاديث القولية والفعلية والتقريرية في سنته المطهرة ، وسيرته العطرة ، وقام الفقهاء بدورهم المبارك في تفصيل أحكام الأسرة في جميع جوانبها ، ودونت أعمالهم الخالدة في كتب الفقه المتعددة ، **والناحية الثانية** : أن أحكام الأسرة هي الأحكام الشرعية الوحيدة – تقريباً - التي ما تزال مطبقة في العصر الحاضر في معظم البلاد الإسلامية ، وحظيت بالتنظيم والتقنين بصدور قانون حقوق العائلة وقوانين الأسرة أو الأحوال الشخصية ، بدءاً من قانون حقوق العائلة العثماني ، وما يليه من القوانين التي تضمنت اجتهادات العلماء المعاصرين ، وهنا مربط الفرس ، لاختيار هذا الموضوع اليوم ، لبيان التفسير المعاصر فيه .

ويتحدد **منهجنا باستقراء** أهم المسائل الجديدة في أنظمة الأسرة وقوانين الأحوال الشخصية ، مما يحقق مقاصد الشريعة ، ويرعى مصالح الأسرة المعاصرة في التزام الأحكام الشرعية التي تتفق مع العصر الحاضر ، وتواكب حاجات المسلمين بحسب واقعهم في القرنين الرابع عشر والخامس عشر الهجريين ، أو القرنين العشرين والحادي والعشرين الميلاديين ، **والتتبع للآراء** والأقوال والاجتهادات الصادرة من علماء الأمة في هذا الخصوص ، سواء صدرت بشكل جماعي أم فردي ، وسواء ت الموافقة عليها رسمياً واعتمدت في الأنظمة أو في بعضها ، أم لم يؤخذ بها رسمياً ، ولا تزال في حيز التداول ، وسطرت في الكتب والمؤلفات، ويمكن الرجوع إليها عند الحاجة ، ونعرض هذه المستجدات ونبين دليلها ووجهة النظر فيها وصلاحيتها للحياة والتطبيق ، مع بعض **المقارنة** فيها .

وجاءت **خطة البحث** في مقدمة ، وتمهيد ، وثلاثة مباحث ، المبحث الأول : الأحكام المعاصرة في النكاح ، المبحث الثاني : الأحكام المعاصرة في الطلاق ، المبحث الثالث : الأحكام المعاصرة فيما يترتب على النكاح والطلاق ، كالنفقة ، والنسب ، والميراث ، والخاتمة في نتائج البحث ، وتوصياته ، وعرض أهم المصادر والمراجع .

التمهيد : المبادئ العامة والأصول المعتمدة في أحكام الأسرة في الشريعة الإسلامية

نعرض في هذا التمهيد بعض الجوانب المهمة المتعلقة بموضوع البحث ، وهي :

أولاً : أنواع الأحكام الشرعية :

سبقت الإشارة إلى عناية القرآن والسنة بأحكام الأسرة ، وأنها تناولتها بإسهاب ، ولكن منهج القرآن والسنة عرضت هذه الأحكام - كسائر أحكام الشرع - بطريقتين ، **الأولى** : بيان بعض الأحكام تفصيلاً ، وهي غالباً قطعية الثبوت والدلالة ، وهي ثابتة لا

تتغير ولا تتبدل نهائياً ، ولا تقبل الاجتهاد والخروج عنها ، وهي مقررة على المسلمين منذ زمن البعثة ، ويتواصل تطبيقها في جميع الأزمان والأماكن ، وحتى تقوم الساعة ، ولا مجال فيها لدعوى المعاصرة والتجديد ، خلافاً لما تسعي إليه مؤتمرات المرأة العالمية التي تهدف للغزو الفكري ، ومحاربة الإسلام أصلاً ، وتهدف إلى إفساد الأسرة المسلمة وهدمها ، وتدميرها ، ، ونبذ الشعارات الخادعة والبراقة ، مثل : دعوى المساواة بين المرأة والرجل ، والعنف أو الاغتصاب الزوجي ، ولذلك لقيت الإنكار والاستنكار من جماهير المسلمين ، مع رفضها ، ومحاربتها ، وعدم قبولها مطلقاً ، إلا من شرذمة موالية لأعداء الله ، ومتابعة للمستشرقين ، ومأجورين ، بل وعملاء للجهات الأجنبية التي تخطط وتتآمر على الأمة الإسلامية ، **الطريقة الثانية** : تقرير المبادئ العامة ، والقواعد الأساسية للأحكام ، وترك التفصيل ومبادئ التطبيق للاجتهاد من العلماء المختصين في الفقه ، وللحكام والخلفاء المسلمين الذين يتولوا أمر المسلمين لإقامة الشرع ، ورعاية الدين ، وصيانة الدنيا ، واختيار الأصلح والصالح ، بناء على أصول الاستصلاح ، أو المصلحة المرسلة التي تحقق مصالح الأمة ، أو الاستحسان في ترجيح أحد القياسين لغرض أو لحكمة جوهرية ، أو الاستصحاب في إبقاء الأحكام الثابتة والمقررة في الزمن الماضي إلى الزمن الحاضر حتى يثبت ما يغيرها، أو ما يوافق العرف المحلي والدولي بما لا يخالف أحكام الدين ، أو ما يساعد في فتح الذرائع لما فيه من الخير ، أو ما يتطلبه سد الذرائع لما يجلبه من شر ، ولو كان ذلك مخالفاً لآراء سابقة ، أو لاجتهادات مضت ، وكل ذلك تحت القاعدة الفقهية الأساسية " لا ينكر تغير الأحكام بتغير الأزمان " وهو ما قرره الإمامان أبو يوسف ومحمد صاحبا أبي حنيفة رحمهم الله تعالى فقالا عند مخالفتهم لإمامهم ، فقالوا : " إنه اختلاف عصر وزمان ، وليس اختلاف حجة وبرهان " ، وهذا القسم هو ما تدخله المعاصرة في الأحكام الشرعية عامة ، وفي أحكام الأسرة خاصة ، وهو محل البحث .

ثانياً : المنهج الشرعي في تبني الأحكام المعاصرة ، واختيارها ، وتطبيقها على المسلمين ، ولامجال للتوسع في بيان هذا المنهج، وإنما نحدده من خلال القواعد الفقهية الآتية باختصار ، وهي :

1- **تصرف الإمام على الرعية منوط بالمصلحة** : إن الشرع أقام الخليفة ، أو الراعي ، أو السلطان ، أو الإمام ، وكل من ولي أمراً من أمور العامة ، ليرعى إقامة الدين ، وحفظ الدنيا ، ورسم له الطريق القويم لعمله ، وأن تصرفاته على الرعية منوط ومرتبط بتحقيق المصالح لهم ، ويتوقف نفاذ التصرف ، ولزومه عليهم بوجود الثمرة والمنفعة المقصودة والناتجة عن تصرفه ، دينية كانت أم دنيوية ، لأنه مأمور من قبل الشارع أن يحوطهم بالنصح ، ومتوعد من قبله على ترك ذلك بأعظم وعيد ، فإن تضمن التصرف منفعة ما وجب عليهم قبوله وتنفيذه ، وإلا رد عليه ، وسوف يحاسب في الدنيا والآخرة على فعله ، لما يترتب عليه من العبث والضرر ، ولذلك يجب أن تبنى أعماله على المصلحة وخيرها ، وهي المحددة : بجلب الخير ولمنافع ، ودفع الضرر والمفاسد ، والدليل الشرعي لهذه القاعدة قوله صلى الله عليه وسلم : " ما من عبد يسترعيه الله عز وجل رعية ، يموت وهو غاش رعيته ، إلا حرم الله تعالى عليه الجنة " [1]، وقال رسول الله صلى الله عليه وسلم : " من استعمل رجلاً من عصابة ، وفيهم من هو أرضى لله منه ، فقد خان الله ، وخان رسوله، وخان المؤمنين " [2]، وقال رسول الله صلى الله عليه وسلم : " لا طاعة لمخلوق في معصية الخالق " [3]، وقال الشافعي رحمه الله تعالى : " منزلة الإمام من الرعية منزلة الولي من مال الولي " وهو اقتباس من قول أمير المؤمنين عمر بن

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[1] رواه البخاري 6 / 2614 رقم 6723 ، ومسلم 2 / 165 رقم 142 ، وفي رواية : " ما من أمير يلي أمر المسلمين ، ثم لا يجهد لهم ، وينصح ، لم يدخل معهم الجنة " ، رواه مسلم 2 / 165 رقم 142 ، ونقل النووي عن القاضي عياض المراد من الحديث ، وأن ذلك من الكبائر ، شرح النووي على مسلم 2 / 166 .

[2] رواه الحاكم 4 / 92 ، والمنذري في الترغيب والترهيب 3 / 179 .

[3] هذا جزء من حديث رواه مسلم 12 / 227 رقم 1840 ، ورواه البخاري 6 / 2649 رقم 6830 بلفظ " لا طاعة في المعصية ، إنما الطاعة في المعروف ، وأبو داود ، بذل المجهود 9 / 219رقم 2625 ، والترمذي ص 294 رقم 1707 ، والنسائي 7 / 142 رقم 4206 ، وابن ماجه ص 312 رقم 2864 ، وأحمد 4 / 426 ، 5 / 66 ، وبلفظ البخاري 1 / 131 ، والحاكم 3 / 443 .

الخطاب رضي الله عنه : " أنزلت نفس من مال الله بمنزلة والي اليتيم ، إن احتجت أخذت منه ، وإن أيسرت رددته ، فإن استغنيت استففت "[4].

2- **حق ولي الأمر بالاختيار والتنظيم أو التقنين** : ثبت في الأثر " أن الله يزع بالسلطان ما لا يزع بالقرآن " ، وهذا وأخوذ من قول أمير المؤمنين عثمان بن عفان رضي الله عنه : " يزع الله بالسلطان أعظم ما يزع بالقرآن " [5]، وقرر الفقهاء القاعدة الجليلة السابقة ، وهي " تصرفات الإمام على الرعية منوطة بالمصلحة " ، ومن هنا يأتي دور الريادة والتوجيه من السلطات أولاً ، ثم دور التشريع والتنظيم ثانياً ، لمعالجة القضايا المستجدة التي تهم الأمة والمجتمع ، ومنها أحكام الأسرة التي انتشر فيها ظواهر متعددة في هذا العصر لأسباب متعددة ، أهمها : غياب التربية الدينية ، وفقدان الوازع الديني ، وطغيان النواحي المادية ، وإن الفقه الإسلامي بحر زاخر ، وثروة عظيمة ، وفيه أحكام شرعية قطعية لا مجال للحياد عنها أو الخروج عليها ، وأحكام اجتهادية واسعة ، ولا حصر لها ، وهي التي وصل إليها الأئمة والعلماء والفقهاء ومجتهدو المذاهب ، وكثير منها متأثر بالواقع الذي صدرت فيه ، ويعيشه الإمام أو المجتهد ، وبالظروف التي تحيط بالمسلمين والمجتمع والدولة والأمة ، وبحسب الأعراف السائدة في مختلف الأقطار والأزمان ، وبناء على مناهج اجتهادية متعددة ، وهنا يأتي دور اللجان التشريعية عند اختيار الرأي الأقوى دليلاً ، والأصوب تطبيقاً ، والأنسب للزمن والعصر ، وما يتفق مع الواقع والحياة والتطور والظروف الاجتماعية والاقتصادية وغيرها ، دون الخروج عن الأحكام القطعية ، ولا عن مقاصد الشريعة ، وهذا ما تم عملياً اليوم باختيار عدة أحكام من المذاهب الفقهية لمعالجة الظواهر المرضية في المجتمع ، سواء قبل وقوعها بالتركيز على الإصلاح ، والحرص على اختيار الزوجين ، والتدقيق في إنشاء عقد الزواج ، ولا يزال الباب مفتوحاً .

3- **اختيار الأحكام من مختلف المذاهب الفقهية** : بما يحقق الأهداف السابقة ، دون الالتزام بمذهب فقهي واحد ، لكن مع تفضيل مذهب ما إن كان شائعا ومنتشراً في بلد معين ، واختيار القول الأقوى دليلاً ما أمكن ، والأصلح تطبيقاً ، والأنسب للزمن والعصر ، بما يتفق مع الواقع والحياة والتطور والظروف المختلفة ، وهذا هو المنهج القويم ، لأن **اختلاف الأمة رحمة** ، ولأن الفقه الإسلامي ليس محصوراً بمذهب معين ، وإنما يتمثل في جميع المذاهب والآراء الصادرة من العلماء ولذلك يقول أستاذنا الشيخ مصطفى أحمد الزرقا : " إن المذاهب الفقهية كالصيدلية التي تحوي مختلف الأدوية ، والطبيب أو الصيدلي يختار منها ما يناسب المريض بحسب جسمه وما يتناسب مع بقية الأعراض عنده " [6]، ولأن الالتزام المذهبي لا يتفق مع العصر الحاضر ، مع التمازج الاجتماعي بين أتباع المذاهب ، ومع انتشار الفتاوى والأحكام والآراء على أجهزة الإعلام المسموعة والمرئية والمكتوبة ، ومختلف وسائل التواصل الاجتماعي ، ولأنه يوجد في كل مذهب من الغرائب والعجائب والفرائد مما يتعذر تطبيقه في الوقت الحالي ، مما يؤدي للحرج الشديد المنفر من الدين ، ويتنافى مع مقاصد الشريعة ، وهو في أصله أمر اجتهادي ، ولم يأمر أئمة المذاهب بالالتزام به ، بل نهوا أصلاً عن تقليدهم ، وخاصة عند وجود النص الظني المخالف لهم ، كالرضاع عند المالية بقطرة طائرة ، وسقوط حق الزوجة بطلب الطلاق للضرر والشقاق بمجرد حصول خلوة مع زوجها بعد وقوع الضرر عند المالكية ، ومنع الطلاق نهائياً للضرر عند الحنفية والشافعية والحنابلة ، وإلزام زوجة المفقود بالانتظار إلى بلوغه التسعين عند الشافعية ، ومئة وعشرين عند الحنفية ، وإعطاء الزوج حق طلاق المطلقة بطلقة ثانية وثالثة عند المذاهب الأربعة ، وإن الأحكام الفقهية الاجتهادية في المذاهب ليست ملزمة بنص الأئمة والعلماء ، وخاصة عند تغير الزمان والمكان ، أو كان ذلك لا يناسب هذا الزمن ، أو التطور الحاصل اليوم ، وهو ما نقلناه سابقاً عن الإمامين أبي يوسف ومحمد ، مع أن الفرق بينهما لا

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[4] الأشباه والنظائر ، للسيوطي ص 134 .
[5] الدر المنثور 5 / 329 ، تاريخ بغداد 4 / 107 .
[6] هذا من كلام الشيخ رحمه الله تعالى لنا في محاضراته ، ويقول أيضاً : " ولا مراء أن المذهب الاجتهادي الواحد ، مهما اتسع بأصوله وفروعه ، وتشعبت نظرياته وتخريجاته ، لا يمكن أن يكفي الأمة في حاجاتها التشريعية المتجددة ، فالسعة الكبرى في قابليات الفقه الإسلامي العظيم إنما تتجلى في مجموع مذاهبه الاجتهادية ، لا في واحد منها " المدخل الفقهي العام 1 / 243 .

يزيد عن ربع قرن أو نصف قرن ، فكيف إذا كان الفاصل بيننا وبين الأئمة والفقهاء عشرة قرون وأكثر ؟! ويؤكد الشافعية ذلك عند دراسة مذهبي الإمام الشافعي رحمه الله القديم والجديد ، وليس بين المذهبين أكثر من عشر سنوات ؟ ولأن المقرر في أصول الفقه أن تغير الأوضاع الزمانية ، والأحوال المكانية يؤثر تأثيراً كبيراً على الفتوى والأحكام الاجتهادية[7] ، ولأن الهدف الأصلي المعتبر الثابت أن هذه الأحكام تهدف إلى إقامة العدل ، وجلب المصالح ، ودرء المفاسد ، فإن تغيرت الظروف والأزمنة والأمكنة تغيرت الفروع الفقهية بما يتناسب معها ، ويحقق مقاصد الشريعة ، ويقرر ذلك العلامة ابن قيم الجوزية رحمه الله تعالى (ت 751 هـ) فيقول : " إن الشريعة مبناها وأساسها على الحِكَم ومصالح العباد في المعاش والمعاد ، وهي عدل كلها ، ورحمة كلها ، ومصالح كلها ، وحكمة كلها ، فكل مسألة خرجت عن العدل إلى الجور ، وعن الرحمة إلى ضدها ، وعن المصلحة إلى المفسدة ، وعن الحكمة إلى العبث ، فليست من الشريعة ، وإن أدخلت فيها بالتأويل " [8] ، ولذلك نبادر إلى القول : إنه لا مانع شرعاً وعقلاً وتنظيماً وقانوناً من تعديل القوانين والأنظمة لمواكبة العصر ، واختلاف الزمان الذي يتسارع كالبرق ، على أسس : اختيار الأنسب والأصلح من الآراء بعد الدراسة والتمحيص وتقليب وجهات النظر ، واستعراض مختلف الأدلة والآراء ، أو عند الاتفاق أو الأخذ برأي الأغلبية ، والتزام التوسط في الأمور ، وتجنب المغالاة والتطرف ، والبعد عن التساهل المفرط ، ليكون الاختيار دون إفراط ولا تفريط ، ولا غلو ولا تقصير ، وهذا ما أدركه السلف الصالح عند دعوتهم بتجنب تشددات ابن عمر رضي الله عنهما ، وتساهلات ابن عباس رضي الله عنهما ، وبذلك نلتزم الشرع والعدل بين الرجل والمرأة ، وبين الأبوين والأولاد (مثل الوصية بالوالدين ، وبر الوالدين ، دون الوصول إلى البر الإرهابي ، والتدميري ، والتخريبي أحياناً) ، وبين الزوجين والأولياء والأسرتين والأقارب ، دون تحيز للرجال ضد النساء ، أو للنساء ضد الرجال ، أو تقديم مصلحة الزوج أو الزوجة على مصلحة الأولاد ، والميل الجارف للأم ضد الزوجة ، أو للزوجة ضد الأم ، وتحقيق المصلحة المعتبرة للأسرة ، حسب الأعراف السائدة بما لا يتعارض مع أحكام الشرع الحنيف ، فالعرف في الشرع له اعتبار ، لذا عليه الحكم قد يدار ، وبما يتفق مع التقدم الحضاري والتقني الذي وصلت إليه الشعوب المعاصرة ، والاستفادة من تجارب البلاد الإسلامية ، وأنظمتها وقوانينها في الأحوال الشخصية ، للاستفادة منها ، واختيار المناسب من أحكامها ، وقال العلامة ابن عابدين رحمه الله تعالى في رسالته (نشر العَرْف في بناء بعض الأحكام على العُرْف): " إن كثيرا من الأحكام يبينها المجتهد على ما كان في زمانه ، فتختلف باختلاف الزمان لتغير عرف أهله ، أو لحدوث ضرورة ، أو لفساد أهل الزمان ، بحيث لو بقي الحكم على ما كان عليه للزم منه المشقة والضرر بالناس ، ولخالف قواعد الشريعة المبنية على التخفيف والتيسير ودفع الضرر والفساد ، لأجل بقاء النظام على أحسن إحكام ، ولهذا ترى فقهاء المذهب خالفوا ما نصّ عليه المجتهد في مواضع كثيرة بناها على ما كان في زمنه لعلمهم بأنه لو كان في زمنهم لقال بما قالوا به أخذاً من قواعد مذهبه " ثم أتي رحمه الله تعالى بأمثلة كثيرة [9] .

وبناء على هذه الأسس والقواعد نبين ما جرى من المعاصرة في أحكام الأسرة في المباحث الآتية .

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[7] بحث ذلك بشكل طيب العلامة القرافي المالكي في كتابيه : الفروق ، والإحكام في تمييز الفتاوى عن الأحكام ، والعلامة ابن قيم الجوزية رحمه الله تعالى في كتابيه : إعلام الموقعين ، والطرق الحكمية .

[8] إعلام الموقعين 3 / 5 ، ت الوكيل ، وقال ابن تيمية رحمه الله تعالى : " إن الشريعة جاءت بتحصيل المصالح وتكميلها ، وتعطيل المفاسد وتقليلها " ، الفتاوى الكبرى 20 / 48 ، السياسة الشرعية ص 47 ، وانظر : قواعد الأحكام ، للعز بن عبد السلام 1 / 5 ، الموافقات للشاطبي 2 ، 283 ، وكتابنا: الوجيز في أصول الفقه الإسلامي ، فصل : مقاصد الشريعة 1 / 101 ، 108 .

[9] رسائل ابن عابدين 2 / 114 ط . محمد هاشم الكتبي 1325 هـ .

المبحث الأول

الأحكام المعاصرة في الزواج

ظهر في هذا العصر عدد من الأحكام المعاصرة في الزواج ، وهي مما اجتهد فيها الفقهاء والعلماء في القرنين الأخيرين بناء على الأصول الشرعية في الاجتهاد مما لم يرد في الكتاب والسنة ، وقصدوا بيان الأحكام الفقهية للمسائل والقضايا المستجدة ، بما يؤكد صلاحية الشريعة الغراء لكل زمان ومكان ، وبما يضع للمسلمين ما يناسبهم من الأحكام التي ترعى مصالحهم ، وترضي ربهم، وأخذت معظم هذه الأحكام طريقها للتطبيق ، والتنفيذ ، والإلزام عن طريق الأنظمة والقوانين ، ونعرض أهمها ، وهي :

أولاً : آثار العدول عن الخِطبة : إن الخِطبة مجرد وعد بالزواج من الطرفين ، ويجوز لكل منهما العدول عنها ، وإذا قدمت الهدايا من الخطيبين ، قرر الفقهاء قديماً أنه يطبق على هذه الهدايا حكم الهبة المقررة فقهاً وخُلُقاً وعرفاً وحسب المذاهب ، ولكن طرأ في العصر الحاضر أمور جديدة ، منها : إطالة مدة الخطبة حتى تصل لسنتين وأكثر ، وأن الخاطبين ، وأهلهما أحيانا ، يقدمان هدايا كثيرة أثناء فترة الخطبة ، وكثير منها تقبل الحفظ والادخار ، وبعضها يستهلك في حينه ، وكثيراً ما يغالى في الهدايا وتصل إلى مبالغ كبيرة ، أو تكون قيّمة ، ثم يعدل الخاطب غالباً ، وقد تعدل المخطوبة ، فتكون الهدايا السابقة في قمة المشاكل والاختلاف فيها ، وتكون أحكام الهبة الفقهية قاصرة عن حل الإشكال ، لأنه يترتب في الغالب ومع طول مدة الخطبة ، ضرر شديد على الخاطب الثاني ، وغالباً ما تكون المخطوبة ، وللمطالبة عن آثار الضرر من العدول في أمور ، مما دعا الفقهاء والأنظمة المعاصرة للتدخل فيهما ، وتم إقرار ثلاثة أحكام جديدة ، وهي :

الأول : رد الهدايا وعدمه : ظهر في هذا الخصوص عدة آراء ، والراجح منها : وجوب النظر حسب مبادئ العدالة ، وتغير الأوضاع الاجتماعية ، للتفريق بين عدول الخاطب ، وعدول المخطوبة ، وترتيب أثر الضرر على المتسبب بالعدول ، فإن كان العدول من جهة الخاطب فلا ترد المخطوبة شيئاً ، وتبقى الهدايا تعويضاً عما يلحقها من الضرر المادي والمعنوي والنفسي ، وهو تكريم لها ومسامحة وعن طيب خاطر من الخاطب ، وإن كان العدول من جهة المخطوبة ، فيجب عليها أن ترد جميع الهدايا إن كانت قائمة ، أو قيمتها إن هلكت أو استهلكت ، لتطبيق أحكام الهبة شرعاً ، وهي تتحمل آثار الضرر الذي يلحقها، أو قد يلحقها، من أثر العدول فهي المتسببة له .

الثاني : التعويض عن ضرر العدول : قد يترتب على عدول الخاطب غالباً ضرر كبير على المخطوبة ، وخاصة عند إطالة الخطبة ، وهذا نادر جداً وشبه مستحيل في الماضي ، ولكن الآن تغير الوضع بشكل شبه جذري ، وظهر الضرر الظاهر المادي والأدبي والمعنوي مما لا مجال لعرضه ، ، ومن المقرر شرعاً أن كل من تسبب بضرر إلى الآخر فإنه يتحمل التعويض عن هذا الضرر ، ولم يتعرض الفقهاء القدامى لذلك نهائياً ، وهنا انبرى الفقهاء المعاصرون لبحث الموضوع ، وتعددت وجهات النظر ، والذي نراه راجحاً تقرير مبدأ التعويض عن العدول إذا نشأ عنه ضرر ، وهو مما تقره الشريعة الغراء بناء على مبدأ " إساءة استعمال الحق " الذي قرره الإمام أبو حنيفة رحمه الله تعالى في كثير من فروع الفقه ، وقال به الإمام مالك في مسائل كثيرة في فقهه ، وقال به عدد من الفقهاء الآخرين ، وأصبح هذا المبدأ مسلماً به اليوم في معظم القوانين في البلاد الإسلامية ، وفي أكثر قوانين العالم بعد أن سبقهم فقهاء الإسلام إليه بأكثر من اثني عشر قرناً ، ويضاف إلى الضرر مبدأ النهي عن الغرر ، فالخاطب غرر بالآخر ، ومبدأ الالتزام في المذهب المالكي ، وهو عندهم : " إلزام الشخص نفسه شيئاً من المعروف مطلقاً أو معلقاً على شيء " وهذا ينطبق على الخاطب الذي وعد بالزواج ، واستمر على هذا الوعد مدة طويلة ، مع القرائن بأنه ملتزم بإتمامه بالزواج، ثم أخلّ بوعده ، كما يضاف له الاستدلال بحديث " لا ضرر ولا ضرار " [10] ، وهذا الضرر والتعويض يقرره القاضي بشروط:

[10] رواه عدد من الصحابة ، وأخرجه ابن ماجه 2 / 784 ، أحمد 1 / 312 ، والدارقطني 4 / 228 ، 3 / 77 ، والحاكم 2 / 58 ، والبيهقي 6 / 70، 156 ، ورواه مالك مرسلاً 2 / 181 رقم 2351 ط النداء ، وأخرجه النووي في الأربين ، وقال : حسن ، جامع العلوم والحكم 3 / 905 .

أن يثبت أن العدول لم يكن بسبب من المخطوبة ، وأن يثبت وجود الضرر بها مادياً أو معنوياً ، وأن الخاطب أكد رغبته في الزواج من المخطوبة ، ثم عدل عنه [11].

الثالث : إعادة المهر أو قيمته : إن المهر جزء من عقد النكاح ، وله أحكامه الواردة بالنصوص الشرعية ، والمتفق عليها بين الفقهاء ، في استحقاق الزوجة نصفه إذا طلقت قبل الدخول ، واستحقاقه كاملاً بعد الوطء (وأضاف الجمهور استحقاقه الكامل بالخلوة ، خلافاً للشافعية) ، ولكن الجديد والطارئ أن الخاطب قد يسلم المهر أو بعضه للمخطوبة قبل العقد ، وكان المقرر شرعاً وفقهاً أن الخاطب إذا عدل عن الخطبة كان له أن يسترد ما دفعه من المهر ، وإذا كان ما دفعه لا يزال موجوداً في يد المخطوبة أو أهلها استرده بذاته ، وإن كان المهر قد هلك ، أو استهلك ، استرد مثله إن كان مثلياً ، أو قيمته إن كان قيمياً ، وهذا متفق عليه بين الفقهاء قاطبة ، ولكن الجديد اليوم أن الخاطب يسلم المهر للمخطوبة ، ويوحي إليها برغبته بالعقد والزواج لاحقاً ن وتطول مدة الخطبة ، وهي في الغلب تتصرف في المهر بعد الخطبة ، فتشتري به جهازها من ثياب وأثاث وغير ذلك ، ثم يتم العدول عن الخطبة ، وتثار مشكلة رد المهر وإعادته ، واختلفت الآراء في الحكم على عدة أقوال ، واختار العلماء والفقهاء في قانون الأحوال الشخصية السوري ، وفرقوا بين حالتين ، الأولى : في حالة عدول الخاطب فتخير المخطوبة بين إعادة مثل النقد الذي استلمته ، وبين تسليم الجهاز والأمتعة التي اشترتها من المهر إلى الخاطب ، حتى لا تتحمل الضرر والمسؤولية عن استهلاك المهر ، وإن كان العدول من المخطوبة فيجب عليها إعادة المهر أو قيمته ، وتتحمل مسؤولية الشراء ، واستخرج العلماء الدليل لهذا التفصيل بأنه منطبق على عرف الناس اليوم ، وأن إطلاق الفقهاء السابق هو جار على ما كان من العرف الشائع في عصورهم ، ويؤيد ذلك أن شراء المخطوبة بالمهر جهازا لها إنما هو واقع بتسليط من الخاطب ، لأن العرف جار على عدم قبول الرجل بمجيء عروسه إليه دون جهاز ، بل يدفع المهر لكي تجهز به نفسها ، فإذا عدل هو عن الزواج لم يكن له إلا أخذ ذلك الجهاز الذي اشترته بماله بتسليط منه ، وبإذن ضمني بصرفه في ذلك ، وعليه أن يتحمل الضرر الذي هو الفرق بين قيمة هذه الأشياء بحالها الحاضرة لو أريد بيعها ، وبين السعر الذي تشترى به عادة ، فيستحق الرجل استرداد مثل ما دفع ، ويضمن هذا الفرق الذي تتضرر به المرأة لو أرادت بيع المشتريات الذي كان بناء على تغرير الخاطب ، وكل ذلك إذا لم يكن العدول بسبب حقيقي مقرر شرعاً ، ويترك التحقيق للقاضي[12] .

ثانياً : منع زواج الصغار : اتفقت المذاهب الأربعة على جواز زواج الصغير أو الصغيرة ، لأدلة كثيرة ، وشروط دقيقة ، واحتياطات جمة ، ولا يعني ذلك جواز الدخول بها ، فإن كان الدخول بها يلحق ضرراً ، فإنه لا يحل للزوج الدخول بها حتى ولو كانت كبيرة ، وكثيراً ما يتم الزواج بين الصغار والأطفال من الأقارب لغايات متعددة ، وطبق ذلك عملياً من زمن البعثة وطوال التاريخ ، لتوفر القيم الإسلامية والتربية الدينية ، والتزام تطبيق الأحكام الشرعية ، وكان العمل عليه في المحاكم الشرعية ، وعليه العمل عند الناس ، ولم يصدر عن ذلك نتائج غريبة أو عجيبة أو شاذة ، وفي العصر الحاضر غابت هذه الأسس ، وبدأت تطفو الآثار السلبية عن زواج الصغار ، بل الويلات والمآسي التي يندى لها الجبين ، ونشأت الأضرار الاجتماعي والخلقية ، فنهض العلماء والفقهاء والمصلحون للتصدي إلى هذه الظاهرة الخطيرة في المجتمع الإسلامي ، وقرروا منع زواج الصغار من الذكور والإناث ، ونجحوا في إقرار ذلك في معظم قوانين الأحوال الشخصية المعاصرة ، بدءاً من قانون حقوق العائلة العثماني عام 1336 هـ ، وأخذوا برأي من خارج المذاهب الأربعة ، وهو قول ابن شبرمة والبتيّ وأبي بكر الأصم ، بعدم جواز العقد على الصغار ، لمراعاة الأوضاع الاجتماعية التي تجعل من زواج الصغار عبئاً وعبثاً واتجهت الغالبية إلى تحديد سن الزواج للذكر قي الثامنة عشرة ، وسن الأنثى سبع عشرة سنة ، استئناساً بأحد آراء أبي حنيفة رحمه الله تعالى ، مع استثناءات تختلف من بلد

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[11] انظر : ميثاق الأسرة في الإسلام ص 179 م / 50 ، نظام الأسرة في الإسلام ص 81 ، شرح قانون الأحوال الشخصية السوري 1 / 59 ، شرح قانون الأحوال الشخصية الأردني 1 / 46 ن المعالم المعاصرة للمرأة والأسرة ص 276 .

[12] انظر : شرح قانون الأحوال الشخصية السوري 1 / 57 ، ميثاق الأسرة في الإسلام ص 179 ، م / 50 ، شرح قانون الأحوال الشخصية الأردني 1 / 45 ، نظام الأسرة في الإسلام ص 81 .

إلى آخر ، بحسب الأعراف ، والظروف الخاصة التي يقدرها القاضي ، وبضوابط محددة [13]، وهذا ما يتناسب مع العصر الحاضر ، وحالات المسلمين الحالية ، وتطور الحياة وأنظمة التربية ومراحل التعليم ، وبقية القوانين النافذة .

ثالثا : حق الاشتراط عند عقد النكاح : إن الشروط المقترنة بعقد الزواج ثلاثة أنواع ، **الأول** : ما كان من مقتضيات الزواج ، ومقاصده ، وليس فيه تغيير لحكم من أحكام الشريعة ، كاشتراط العشرة بالمعروف ، وعدم التقصير في حق من حقوق الزوج أو الزوجة ، وأن لا يدخل بيت الزوجية أحد إلا بإذن الزوج ، وغير ذلك ، فهذا النوع يجب الوفاء به باتفاق الفقهاء ، **النوع الثاني**: الشروط المنافية لطبيعة الزواج ، كشرط الامتناع عن المعاشرة ، وغيره ، فهذا النوع لا يجب الوفاء به ، ولكنه لا يبطل العقد ، ويظل صحيحاً وقائماً ، ويكون الشرط باطلاً ، لأنه مخالف لطبيعة عقد الزواج ومقاصده ، ويسقط حقوقاً شرعية تجب بعقد الزواج، وهذا باتفاق الفقهاء ، **والنوع الثالث** : الشرط الذي يشترطه أحد الزوجين على حساب الآخر ، كاشتراط الزوجة ما تراه أكفل لراحتها ، وأوفى بحاجتها من المباحات التي لا تنافي مقتضى عقد الزواج عليها ، كأن تشترط المرأة تفويض الطلاق إليها ، مع عدم الإخلال بحق الرجل فيه ، أو لا يخرجها من بلدها، أو أن لا يتزوج عليها ، أو أن تعمل خارج البيت ، أو تبقى في وظيفتها، وأن تحدد الجزاء على مخالفة هذا الشرط ، وكأن يشترط الرجل أن تعيش معه في بيت أهله ، أو تسكن بجوار ضرتها ، أو أن تسافر معه إلى حيث يعمل ، و الآن توسع هذا النوع ، وكثرت الشروط في عقد الزوج ، واختلف العلماء في هذا النوع إلى رأيين، الأول : إن هذا الزواج صحيح ، وتلك الشروط لا يلزم الوفاء بها ، وهو رأي الحنفية والمالكية والشافعية وغيرهم من أهل العلم، وهو ما كان سائداً ومنتشراً في مختلف البلاد الإسلامية ، وطوال العصور ، والرأي الثاني : صحة هذه الشروط ، ووجوب الوفاء بها ، وهو رأي الحنابلة ، وقبلهم عدد من الصحابة ، وهذا ما شاع وانتشر في العصر الحاضر ، ونادت به النساء غالباً ، وأصبح مثار المناقشات ، والمداولات ، والاختلاف بين الناس ، فتصدى لها الفقهاء والعلماء ، وأقر معظمها في قانون حقوق العائلة وقوانين الأحوال الشخصية ، واتجهوا في معظم البلاد الإسلامية إلى تبني المذهب الحنبلي ، واستدلوا بحديث عقبة بن عامر رضي الله عنه قال : قال رسول الله صلى الله عليه وسلم : " إن أحق الشروط أن توفوا به ما استحللتم به الفروج "[14] ، وقال عمر رضي الله عنه : " إن مقاطع الحقوق عند الشروط ، ولكَ ما شرطتَ " وفي رواية " المؤمنون على شروطهم ، عند مقاطع الحدود[15] ، ويلتزم الزوج بالوفاء بالشرط ولو جبراً عليه ، ويلحق بهذا النوع أن تشترط الزوجة عند زواجها طلاق زوجة الرجل إن كان متزوجاً قبلها ، فهذا الشرط حرام ، ولا اعتبار له ، ويحرم الوفاء به ، لقوله صلى الله عليه وسلم : " لا يحل لامرأة تسأل طلاق أختها لتستفرغ صَحْفَتها ، فإنما لها ما قُدِّر لها " وفي رواية " نهى رسول الله صلى الله عليه وسلم أن تشترط المرأة طلاق أختها [16] ، والفارق بين هذا الشرط وبين شرطها ألا يتزوج عليه أن اشتراط الطلاق فيه إضرار بالضرة ، وكسر قلبها ، وخراب بيتها ، وشماتة أعدائها ، وليس ذلك في اشتراط عدم الزواج بغيرها، وقد فرق النص الشرعي بينهما ، ولأن التعدد من المباحات التي يجوز منعها أو تقييدها لمصلحة ، بخلاف الطلاق ، فهو أبغض الحلال إلى الله تعالى ، فقياس أحدهما على الآخر فاسد .

رابعاً : عمل المرأة خارج البيت : كان عمل المرأة خارج البيت نادراً أو معدوماً ، ولم يكن سبباً للإشكال والاختلاف في الأسرة قديماً، وكانت المرأة بجانب الرجل ، وخاصة في الأرياف والبوادي والمناطق الزراعية ، وتعمل معه ، وتشاركه الحياة بحلوها ومرها ، وتقاسمه المنافع والإنتاج والثمار ، ولكن الأمر اختلف كثيراً في العصر الحاضر بعد ظهور الوظائف المتنوعة ، والصناعات والمعامل والشركات ، واتجهت المرأة للمشاركة في جميع الأعمال ، ثم يأتي الزواج الذي يقتضي أن تقوم الزوجة بأعمال بيت الزوجية ، وتربية الأولاد ، ورعاية شؤونهم ، وعندها الرغبة في العمل خارج البيت ، أو قد تكون أصلاً عاملة خارج

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[13] انظر : شرح قانون الأحوال الشخصية السوري 1 / 115 ، شرح قانون الأحوال الشخصية الأردني 1 / 87 .
[14] رواه البخاري 2 / 970 رقم 2572 ، 5 / 1978 رقم 4856 ومسلم 9 / 201 رقم 1418 ، وأبو داود ، بذل المجهود 8 / 71 رقم 2139 ، والترمذي ص 200 رقم 1127 ، والنسائي 6/ 76 رقم 3281 ، وابن ماجه ص 212 رقم 1954 ، وأحمد 4 / 114 ، والدارمي رقم 2203 .
[15] رواه البخاري معلقاً 2 / 970 قبل الرقم 2572 ، 5 / 1978 قبل الرقم 4856 .
[16] رواه البخاري 5 / 1978 رقم 4757 ، 6 / 2435 رقم 6227،ومسلم 9 / 191 رقم 1408 ، 9 / 198 رقم 1413 ، 10 / 161 رقم 1515 ، وأحمد 2 / 76 ، 238 ، 274 ، 311 .

البيت قبل الزواج ، فاقتضى ذلك بيانه عند عقد الزواج لوضع الزوج في الصورة ، واشتراطه في العقد ، وصار شائعاً ، وتعرض له الفقهاء والعلماء المعاصرون لبيان الحكم الشرعي فيه ، وربطه بالحقوق والواجبات الزوجية ، ويقصد بالعمل هنا معناه العام وهو " قيام المرأة بأداء مجهود ذهني أو بدني تتقاضى عليه أجراً ، أو تطوعاً بلا أجر "، وهو مقيد بكونه " خارج البيت ليكون وسيلة لتحقيق مصلحة معينة للأسرة والمجتمع " ، وهو في الأصل مباح شرعاً ، وهو ما ورد قصة موس مع ابنتي شعيب " ووجد من دونهم امرأتين تذودان قال ما خطبكما قالتا لا نسقي حتى يصدر لرعاء " القصص / 23 ، وهو في الظاهر يتعارض مع واجبات الزوجة في البيت ، ومع ذلك تحرص عليه لأسباب متعددة ، وينشأ عنه آثار كثيرة على الزوج والأولاد ، وتترتب عليه اختلافات متعددة ، كحقها بالنفقة ، ومصير الراتب لها حصراً أو يشاركها الزوج ، وقد تحتاجه لمساعدة أبويها ، وكيفية أداء العمل داخل البيت ، وقد يحتاج لمساعدة امرأة أجنبية مع الراتب ، ومن سيدفعه ؟ وغير ذلك من الآثار الكثيرة ، ونتج عملياً مشاكل عدة بين الزوجين وقد تصل للطلاق والافتراق وتدمير الأسرة وتشريد الأولاد ، ووجد العلماء والفقهاء أن الحل الأساسي والشرعي بوجوب الاتفاق بين الزوجين على عمل المرأة خارج البيت ، لتحديد الحقوق والواجبات ، وقرر العلماء الضوابط لذلك ، ونعرضها باختصار ، وهي :

- أن يكون العمل مباحاً شرعاً ، ومتفقاً مع مصلحة الجماعة وفطرة المرأة .
- التفاهم والتراضي بين الزوجين في حدود مصلحة الأسرة دون تكلف ولا إفراط ، مع تحديد العلاقة المالية بين الزوجين.
- أن تساهم المرأة في نفقات البيت بالقدر المناسب لحال الزوجين ، وحسبما يتفقان عليه رضاء ، أو بتقدير حَكَم عَدْل بينهما .
- أولوية مصلحة الأطفال في التربية والرعاية الصالحة باعتبارهم عماد الأمة وجيل المستقبل .
- إذا اقتضت الظروف أن تعمل الزوجة خارج البيت ، فعلى زوجها أن يعينها ، وأن يهيئ لها سبل أداء عملها وإحسانه ، كما يعينها على أداء الأعمال المنزلية ورعاية الأطفال .
- الحرص على بقاء الحقوق والواجبات الزوجية لكلا الزوجين ، والالتزام بالضوابط الأخلاقية الإسلامية للرجل والمرأة ، وخاصة عند اشتراكها مع الرجال في العمل ، مثل : الالتزام الكامل بالحجاب والزي الشرعي ، وغض البصر ، واجتناب مصافحة الرجال الأجانب في عامة الأحوال ، واجتناب الخلوة ، واجتناب اللقاء الطويل المتكرر ، واجتناب مواطن الريبة ، واجتناب ظاهر الإثم وباطنه ، واجتناب الطيب والزينة ، والجدية في التخاطب ، والوقار في الحركة ، وهذه أحكام شرعية عامة لخروج المرأة من بيتها ، وعند مخالفتها في العمل تؤدي غالباً لنتائج كارثية على الأسرة والمجتمع [17].

خامساً : عدم الضرب بين الزوجين : كان الضرب وسيلة منتشرة في التعزير ، وتأديب الأولاد ، وحتى ضرب الزوجة ، وينتقل أحياناً لضرب الزوج من زوجته ، وهو شائع ومنتشر عند مختلف الشعوب والأمم ، وقد ورد الإذن به في قوله تعالى : " واللاتي تخافون نشوزهن فعظوهن واهجروهن في المضاجع واضربوهن فإن أطعنكم فلا تبغوا عليهن سبيلاً " النساء / 34 ، فالضرب تشريع استثنائي لمواجهة حالات لا تفلح في تقويمها الوسائل التربوية الأخرى ، مع التدرج من الرفق والوعظ ، فالهجر ، فالضرب، وحدده رسول الله صلى الله عليه وسلم بالضرب الخفيف بالسواك ونحوه ، مع تجنب الوجه ، وقيده الحنفية والشافعية بما يتعلق بالحقوق الزوجية حصراً [18]، ولكن صار الضرب بين الزواج وصمة عار بين الناس ، ويؤدي إلى كثير من المفاسد الاجتماعية وهدم العلاقة الزوجية ، وطبقاً لهذه المفاسد ، فإن ولي الأمر قد يرى منع الضرب ، ويعاقب عليه كي لا يتفاقم ، مما دفع العلماء والفقهاء المعاصرون بالتوصية بتركه والامتناع عنه ، وقرروا ذلك بنص " لا يجوز - مهما بلغت درجة الخلاف بين

[17] انظر : ميثاق الأسرة في الإسلام ص 246 ، 252 ، 262 ، م / 71 ، 72 ، 76 .
[18] الموسوعة الفقهية الكويتية 10 / 22 .

الزوجين - اللجوء إلى استعمال الضرب تجاوزاً للضوابط الشرعية المقررة ، ومن يخالف هذا المنع يكون مسؤولاً مدنياً وجنائياً"، واستندوا على ما ورد في السنة الشريفة والسيرة العطرة ، منها قوله صلى الله عليه وسلم في حديث طويل وقصة : " قد طاف بآل محمد نساء كثير يشكون أزواجهن (يعني من الضرب) : ليس أولئك بخياركم " [19] ، ويشهد له حديث : " ولن يضرب خياركم " [20] ، وثبت أن رسول الله صلى الله عليه وسلم لم يضرب زوجة ، ولا خادماً في حياته [21].

سادسا : اشتراط عدم التعدد : ورد تعدد الزوجات في قوله تعالى : " فانكحوا ما طاب لكم من النساء مثنى وثلاث ورباع فإن خفتم ألا تعدلوا فواحدة " النساء / 3 ، وتأكد ذلك في السنة النبوية والسيرة الشريفة ، ومارسه المسلمون طوال التاريخ وحتى عصرنا الحاضر ، وأن حكمه الإباحة ، ويحقق مقاصد الشريعة ، وفيه حِكم كثيرة ، ولكنه قد يترتب عليه بعض الآثار السلبية ، وخاصة عند ضعف الإيمان ، ونقص الوازع الديني ، وسوء التطبيق ، مع وجود الغيرة عند النساء بالفطرة ، وظهر التطبيق السيء لتعدد الزوجات في العصور الأخيرة ، وبناء على ما سبق في حق المرأة الاشتراط عند عقد النكاح ، فقرر العلماء والفقهاء أنه " يجوز للزوجة أن تشترط في عقد الزواج ألا يتزوج عليها زوجها ، وأن تحدد الجزاء المترتب على مخالفة هذا الشرط " ، وهذا يتفق مع ما قررناه سابقاً في جواز مثل هذه الشروط في الفقرة الثالثة ، وأنه " يجوز استيفاء عقد الزواج بتحديد شروط كل من الزوجين بدقة ووضوح في الأحوال التي تسمح فيها الشريعة بذلك ، مراعاة للعدالة والتوازن بين حقوق وواجبات كل منهما وفق الأصول والضوابط الشرعية ، ولحماية الحياة الأسرية وبقائها " ، وللزوجة أن تحدد الجزاء المترتب على مخالفة هذا الشرط بالتعويض المالي وغيره ، أو بحقها بالطلاق ، والأولاد ، وغير ذلك ، وهذا يمنحها الأمان ، والراحة النفسية بالانفراد بالزوج ، وعدم فتح الباب للمنغصات المتوقعة عند التعدد ، وللزوج الاختيار بالوفاء بالشرط ، أو مخالفته وتحمل النتيجة [22].

سابعاً : منع تعدد الزوجات : إن التعدد مباح شرعاً ، ونصت على حكمه معظم قوانين الأسرة والعائلة والأحوال الشخصية في العصر الحاضر ، وهو من أعظم فضائل الشريعة عند الحاجة إليه ، كمرض الزوجة أو عقمها ، أو عدم رغبتها بالجنس ، أو عدم طاقتها لتحمل شبقه ، أو كثرة أسفار الزوج ، أو كثرة الحرب وقتل الشباب والرجال ، وزيادة عدد النساء ، أو الأرامل ، أو غير ذلك ، فيكون من الأخلاق الفاضلة والوفاء وتكريم المرأة ، وعدم إحراجها لتصبح بائعة للهوى ، أو إجبارها على العنوسة ، وحياة الأرملة طوال حياتها ، أن تكون شريكة لغيرها في زوج واحد ، وكان تعدد الزوجات أعظم أهداف غير المسلمين لشن الهجمات عليه ، والتشنيع على الإسلام والمسلمين بسببه ، ولم يأبه المسلمون طوال التاريخ لهذا الهجوم الفاجر الآثم ، ولم يلتفتوا له ، وبقي التعدد قائما ، وكان محدداً بشكل معتدل وبنسب قليلة ، والتعدد بالثالثة أو الرابعة شبه نادر عند المسلمين ، مع التحذير من بعض الصور المعاصرة للتعدد المسيء للإسلام والمسلمين ، ولكن رأت بعض البلاد الإسلامية منع التعدد لحجج متنوعة ، مثل تركيا ، وتونس ، وكان الدافع له ما فرضه الغرب على تركيا العلمانية في معاهدة لوزان من وجوب التخلي عن الشريعة وغيرها ، وما صدرته فرنسا مع عميلها في تونس ، ولم يوافق عليه أحد من العلماء والفقهاء إلا علماء الحكام ، وكلاب السلطان، كما قررته رسميا معظم الدول في أروبا وأمريكا وبعض الدول الأخرى ، وألزمت المسلمين المقيمين فيها والمهاجرين إليها بمنع التعدد الرسمي ، حتى كان الرجل يؤتى إلى المحكمة ، فإن قال عن الزوجة الثانية :إنها صديقة (وفرند) ويزني بها ، فيبارك له، ويطلق سراحه ، وإن اعترف أنها زوجة ثانية ، أحيل للسجن ، ولكن - مما يؤسف له - أن يفتح الباب على مصراعيه للتعدد السري ، والعلاقات الشاذة ، وما يسمى بالفرند ، حتى للمتزوجين والصغار والمراهقين ، و صار الجنس مشاعاً ، وترتبت عليه الويلات والمآسي والأمراض الجنسية عند الرجال والنساء ، ثم ظهرت الطامة الكبرى على الأطفال والصغار ، وما عرف في

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[19] رواه أبو داود ، بذل المجهود 8 / 83 رقم 2146 ، وابن ماجه ص 315 رقم 1985 ، والدارمي رقم 2219 ، والنسائي وابن حبان والحاكم .
[20] رواه البيهقي في السنن ، وابن سعد في الطبقات .
[21] انظر : ميثاق الأسرة في الإسلام ص 213 ، م / 65 ف 3 .
[22] انظر : ميثاق الأسرة في الإسلام ص 191 ، م / 54 ، ص 271 ، م/ 81 ،وحصل ذلك زمن عمر رضي الله عنه ، وبعد الشرط والمخالفة جاء الزوج يشتكي ، فرده عمر ن فقال : إذن يطلقنا ؟! فأجابه عمر رضي الله عنه بقوله : " مقاطع الحقوق عند الشروط " أي : هي اشترطت ، وأنت وافقت .

الغرب بالأمهات القاصرات ، وأولاد الشوارع ، ودور حفظ وتربية المشردين واللقطاء ، وبلغ أولاد الزنا في بعض الأقطار الأوروبية حوالي ستين بالمئة ، ونذكر منع التعدد هنا باعتباره أحد الصور المعاصرة ، والمستجدات الطارئة ، ولا يحتاج للتوسع، فالأمور فيه واضحة كوضوح الشمس .

ونكتفي بهذه المسائل والصور ، ويوجد كثير غيرها ، ونتركه لمجال آخر ، مثل تحديد مقدار المهر الذي أصدره حاكم الإمارات العربية منذ أربعين سنة ، ولا يزال نافذا حتى الآن .

المبحث الثاني

الأحكام المعاصرة في الطلاق

الطلاق شرعاً : حل عقد النكاح بلفظ الطلاق ونحوه ، أو هو رفع قيد النكاح المنعقد بين الزوجين بألفاظ صريحة ، أو هو انفصام رابطة الزواج بإرادة الزوج المنفردة ، وشرعه الله تعالى علاجاً مكروهاً ، لحديث : " أبغض الحلال إلى الله الطلاق " [23]، للتخلص من زواج لم يتحقق مقصوده الشرعي ، وحينما يستحكم الخلاف بين الزوجين ، ويتأكد استحالة استمرار الزواج ، لقوله تعالى : " فإمساك بمعروف أو تسريح بإحسان " البقرة / 229 .، وللطلاق حِكَم كثيرة ، ومنصوص عليه في القرآن الكريم والسنة الشريفة بضوابط دقيقة ، وكان الغرب يمنعه طوال القرون الماضية ، ثم فتحه في منتصف القرن العشرين على مصراعيه ، وبدون ضوابط ولا شروط حتى عم به الفساد ، وبقي الأمر منضبطاً عند المسلمين كما قرره الشرع الحنيف .

ولكن تطور الحياة ، وضعف الإيمان ، وقلة الوازع الديني ، وسوء التربية الإسلامية ، أدى إلى خروج القطار عن سكته ، وظهرت مستجدات كثيرة شوهت وقائع الطلاق ، فهب العلماء والفقهاء لاستدراك الأمر ، والاجتهاد لوضع الحلول الشرعية للقضايا الجديدة ، ونستعرض أهمها في هذا البحث ، ومنها :

أولاً : متعة الطلاق : المتعة شرعاً **:** هي اسم للمال الذي يدفعه الرجل إلى امرأته لمفارقته إياها في حال الحياة كالطلاق ، وهي ثابتة بنص القرآن في عدة آيات ، منها قوله تعالى : " لا جناح عليكم إن طلقتم النساء مالم تمسوهن أو تفرضوا لهن فريضة ومتعوهن على الموسع قدره وعلى المقتر قدره متاعاً بالمعروف حقاً على المحسنين " البقرة / 236 ، وقوله عز وجل : " وللمطلقات متاع بالمعروف حقاً على المتقين " البقرة / 241 ، فالمتعة للزوجة واجبة عند فراقها في الحياة ، وتجب على الزوج ، للأمر بها في القرآن الكريم ، والأمر للوجوب ، وذلك باتفاق المذاهب مع التوسع في بعضها ، قال الماوردي رحمه الله تعالى: " ولأن إجماع الصحابة أن المتعة لكل مطلقة إلا التي طلقت قبل الدخول ولم يفرض لها مهر " [24] ، ولكن المسلمين لم يلتزموا بهذا الواجب ، وغفل النساء عن المطالبة به ، حتى نبه عليها النووي رحمه الله تعالى منذ قرون ، فقال : " إن وجوب المتعة مما يغفل النساء عن العلم به ، فينبغي تعريفهن ، وإشاعة حكمها ليعرفن ذلك " [25] ، ولكن كلام النووي ونصيحته لم تلق أذنا صاغية، وبقيت المتعة غير مطبقة نهائيا عند المسلمين ، وحتى بعد تشريع قانون العائلة ، وقوانين الأحوال الشخصية المعاصرة .

وأخيراً وقعت المآسي غالباً من وقوع الطلاق في العصر الحاضر ، وحلت الصعوبات أمام المطلقة التي كانت في بيت الزوجية، فأصبحت شبه مشردة حسب الأوضاع الاجتماعية القائمة ، وتخلي الأهل عن المطلقة ، وتسرب إلى البلاد الإسلامية ما يشيع في الغرب من إعطاء المطلقات الأموال الطائلة ، حتى تصل إلى الإفراط والتطرف والظلم الفاحش للزوج ، وقدد كلفت منذ خمسين

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[23] رواه أبو داود 1 / 503 ، وابن ماجه 1 / 650 رقم 2018 ، والحاكم وصححه 2 / 196 .
[24] الحاوي ، الماوردي 12 / 183 ، وانظر : المنهاج ومغني المحتاج 3 / 241 ، المهذب4 / 220 ، المجموع 18 / 70 ، كنز الراغبين 3 / 117 ، الروضة 7 / 321 ن الحاوي 12 / 101 ، البيان 9 / 471 ، الأنوار 2 ، 140 .
[25] فتاوى النووي ص 138 ط المكتب الإسلامي لإحياء التراث ، القاهرة ، 1425 هـ / 2004 م ، مغني المحتاج 3 / 241 .

سنة تقديم بحث عن حق المطلقة بالتعويض ، وبعد الدراسة المعمقة طالبت بتطبيق المتعة الشرعية لتكون بديلاً عن التعويض القانوني ، وتعهدت لنشر الفكرة ، والدعوة لها ، لتطبيق هذا الحكم الشرعي المهجور ، ولإنقاذ المطلقة عما يصيبها من أضرار ، وما يلحقها من فاقة ، وما يعوض عليها آلام الفراق ، ومغادرة بيت الزوجية التي قد تزيد عن خمس سنوات ، أو عشر ، أو عشرين سنة وأكثر ، ولسد باب الغزو الفكري والقانوني باسم حماية المرأة ومنحها التعويضات الغربية التي تصل إلى نصف ثروة الزوج وأملاكه.

وحقق الله مرادي عند اشتراكي بوضع قانون الأحوال الشخصية الإماراتي عام 2004 م ، وقررنا تشريع المتعة ، تعويضاً للمطلقة، وكان أول قانون معاصر ينص على تشريع المتعة للمطلقة ، ثم انتقل ذلك لبعض قوانين الأحوال الشخصية ، وسبق إليه بشكل موجز قانون الأحوال الشخصية الأردني ، في بعض الحالات ، المادة 55 ، فإن اتفق الزوجان على مقدار معين من المال، كان ذلك لهما ، وصحت المتعة ، وكان ذلك من حسن الأخلاق والإحسان من المطلق ، ويحلل كل منهما صاحبه ويسامحه " والصلح خير " النساء / 128 ، وإن اختلفا رفعا الأمر للمحكمة ، ويقدرها القاضي حسب حال الزوج ، ومدة الزواج السابقة ، وحال المطلقة ، حتى لو احتاجت لمسكن تعيش فيه ، وكان تطبيق متعة الطلاق من محاسن العصر ، ونص عليها ميثاق الأسرة في الإسلام ، فقال : " تحث الشريعة الإسلامية على إعطاء الزوجة المطلقة عطاءاً مادياً يسمى المتعة بقدر يسار الزوج ومدة الزواج تطييباً لنفسها ، وجبراً لما أصابها من ضرر بسبب الطلاق " [26] ، وهذا ما أفتي به لتطبيقه على الأخوات المسلمات في الولايات المتحدة ، لتجنب المآسي التي تقع بهن ، وللتحذير من اللجوء إلى الأحكام والأنظمة الجائرة السائدة هنا .

ثانياً : عدم وقوع الطلاق على المطلقة : الأصل الشرعي وقوع الطلاق من الزوج على الزوجة حسب النصوص الشرعية ، والتطبيق العملي منذ البعثة وحتى تقوم الساعة [27] ، ولكن الفقهاء اجتهدوا أن المطلقة طلاقاً رجعياً ، أي بعد الطلاق الأول والثاني، تُعدّ بحكم الزوجة باتفاق المذاهب ، وطبقوا كثيراً من الأحكام الزوجية عليها ما بين موسع حوالي تسعين بالمئة ، ومضيق في خمسين بالمئة ، واتفقوا على أن للزوج (سابقا) يحق له الطلاق ، ويصح منه الظهار ، والايلاء ، ولم يخالف في ذلك إلا تابعي أو اثنان في القرن الهجري الأول ، ولم يؤبه بهما ، وسار التطبيق في التاريخ الإسلامي على رأي المذاهب الأربعة ، حتى كنا في اجتماعات وضع قانون الأحوال الشخصية الإماراتي عام 2004 م ، ورأى الأكثرية إلغاء هذا الحكم ، وأن المطلقة لا يقع عليها الطلاق ، لعدم وجود نص شرعي في بقائه ، ولأن هذا يتفق مع مقاصد الشريعة في الطلاق ، ويتفق مع العقل والمنطق والعقل ، فالمرأة مطلقة في الواقع والحياة وحتى في السجلات الرسمية وفي قرار المحاكم إن صدر الطلاق منها ، وأن هذا الطلاق من الزوج المطلق سفه ، وقلة أدب ، وتعسف في استعمال الحق ، لأنه مفرط ، فإن قصد بالطلاق مجرد الفراق للزوجة فقد حصل ذلك بالطلاق الأول ، فلماذا يلجأ للطلاق الثاني والثالث من المعتدة ؟ وهذا لا يفعله إلا أحمق ، أو فاقد التوازن ، أو من امتلأ قلبه حقداً وغيظاً على المعتدة ، أو المتسرع في أمر أحله المشرع ، فرأى العلماء صدّه عن هذه النزعات والنزوات ، ورد قصده عليه، وذلك لمصلحته ، وهذا ما نقل عن الإمام أحمد في رواية نقلها ابن القيم ، وأيدها ابن تيمية ، وابن المغيث من المالكية ، وقالوا : بعدم وقوع الطلاق على المعتدة نهائياً ، وأن اعتبار المعتدة زوجة هو اعتبار حكمي لبعض الآثار ، وليست زوجة حقيقة، فلا تترتب الأحكام الأساسية كالطلاق على الاعتبار الحكمي ، وترك الحقيقة الواقعة ، وأن هذا المطلق يستحق التأديب والتعزير عليه شرعاً ، لأنه يقصد فقط مجرد إلحاق الضرر والأذى بالمطلقة ، وهذا مبدأ جاهلي قبل الإسلام ، وهو ما كان يتم في الجاهلية، بأن يطلق الرجل زوجته ، وينتظر قرب انتهاء العدة فيراجعها ، وهكذا يفعل دواليك ، لتبقى بدون زواج ، بقصد الأذى والضرر بالزوجة ، وقررنا منع المطلق من هذا الطلاق الجديد الباطل ، وتم تنفيذه عملياً بنص القانون ، وانتقل إلى بعض البلاد ، وهو

[26] ميثاق الأسرة في الإسلام ، المادة 86 ، المذكرة التفسيرية ص 277 ، شرح قانون الأحوال الشخصية الأردني 1 / 204 .
[27] قال الماوردي رحمه الله تعالى : " الطلاق لا يقع إلا من زوج ، ولا يقع إلا على زوجة "، الحاوي 12 / 384 ، وانظر : المنهاج ومغني المحتاج 3 / 287 ، المهذب 4 / 278 ، المجموع 18 / 198 ، كنز الراغبين 3 / 165 ، الروضة8 / 53 ، الحاوي 13 / 59 ، البيان 10 / 69 ، الأنوار 2 / 196 ، المعتمد 4 / 166 .

مما أتقرب إلى الله تعالى بالعمل به ، ولو خالف حكماً اجتهادياً في المذاهب الأربعة ، ورفعنا الظلم عن المطلقات ، ومنعنا تحكم الأزواج بهن ، ونطالب الأخذ بهذا الرأي الجديد المعاصر في جميع البلاد ، ولا نمنع الزوج أن يراجعها ، لتأخذ حقوقها ، فإن أراد أن يطلقها ، وهي زوجة له ، فلا مانع منه شرعاً [28].

ثالثا: اعتبار الخلع فسخا: الخلع شرعاً : هو فُرْقة بعوض بلفظ طلاق أو خلع ، فهو تفريق بين الزوجين بطلب المرأة ودفع البدل منها ، وهو مشروع وجائز بالقرآن والسنة والإجماع ، واتفقت المذاهب الفقيهة على تطبيقه والعمل به ، وأنه بائن ، ولا رجعة فيه للزوج ، لأنها بذلت المال لتملك نفسها، وتخلص من الزوج ، ولكن اختلف الفقهاء باعتباره فسخاً وإنهاء للزواج السابق ، أو طلاقاً ينقص عدد الطلقات كلفظ الطلاق ، واستمر العمل على هذين الرأيين حسب البلاد والمذاهب ، ولما وضعنا قانون الأحوال الشخصية الإماراتي رجحنا العمل بالقول الثاني ، وأن الخلع هو فسخ للعقد السابق ، توسعاً في الشرع ، وتيسيراً على الناس، حتى لا يعد ذلك طلاقاً ، وينقص من عدد الطلقات إذا عاد الرجل والمرأة بزواج جديد ، وطالبنا الفقهاء والعلماء والمسؤولين باعتماد ذلك في القوانين المعاصرة [29].

رابعاً : التطليق للضرر : الطلاق شرعاً : حل عقد النكاح بلفظ الطلاق ونحوه ، أو هو رفع قيد النكاح المنعقد بين الزوجين بألفاظ صحيحة ، وهو ثابت ومقرر شرعاً ، وهو - في الأصل - بيد الزوج ، لقوله صلى الله عليه وسلم : " إنما الطلاق لمن أخذ بالساق" [30] ، ويجوز للمرأة أن تطلب من القاضي الطلاق لأسباب متعددة ، كما يحق للقاضي إيقاع الطلاق بين الزوجين للأسباب التي يراها ، ولكن ذهب جمهور المذاهب الحنفية والشافعية والحنابلة إلى منع المرأة من طلب الطلاق للضرر الذي يلحقها من الزوج، وسار التطبيق على ذلك في معظم البلاد الإسلامية طوال ثلاثة عشر قرناً ، ولما ساد الفساد في المجتمع ، وتطاول الرجال على إلحاق الإيذاء والضرر الأدبي والمعني والمادي بزوجاتهم ، وأساؤوا إليهن بمنتهى الوسائل ، ولا تملك الزوجات رفع الدعوى لرفع الظلم والضرر عنهن ، نهض الفقهاء والعلماء المعاصرون بطلب العمل بالمذهب المالكي الذي يسمح بالطلاق للضرر ، وله أدلته القوية ، وارتفعت الأصوات إلى لجان التشريع ، فقرروا ولأول مرة ذلك ، ونصوا عليه في معظم قوانين الأحوال الشخصية المعاصرة ، وتم تطبيقه في المحاكم ، ورفع الضيم والظلم عن المرأة إن قررت عدم الصبر على الضرر الصادر من الزوج ، ورفعت أمرها للقاضي لطلب التطليق للضرر ، وصار ذلك سائداً في البلاد الإسلامية اليوم ، ونص عليه ميثاق الأسرة في الإسلام، فقال : " إذا وقع على الزوجة ضرر من زوجها ، يتعذر معه دوام العشرة بين أمثالهما ، كان الحق في طلب الطلاق ، فإذا امتنع زوجها عن طلاقها رفعت أمرها إلى القاضي ، فإذا ثبت الضرر قضى لها بالتطليق من زوجها ، والتطليق للضرر يقع بائناً ببينونة صغرى ، فلا تحل لزوجها إلا بعقد ومهر جديدين (ويشترط رضاها وموافقتها قطعا، بخلاف الطلاق الرجعي) إذا لم يكن الطلاق مكملاً للثلاث " والضرر المقصود هنا : هم كل ما يصدر عن الزوج من قول أو فعل أو ترك بقصد وتعمد وبغير موجب شرعي يترتب عليه إلحاق الأذى أو الألم ببدن الزوجة أو نفسها أو اعتبارها أو يعرضها لذلك ، والدليل على ذلك الحديث السابق في الهامش رقم 10 : " لا ضرر ولا ضرار " [31] ، وهذا ما ننصح به الزوجات المظلومات في أمريكا ، حتى ولو بالاستعانة بالقضاء المدني الأمريكي ، لعدم وجود قضاء شرعي ، ولا مركز إسلامي معتمد في معظم المدن الأمريكية .

خامسا : حق القاضي بالخلع والتطليق عند تعسف الزوج ، وامتناعه عن الخلع : سبق تعريف الخلع ، ويتم الخلع بمجرد التراضي بين الزوج والزوجة ، ولا يتوقف على حكم القاضي ، أو رفع الأمر إليه ، لأنه قطع عقد بالتراضي ، وجعل لرفع

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[28] انظر تفصيل ذلك في كتابنا : المعالم المعاصرة للمرأة والأسرة ص 282 ، والمصادر والمراجع في الهامش .
[29] المعالم المعاصرة للمرأة والأسرة ص 292 .
[30] رواه الدارقطني 4 / 37 ، والبيهقي مرسلاً وموصولاً 7 / 370 ، ورواه بلفظ آخر ابن ماجه 1 / 672 .
[31] ميثاق الأسرة في الإسلام ، المادة87 ، والمذكرة التفسيرية ص 279 ، وانظر : شرح قانون الأحوال الشخصية السوري 1 / 240 0 القانون السوري م/ 112 ، حسب المذهب المالكي وقانون حقوق العائلة ، شرح قانون الأحوال الشخصية الأردني 2 / 465 ، المادة 133 ، المعالم المعاصرة للمرأة والأسرة ص 299 .

الضرر عن الزوجة ، وهذا منطقي ومتفق عليه ومقرر في الشرع ، ومطبق بين المسلمين قديماً وحديثاً ، ولكن الطارئ والجديد هو تعسف الزوج ، وامتناعه عن إتمام الخلع تسلطاً واستبداداً ، وبقصد التحدي وإلحاق الأذى والضرر بالزوجة ، وإحراجها ، وإجبارها على البقاء عنده ، وهذه الطريقة سائدة اليوم ، وشائعة حتى مع الأزواج في أميركا ، مما تشبه فكرة الرق والعبودية في الجاهلية ، وهنا تدخل العلماء الفقهاء المعاصرون إلى منح القاضي الحق في إجبار الزوج على الخلع ، فإن أبى وأصر على الرفض ، حكم القاضي بالخلع ، أو بالتفريق ، أو بتطليق الزوجة من زوجها ، ونص على ذلك ميثاق الأسرة في الإسلام ، المادة 89 ، وفي آخرها " فإذا لم يتفقا ، أو لم يستجب الزوج تعسفاً ، رفعت الزوجة أمرها إلى القاضي ليحكم بتطليقها من زوجها طلاقاً بائناً " وهو ما ذهب إليه سعيد بن جبير ، والحسن البصري ، وابن سيرين ، وزياد بن عبيد الله من التابعي ، رحمهم الله تعالى ، خلافاً للمذاهب الفقهية [32] .

سادساً : الطلاق بلفظ الثلاث : إذا طلق الرجل زوجته بلفظ الثلاث بكلمة واحدة ، أو بكلمات في مجلس واحد ، فإنه يقع به ثلاثاً في قول المذاهب الأربعة ، وجمهور الصحابة ، وهو ما كان يطبق طوال ثلاثة عشر قرناً ، لظاهر الآيات الكريمة ولعدة أحاديث شريفة ، حتى ساءت الأخلاق ، وفقد الوازع الديني ، وساد السفه من الرجال ، وكثر الطلاق الثلاث في الحياة والمجتمع ، وتحطمت الأسرة ، ورجع الرجال بالويل على أنفسهم ، ويستغيثون بالعلماء والمفتين لحل معضلتهم ، ولبى العلماء المعاصرون والفقهاء الدعوة ، ونظروا في المسألة بتروٍ وإمعان في حال المسلمين ، والدمار الحاصل ، وقرروا أن الطلاق الثلاث أو المكرر في المجلس الواحد يقع طلقة واحدة ، أخذا بقول ابن تيمية وابن القيم رحمهما الله تعالى اللذين قالوا به قبل سبعة قرون ، وثار العلماء عليهما حتى ألقوهما بالسجن إلى أن مات ابن تيمية رحمه الله تعالى في السجن بقلعة دمشق ، وأخذت جميع القوانين بهذا القول اليوم ، وهذا ما أراه مناسباً لهذا العصر ، مع يقيني أن أدلة المذاهب أقوى وأرجح ، و لكني أرى أن هذا هو الدواء المناسب للمرض المنتشر والشائع اليوم في إساءة استعمال الطلاق الثلاث ، والأعراض المرضية التي شاعت ، حتى يعود المسلمون إلى دينهم ووعيهم وأخلاقهم الإسلامية ، فيعودوا إلى القول الصحيح عند المذاهب الأربعة [33] .

سابعاً : الطلاق المعلق بشرط : الأصل أن يكون الطلاق منجزاً ، وبصيغة منجزة ، أي : أن يتم تحقيقه ووقوعه في الحال ، أما إذا علق الزوج الطلاق على أمر محتمل ، كقوله : إذا دخلت دار فلان ، ويقصد بذلك منعها من الدخول ، أو التأكيد عليها بترك فعل ، كاليمين ، ويقصد به الاستيثاق والتأكيد ، أو إضافة الطلاق إلى المستقبل ، كقوله : أنت طالق بعد أسبوع ، وكان مقتضى الشرع واللغة والعقل أن يقع الطلاق ، وسار الأمر على ذلك في الحياة والقضاء طوال ثلاثة عشر قرنا، وكان في الواقع قليلاً ، ولما فسدت الأحوال في العصر الحاضر ، وانتشرت هذه الصور حتى وصل التعليق على أتف الأمور والصور ، وفي كل حركة، وصار الطلاق يجري على الألسنة كشربة الماء ، وتعدد ت الحالات ، وضاق القضاة والمجتمع من سوء الأحوال ، فقرر الفقهاء الأخذ أيضاً برأي ابن تيمية وابن القيم رحمها الله تعالى ، وأن الحالف يسأل هل يقصد وقوع الطلاق حقاً ، فيقع طلاقه ، وإن كان يقصد مجرد الحلف أو قصد الحمل أو المنع ، فيعد ذلك يميناً ، وعليه كفارة يمين ، وهذا هو الصواب ، وهو نوع من التأديب للزوج لحماقته ، ووجوب الكفارة عليه .[34]

ونكتفي بهذه المسائل والأحكام المعاصرة في الطلاق ، وهي مجرد أمثلة ، ويوجد غيرها مما عالجه العلماء والفقهاء المعاصرون، جزاهم الله خيراً .

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[32] ميثاق الأسرة في الإسلام ، والمذكرة التفسيرية ص 285 ، وانظر : المعتمد 4 / 202 ، شرح قانون الأحوال الشخصية السوري 2 / 443 ، شرح قانون الأحوال الشخصية الأردني 2 / 445 ، ولم ينص القانونان على حق القاضي بالإجبار على الخلع والتطليق .

[33] انظر تفصيل ذلك مع المصادر والمراجع في : شرح قانون الأحوال الشخصية الأردني 2 / 313 ، شرح قانون الأحوال الشخصية السوري 2 / 219 ، المعتمد في الفقه الشافعي 4 / 171 ، نظام الأسرة في الإسلام ص 230 ، المعالم المعاصرة للمرأة والأسرة ص 285 .

[34] انظر تفصيل ذلك مع الأدلة في : المعتمد 4 / 172 ، شرح قانون الأحوال الشخصية السوري 1 / 219 ، شرح قانون الأحوال الشخصية الأردني 2 / 409 ، نظام الأسرة في الإسلام ص 231

المبحث الثالث

الأحكام المعاصرة فيما يترتب على النكاح والطلاق

يترتب على النكاح والطلاق أحكام كثيرة جداً ، وبعضها يتعلق بالنفقة ، والنسب ، والحضانة ، والرضاع ، والميراث ، والوصية للورثة ، وغيرها ، وحصل في هذه الموضوعات مسائل معاصرة ، وكان العلماء والفقهاء المعاصرون يتصدون لها لبيان الشرع القويم بما يرضي الله تعالى ، ويحقق مصالح الناس ، ونعرض جانباً منها :

أولاً : منع التنازل عن النفقة وحضانة الأولاد بدلاً في الخلع : سبق بيان الخلع ، وأنه تفريق بين الزوجين بطلب الزوجة ودفع البدل منها ، وهو مقرر شرعاً ، وقد تضيق يد الزوجة عن دفع البدل الذي يطلبه الزوج ، ويطمع الزوج باستغلال طلب الزوجة للتفريق ، ويلعب المال في عقله وقلبه ، فيطلب من الزوجة التنازل عن نفقتها ، أو نفقة أولاده منها ، أو يطلب إسقاط حقها في الحضانة لأولادها ، وقد يدفع الزوجةَ الاضطرارُ للخلع فتوافق مكرهة على هذه الطلبات الجائرة ، ويكون الأطفال هم الضحية ، بفقدان الرعاية والحضانة وحتى النفقة من والدهم ، ليعيشوا ذل الفقر والحرمان والحاجة مع أمهم المطلقة ، لتطبيق الشروط المتفق عليها ، وكثرت هذه الوقائع في الحياة والمجتمع ، وتركت آثاراً سلبية مدمرة ، فتدخل العلماء والفقهاء المعاصرون ، وأخذ برأيهم قوانين الأحوال الشخصية ، وقرروا حماية الأطفال من هذه الصفقة الجائرة ، وأن الزوج إذا اشترط في المخالعة أن يمسك الولد عنده مدة الحضانة ، ويمنع الأم من حضانتها المقررة شرعاً ، أو إذا أخذت أولادها للحضانة ، فيشترط الزوج عدم دفع نفقتهم ، واتفقا على ذلك ، فإن هذه الشروط باطلة ، ويصح الخلع ، لأنه لا يبطل بالشروط الفاسدة [35] ، وتبقى الحضانة الشرعية للأم بأخذ الأطفال ، ويلزم الأب بالنفقة إن كان الولد فقيراً ، وأضاف القانون الكويتي والسوري بإلزام الأب بأجرة الحضانة أيضاً ، لأنها حق للصغير ، ونص القانون السوري (م / 102 ف 2) " إذا كانت الأم معسرة وقت المخالعة أو أعسرت فيما بعد يجبر الأب على نفقة الولد وتكون ديناً له على الأم " أي : إن تكفلت بالنفقة ، لكن أضاف القانون السوري (م / 103) " وكان لحاضنته الشرعية أخذه منه ، ويلزم أبوه بنفقته وأجرة حضانته إن كان فقيراً " . [36]

ثانيا : تنظيم النسل ومنع التعقيم والتحديد الرسمي : لا شك أن من أهداف الزواج الرئيسة الإنجاب ، وأن الشريعة ترغب في طلب الأولاد ، وأن للطفل مكانة في نظر الشريعة الغراء ، وفي نفوس الناس ، لاستمرار البشرية ، والحفاظ على الجنس البشري، وهو ما تتطلبه الفطرة السليمة ، وقرره جميع الفقهاء والعلماء ، لكن ظهر في العصر الحاضر الدعوة إلى التعقيم وعدم الإنجاب، وطلب تحديد النسل رسمياً ، وشاعت هذه الطامة الكبرى في العالم ، وتسربت إلى البلاد الإسلامية ، وتبناها العملاء ، وأرادوا فرضها على المسلمين ، وهنا هب العلماء والفقهاء ، وحميت المعركة ، واشتد الوطيس ، ووقف المخلصون في وجه الطغاة والمفسدين ، وعقدت عدة مؤتمرات وندوات في العالم العربي والإسلامي ، واتخذوا القرارات المهمة التي تحرم تعقيم الرجال والنساء واستئصال الأرحام والإجهاض بغير ضرورة طبية ، كما تحرم الطرق التي تحول دون استمرار مسيرة البشرية ، وتحريم تحديد النسل الرسمي من الدولة ، وتحريم إجهاض الجنين إلا إذ تعرضت حياة الأم لخطر محقق لا يمكن تلافيه إلا بالإجهاض ، ويحرم بوجه عام الإضرار بالجنين ، مع تعرض الفاعل والمخالف – حتى الأطباء والممرضين - للجزاء المدني والعقابي ، وهو

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[35] رد المحتار على الدر المختار (حاشية ابن عابدين) 2 / 782 ،

[36] انظر : شرح قانون الأحكام الشخصية السوري 1 / 227 ، شرح قانون الأحوال الشخصية الأردني 2 / 458 ، المعتمد 4 / 199 ، والمصادر والمراجع الواردة في الهامش ، المعالم المعاصرة للمرأة والأسرة ص 293 .

ما قررته بعض الأنظمة والقوانين في العالم[37] ، وساد الحق واندحر الباطل في بلاد المسلمين ، لكن الفقهاء والعلماء المعاصرون أجازوا تنظيم النسل الانفرادي (غير الرسمي) بحسب ظروف الزوجين واتفاقهم لأدلة شرعية وعقلية وعملية .

ثالثاً : الوصية الواجبة قانوناً : من المقرر شرعاً بالنصوص الشرعية أن ميراث العصبة يتم بحسب الأقرب ، وأنه إذا وجد الأولاد للميت مع أولاد الأولاد أن الإرث للأولاد باتفاق المذاهب ، وأن أولاد الأولاد لا يستحقون شيئاً من الميراث ، ويسمون أولاد المحروم ، لأن أباهم مات قبل موت جدهم ، ولم يقع خلل اجتماعي عند ذلك في تاريخ المسلمين ، لأن أولاد المحروم إما أن يكونوا أغنياء ، فلا يحتاجون إلى المال والإرث من جدهم ، وهذا نادر ، وإما أن يكونوا فقراء ، وهم أيتام صغار غالبا ، فكان أعمامهم وأقاربهم يتولون شؤونهم الكاملة ، وإن كان الأقارب فقراء فكان الوقف على الفقراء والأيتام ، يغطي ذلك تماماً ، بل كان الأيتام الفقراء محل حسد من غيرهم ، لما يتمتعون به من إكرام ورعاية ، وكفالة ، حتى كان سائر الأطفال يتمنون أن يكونوا أيتاماً لينالهم العطف والرعاية والحظوة التي يتمتع به الأيتام الصغار ، حتى حل الجهل والفقر في القرن الرابع عشر الهجري ، العشرين ميلادي ، وأجدبت الأرض ، وضعف الوازع الديني ، ورعاية ذوي الأرحام ، فحلت الكارثة بأولاد المحروم ، وجمعوا بين اليتم بفقد الأب الراعي لهم ، وبين الفقر والحرمان من ميراث والدهم لوكان حياً ، وشاعت هذه الظاهرة القاسية في المجتمع الإسلامي ، وتفطن العلماء والفقهاء المعاصرون لهذه المأساة ، وطالبوا الجد بأن يوصي لأحفاده بشيء من ماله قبل وفاته ، ويحسن أن لا تقل عن مقدار حصة والدهم من ميراثه لو افترض أنه حي ، فإن حصل ذلك ، وأعطى الجد أحفاده عطية في حياته، أو أوصى لهم وصية ، فبها ونعمت ، وهذا صحيح باتفاق المذاهب ، وإن قصر بما سبق ، أو نسي ، أو فاجأه الموت قبل القيام بما سبق ، أو تعمد حرمان أحفاده بشيء من ماله ، والذي قد يكون لابنه المتوفى نصيب كبير في كسبه وادخاره معه ، فهنا قرر الفقهاء ،وطالبوا لجان التشريع في قانون الوصية والميراث ، بأن يقوم القانون بتقرير الوصية جبراً ، ولذلك سميت الوصية الواجبة قانوناً ، تمييزاً لها عن الوصية الواجبة شرعاً على المدين ، والوديع ، وغيرهما ، وأقرت معظم قوانين الأحوال الشخصية في البلاد العربية والإسلامية الوصية الواجبة قانوناً ، مع اختلاف بالتوسع وشمول أولاد الأبناء وأولاد البنات ، أو الاقتصار على أولاد الذكور ، ومع الاختلاف في بعض الشروط ، وأن أولاد المحروم يأخذون ذلك وصية ، وليس ميراثاً ، وهي في المجمل : أن يأخذ أولاد المتوفى حصة من تركة جدهم أو جدتهم ما يساوي حصة والدهم أو والدتهم ، وصية من تركة الجد أو الجدة ، بمقدار حصة أبويهما لو افترض أنهما أحياء عند وفاة الجد أو الجدة ، بشرط ألا تزيد عن ثلث التركة ، وكانت هذه المبادرة من العلماء والفقهاء مباركة وموفقة وإبداعية في العصر الحاضر .[38]

رابعاً : التلقيح الاصطناعي بالأنبوب واستئجار الأرحام : إن النسب وحفظ النسل والعرض من مقاصد الشريعة الضرورية ، وجاءت النصوص الشرعية الكثيرة الدالة على ذلك ، وأن النسب أو النسل من فروع الزواج الذي بدأ مع آدم عليه السلام في الجنة، واستمر مع البشرية جمعاء ، حتى جاء القرن العشرين الميلادي ، الرابع عشر الهجري ، وازدهر العلم في العالم ، وظهر التلقيح الاصطناعي عن طريق الأنبوب ، وتنوعت وسائله دون مراعاة للحلال والحرام شرعاً ، ووقع العبث في النسب ، ونقل البويضات بين النساء ، والمتاجرة بالحيوان المني ، والخلط فيها ، مع الفساد ، والمتاجرة من الأطباء ، وضج العلماء والفقهاء المسلمون المعاصرون ، وتداولوا في هذا الأمر الخطير ، وتم عرض الموضوع شرعياً وطبياً وفنياً ، وقدم لمجمع الفقه الإسلامي الدولي عدد من البحوث التي تمت مناقشتها جماعياً في المؤتمر الثاني ، ثم في المؤتمر الثالث المنعقد بعمان الأردن بتاريخ 1407/2/8 هـ - 1986/10/11 م ، وبعد التداول اتخذ قراره رقم 16 ، وخلاصته أن خمسة طرق محرمة شرعًا ، وممنوعة منعاً باتاً لذاتها أو لما يترتب عليها من اختلاط الأنساب وضياع الأمومة وغير ذلك من المحاذير الشرعية ، وأنه لا حرج في الطريقتين السادسة والسابعة باللجوء إليهما عند الحاجة مع التأكيد على ضرورة أخذ كل الاحتياطات اللازمة ، وهما : السادسة :

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[37] انظر : ميثاق الأسرة في الإسلام ، المادة 91 ، 95 ، والمذكرة التفسيرية لها ص 291 ، 297 ، والقرار رقم 39 من قرارات مجمع الفقه الإسلامي الدولي المنعقد بالكويت 1 / 6 / 1409 هـ - الموافق 10 /12 / 1988م .

[38] انظر تفصيل ذلك في : المعتمد 4 /583 ، الفرائض والمواريث والوصايا ص 582 ، والمصادر والمراجع في الهوامش .

أن تؤخذ نطفة من زوج وبويضة من زوجته ، ويتم التلقيح خارجياً ، ثم تزرع اللقيحة في رحم الزوجة ، والسابعة : أن تؤخذ بذرة الزوج وتحقن في الموضع المناسب من مهبل زوجته أو رحمها تلقيحاً داخلياً " [39]، وهكذا وضع العلماء والفقهاء المعاصرون بالتعاون والاستشارة مع الأطباء المسلمون النقط على الحروف ، وكبحوا جماح العلم المادي الذي يعد سلاحاً ذا حدين للخير والنفع والتقدم والتطور المفيد ، وللشر والتدمير والفساد والجشع المادي ، وقرر الفقهاء أيضا تحريم الممارسات التي تشكك في انتساب الطفل إلى أبويه ، كاستئجار الأرحام ونحوه ، لمخالفته لصريح الآية الكريمة : " إن أمهاتهم إلا اللاتي ولدنهم وإنهم ليقولون منكراً من القول وزوراً : المجادلة / 2 ، وقوله تعالى : " ادعوهم لآبائهم هو أقسط عند الله " الأحزاب / 5 ، مع المنازعات الطامة في الاختلاف على الولد بين الحاملة ، والزوج والمرأة اللذين أخذت منهما النطفة والحيوان المنوي ، والأموال التي صرفت على ذلك [40] ، ويضاف لذلك العبث الذي صدر في مؤتمرات المرأة من إعطاء الطفل الحق في تغيير دين أبويه ، واختيار ما يشاء ، وحقه في تغيير الجنس .

خامساً : التحذير من العلاقات المختلطة بين الجنسين : عرضت الشريعة الغراء العلاقة بين الجنسين بما يحفظ الآداب والأخلاق والقيم الرفيعة ، وتم ذلك طوال ثلاثة عشر قرناً ، حتى طلّ القرن العشرين الميلادي / الرابع عشر الهجري ، وانفتح المسلمون على العالم الغربي الذي تخلى عن مبادئ العلاقات الفاضلة بين الجنسين ، ودعا إلى الاختلاط المشين ، وخاصة بين الشباب ، والشابات ، والمراهقين والمراهقات (والفرند) ، وما ينتج عن ذلك من دعارة ، وهتك أعراض ، وعلاقات جنسية محرمة ، وأمهات قاصرات ، وأطفال للشوارع ، وفتح الدور لاستقبالهم ورعايتهم ، وانتقل بعض ذلك إلى البلاد الإسلامية للتشبه بالغرب، وهاجر كثير من العائلات المسلمة إلى الغرب ، ووقعت المواجهة بين الحق والباطل ، وبين الشرف والعرض والعفاف مع العهر والفساد والانحراف واختلاط الجنسين ، وهنا قام الدعاة والمفكرون والفقهاء والعلماء المسلمون المعاصرون من عرض مبادئ الدين والعقيدة والفكر الإسلامي والأخلاق الإسلامية ، وشرح الأحكام الفقهية ، لبيانها للمسلمين ، وبيان حدود التوعية الجنسية ، وحماية الشباب خاصة من الانحراف ، والتحذير من التشبه بالفساد في الغرب ، للحديث الشريف : " من تشبه بقوم فهو منهم "[41]، وقال العلماء المعاصرون : من الضروري حماية الطفل ، من استثارة الغرائز الجنسية ، والانفعال العاطفي عند التوعية الجنسية، وادماج المعلومات الجنسية بصورة ملائمة لمرحلته العمرية في مواد علم الأحياء ،والعلوم الصحية ، والعبادات ، والأحوال الشخصية ، والتربية الدينية ، واقتران عرض مواد التربية الجنسية بتعميق الآداب السلوكية الإسلامية المتصلة بهذه الناحية ، وربطها بالإيمان والعقيدة ومراقبة الله تعالى ، وبيان الحلال من الحرام ، ومخاطر انحراف السلوك الجنسي عن التعاليم الإسلامية السامية ، والعمل على وقاية المراهقين من الممارسات التي تشجع على الانحراف ، أو إثارة الغرائز الدنيا المخالفة للتعاليم الدينية، ولقيم المجتمع ، ومنع الاختلاط في المدارس ، والنوادي الرياضية ، وتعيين مدربات للفتيات ، ومنع ارتياد المراهقين من الجنسين لأماكن الفساد واللهو العابث ، وتقرير عقوبات رادعة للمسؤولين عن تلك الأماكن في حالة مخالفة ذلك ، وكل هذا ينطلق من نصوص شرعية صحيحة ، وأن العلاقة بين الجنسين أمر فطري غريزي ، وأنه من حاجات الجسد الأساسية ، مع وجوب ضبطه وتنظيمه [42] ، مع الحرص على سمو التعبير ، والحذر الشديد من الفحش في القول ، أو الخدش من حياء المرأة أو جرح كرامتها الإنسانية ، أو إثارة الغرائز الدنيا ، وخاصة لدى المراهقين والمراهقات ، وكل هذا تعاني منه الأسر الإسلامية ، والآباء والأمهات القاطنين في الغرب وبين المجتمعات غير المسلمة ، ويصرخون ، ويستغيثون ، ويبحثون عن الحل لكل ما يواجهون ، وكثير من هذه المآسي انتقلت إلى البلاد الإسلامية بنسب مختلفة ، وانتشرت في الإعلام العالمي ، وفي وسائل

[39] انظر: مجلة المجمع الفقهي الدولي ، العدد 3 ، الجزء1 ص 423 .
[40] انظر : ميثاق الأسرة في الإسلام ، المادة 104
[41] رواه أبو داود ، بذل المجهود 12 / 59 رقم 4030 ، وأحمد 2 / 50 .
[42] ميثاق الأسرة في الإسلام ، المادة 112 ، مع التصرف والاختصار ، والمذكرة التفسيرية له ص 328 ، 333 .

التواصل الاجتماعي ، ولا عاصم من ذلك إلا الله تعالى ، مع وجوب مضاعفة الأعمال من الآباء والأمهات ، لتأمين أعظم قدر من المناعة الذاتية لمواجهة هذا الخطر الداهم ، والله خير معين ، ومجيب .

سادساً : منع استخدام الأطفال في الأعمال الشاقة ، ووجوب التعليم الأساسي ، وحقهم في الضمان الاجتماعي : كانت رعاية الأولاد عند المسلمين مثلاً أعلى طوال التاريخ الإسلامي مما أنتج القادة ، والحكام ، والعلماء في مختلف الفنون ، والمفكرين ، وكانت حسب توجيهات القرآن الكريم ، والسنة النبوية ، والسيرة العطرة ، ومنهج الصحابة ومن تبعهم بإحسان ، إلى أن دبّ الاحتلال الأجنبي الغاشم على البلاد الإسلامية ، واقترن بالغزو الفكري السام والمضلل والساحق ، ولئن خرج المحتل العسكري فقد خلف وراءه الاحتلال الثقافي والفكري والقانوني والسياسي والاقتصادي ، والأسوأ من كل ذلك أنه زرع العملاء من أبناء جلدتنا ، ومن الشعب ، ليقوموا بدوره وأكثر ، ويتلقوا التوجيهات المدمرة منه ، ويضاعفوا في تنفيذها بأسوأ السبل ، ونتج عن ذلك الطامات الكبرى ولا تزال تجثم على رقاب الشعب والأمة ، بل أوقعوا الخلاف بين أفراد الأمة ، وأثاروا النعرات والعنصريات التي وصلت إلى الحروب الأهلية المدمرة والنتائج التخريبية ، ومن ذلك الفقر الذي دعا الناس إلى تشغيل الأطفال لكسب القوت والرزق ، بل لاستغلال الصغار في النزاعات والقتال الطائفي والأهلي ، وهذا سائد في معظم البلاد الإسلامية ، فارتفع صوت العلماء والفقهاء والمفكرين والمصلحين لمنع استخدام الصغار والأطفال قبل بلوغ السن المقررة شرعاً وقانونا في الاشتراك المباشر في الحرب ، وأن يكون للأطفال في حالات الطوارئ والكوارث والمنازعات المسلحة أولوية الحماية والرعاية الخاصة بالمدنيين من حيث عدم جواز قتلهم أو جرحهم ، أو إيذائهم ، أو أسرهم ، وأن لهم أولوية الوفاء بحقوقهم في المأوى والغذاء والرعاية الصحية والإغاثية ، وأن للطفل الحق في الحماية من الاستغلال الاقتصادي ، ومن أداء أي عمل ينطوي على خطورة، أو يعوقه عن التعليم ، أو يكون ضاراً بصحته ، أو بنموه البدني ، أو العقلي ، أو الديني ، أو المعنوي ، أو الاجتماعي ، وأن يتم تحديد حد أدنى لسن التحاق الأطفال بالأعمال المختلفة ، ووضع نظام مناسب لساعات العمل وظروفه ، كما يبدأ حق الطفل في الانتفاع من الضمان الاجتماعي ، بما في ذلك التأمين الاجتماعي والإعانات وغيرها منذ ولادته ، ومن ذلك في عصرنا الحاضر جعل التعليم الأساسي إلزامياً ومتاحاً مجاناً للجميع ، ومشتملاً على المعارف الأساسية اللازمة لتكوين شخصية الطفل ، مع تشجيع وتطوير أشكال التعليم الثانوي المتنوع ، لتغطية احتياجات المجتمع من العمالة القادرة على تحقيق فروض الكفاية ، واتخاذ التدابير المناسبة ، مثل مجانية التعليم ، وتقديم المساعدة المالية عند الحاجة إليها، وجعل التعليم العالي المزود بجميع الوسائل المناسبة متاحاً للجميع على أساس القدرات العقلية والاستعداد البدني والنفسي ، وكل لذلك لمواكبة العصر ، وتأكيد صلاحية الإسلام لكل زمان ومكان [43] .

ونكتفي بهذه الأمثلة من القضايا المعاصرة التي تولى العلماء والفقهاء والدعاة والمفكرون المسلمون المعاصرون معالجتها والدعوة إليها ، لحماية المسلمين ، وإعادة تطبيق الشريعة الغراء ، والدين القويم لهذه الأمة التي وعدها الله بالخير والنصر عند الرجوع لدينه وشرعه ، وهو القائل : " يا أيها الذين آمنوا إن تنصروا الله ينصركم ويثبت أقدامكم " محمد / 7 ، وصلى الله وسلم على سيدنا وأسعدنا وقائدنا وقدوتنا محمد رسول الله ، وعلى آل بيته الطيبين الطاهرين ، وعلى صحابته الغر الميامين الذين كانوا خير جيل عرفه التاريخ ، والحمد لله رب العالمين .

[43] ميثاق الأسرة في الإسلام ، المادة 109 ، 114 ، 116 ، والمذكرة التفسيرية ص 319 ، 338 ، 344 ، وللأسف نرى بعض البلاد الإسلامية تدفع المليارات لشراء السلاح وتدمير البلاد العربية والإسلامية ، وتمتنع عن تزويد العمال والموظفين (غير المواطنين) الذين يخدمونها من الدواء والتعليم المجاني والمساعدات الإنسانية ، مما يندى لها الجبين ، وتقشعر منه الأبدان ؟؟

خاتمة أحكام الأسرة المعاصرة

الحمد لله رب العالمين على التوفيق لكتابة هذا البحث الممتع في الفقه الإسلامي مع الأصالة والمعاصرة ، وبيان التفسير السديد القانوني الصحيح في أحكام الأسرة ، وقوانينها المعاصرة في الأحكام الشخصية ، وبيان الأمثلة للاتجاهات المعاصرة، ونلخصها في النتائج الآتية :

1- إن الشريعة الإسلامية صالحة لكل زمان ومكان ، وأن مصادرها محصورة في القرآن والسنة والاجتهاد .
2- تحتل الأسرة أهمية خاصة في المجال الشرعي ، وأن أحكامها الوحيدة تقريباً التي لا تزال مطبقة اليوم ، وأنها حظيت بالتنظيم والتقنين بصدور قوانين حقوق العائلة والأحوال الشخصية .
3- تنقسم الأحكام الشرعية النصية إلى أحكام قطعية وتفصيلية ، وهي ثابتة لا تتغير ولا تتبدل نهائياً ، وأحكام عامة أو قواعد أساسية ، مع ترك تفصيلها للاجتهاد حسب مبادئ ثابتة ومقررة في أصول الفقه ، وهذا ما تتطلبه المعاصرة .
4- يتحدد المنهج الشرعي في المعاصرة بأن تصرف الإمام على الرعية منوط بالمصلحة ، وحق ولي الأمر بالاختيار والتنظيم أو التقنين ، واختيار الأحكام من مختلف المذاهب الفقهية .
5- بدأت الأحكام المعاصرة في الزواج بآثار العدول عن الخِطبة ، وعند طول المدة وما يترتب عليها من ضرر ، بعدم رد الهدايا ممن عدل عنها ، والتعويض عن ضرر العدول ، وإعادة المهر أو قيمته إن كان الخاطب قد سلمه للمخطوبة .
6- قرر الفقهاء المعاصرون منع زواج الصغار في العصر الحاضر ، لما ظهر فيه من الويلات والمآسي والأضرار الاجتماعية، وقرروا مبدئيا سن 17 ، 18 مع استثناءات ، ومراعاة اختلاف البلدان والأعراف.
7- قرر الفقهاء وجوب الاتفاق عند عقد النكاح على عمل المرأة خارج البيت ، وكيفية توزيع الأعمال والواجبات ، والمشاركة في النفقة وغيرها ، والحرص على الحقوق للزوجين والأولاد .
8- أوصى الفقهاء المعاصرون منع الضرب بين الزوجين تجاوزاً للضوابط الشرعية ، وأن من يخالف هذا المنع يكون مسؤولاً مدنياً وجنائياً .
9- يجوز للمرأة أن تشترط على الزوج عدم الزواج عليها ، ولها تحديد الجزاء المترتب على المخالفة .
10- ظهر في بعض قوانين البلاد الإسلامية منع تعدد الزوجات رسمياً ، بل فرض عليها ذلك كرهاً ، ولم يوافق عليه إلا علماء الحكام ، وكلاب السلطة ، وهو المشروع في معظم بلاد العالم ، بينما تفتح أبواب الدعارة على مصراعيها حتى بين المتزوجين والصغار والمراهقين ، وكانت النتائج كارثية ومدمرة ، وانتصار للشيطان وأعونه ، وللفساد والدمار .
11- قرر الفقهاء المعاصرون إحياء الحكم الشرعي المهجور لدى المسلمين ، وهو منح المطلقة متعة لها لمواساتها ، وتخفيف آثار الطلاق عليها ، وهي التي نص عليها القرآن الكريم في عدة آيات كريمة ، وإغلاق تسرب الأحكام المنتشرة في الغرب بما يسمى التعويض للزوجة ، مع الحيف والظلم والتطرف في تطبيقه في الحياة بما يقصم ظهر الزوج .
12- رأى العلماء والفقهاء المعاصرون عدم صحة وقوع الطلاق على المطلقة أثناء العدة ،لعدم ثبوت ذلك في الشرع ، وأنه مجرد سفه وظلم على المرأة ، وأنه يخالف مقاصد الشريعة في الطلاق ، ويخالف العقل والواقع ، لأن المرأة مطلقة في الواقع ، وأن إيقاع الطلاق عليها يتفق مع عادات الجاهلية الباطلة ، وإن قال به أصحاب المذاهب الأربعة اجتهاداً وبدون نص .
13- رجح العلماء المعاصرون اعتبار الخلع الشرعي الواقع بين الزوجين فسخاً ، ولا ينقص به عدد الطلقات المقررة شرعاً، وذلك تسهيلاً على الناس ، ولتقليل شأن الطلاق في الأسرة المسلمة .
14- رأى العلماء المعاصرون ترجيح قول المالكية في تشريع حق المرأة بطلب الطلاق للضرر الصادر من الزوج لزوجته، إن طلبت ذلك ، وضرورة تطبيق هذا الحكم في جميع البلاد الإسلامية ، لرفع الضرر والأذى عن المرأة ، ولجم لسان الزوج عن إلحاق الضرر بزوجته .
15- قد ترى الزوجة صعوبة العشرة والاستمرار في الحياة الزوجية ، فتطلب المخالعة لقاء دفع بدل لذلك ، وهذا مقرر شرعاً ، وباتفاق المذاهب الذين قرروا أن الخلع عقد رضائي ، ولا بد من موافقة الزوج ، وهنا استغل كثير من الأزواج هذا الشرط، وامتنعوا من إتمام المخالعة لأسباب تافهة ، وتعسفاً في استعمال الحق ، وأن القاضي يسعى لإتمام الخلع، فإن أصر الزوج على رفضه فلا حيلة للقاضي عليه ، ورأى العلماء المعاصرون منح القاضي حق الخلع والتطليق إن رأى مسوغاً لذلك ، لتحقيق مقاصد الشريعة من الخلع ، وإن خالف به المذاهب الأربعة .
16- اتفقت المذاهب على إيقاع الطلاق الثلاث بلفظ واحد أو بعدة ألفاظ في مجلس واحد ـ بأنه ثلاث ، ولما ساءت أوضاع المسلمين، وضعفت عندهم العقيدة والتربية الإسلامية ، شاع هذا الطلاق ، وترتبت عليه طامات كبرى ، فرأى العلماء

المعاصرون الأخذ بقول ابن تيمية وابن القيم رحمهما الله تعالى في اعتبار هذا الطلاق واحداً ، وأخذت بذلك جميع القوانين المعاصرة .

17- الأصل أن يكون الطلاق منجزا في الحال ، فإن كان معلقاً على شرط أو في المستقل ، فإن مقتضى الشرع واللغة أن يقع ، وهو ما أخذت به المذاهب الأربعة ، ثم فسد الناس وأصبح الطلاق على ألسنتهم في كل حركة ، وساءت الأحوال، وبحث الناس عن الحل ، فقال العلماء والفقهاء المعاصرون بقول ابن تيمية وابن القيم رحمهما الله تعالى بعدّ ذلك مجرد يمين ، ويكلف الزوج بأداء كفارة يمين تأديباً له ، وكفى الله المؤمنين القتال ، وارتاح المسلمون من هذه المصيبة ، وأخذت به القوانين المعاصرة .

18- يترتب على النكاح والطلاق آثار كثيرة ، وينتج عنها أحكام متعددة ، ويحصل سوء تطبيق لها ، فتدخل العلماء والفقهاء المعاصرون ، وقدموا حلولاً فيها ، ومن ذلك منع الزوج في المخالعة من استغال حال الزوجة ، بطلبه منها التنازل عن نفقتها، ونفقة أولادها ، والتنازل عن حقها في الحضانة ، مما تسبب عنه البؤس والفاقة ، وضياع الأولاد ، فقرر العلماء منع هذه الشروط الجائرة ، وأنه يصح الخلع ، وتبطل الشروط الفاسدة ، وأخذ بذلك قوانين الأحوال الشخصية .

19- عاث في الأرض الفساد ، ودعت كثير من دول العالم بتعقيم الرجال والنساء لمنع النسل والإنجاب ، وتسرب ذلك لبعض الحكام العرب والمسلمين ، وأرادوا أن يفرضوا هذا على المسلمين ، فهب العلماء والفقهاء المخلصون في وجه الطغاة، وعقدوا الندوات والمؤتمرات ، وقرروا تحريم التعقيم، ومنع تحديد النسل ، وجواز تنظيم النسل فردياً بحسب ظروف الزوجين واتفاقهم عليه بما يرونه مناسباً لهم .

20- إن أولاد الأولاد لا يرثون عند وجود الأولاد بموجب نظام الإرث والعصبة المقررة في القرآن والسنة ، ولم تكن هذه الحالة مشكلة في التاريخ الإسلامي ، لكن تجسدت في العصر الحاضر مشكلة ابن المحروم من الميراث ، الذي حل به اليتم والفقر، فأبدع الفقهاء المعاصرون منحه وصية واجبة له ، بمقدار حصة أصله من التركة لو فرض أنه حي ، وبشرط أن لا تزيد عن ثلث التركة ، التزاماً بحديث تحديد الوصية بالثلث ، وتم حل هذه المعضلة الطارئة ، وأقرت هذه الوصية الجديدة في معظم قوانين الأحوال الشخصية. .

21- تقدم التطور العلمي في التلقيح الصناعي وأطفال الأنابيب واستئجار الأرحام ، ودخله العبث والجشع المادي والتنافس في كسب الزبائن ، وانتشر ذلك في العالم ، ووصل المرض الخبيث إلى المسلمين ، وهب العلماء والأطباء المسلمون لدراسة الأمر ، وعرضوه على المجامع الفقهية الدولية ، فحرموا خمس وسائل ، وأباحوا وسيلتين فقط ،ا والمتعلقتين حصراً بين الزوج وزوجته ، وحرموا استئجار الأرحام ، وأنقذوا المسلمين من الطامة والويل والعبث بالأعراض والأنساب .

22- شاع في العصر الحاضر الاختلاط المشين بين الجنسين ، وتبنت البلاد الغربية وحكوماتها الدعوة للفساد ، والعلاقات الجنسية الشاذة ، ونشر الإباحية ، وتسلل قسم من ذلك إلى البلاد العربية والإسلامية ، وبلغ الخطر مداه عند الجاليات المسلمة في بلاد العالم ، وتصدى العلماء والفقهاء والدعاة والمفكرون المسلمون لمواجهة هذا الوباء المنتشر ، وأعلنوا التحذير من العلاقات المختلطة المحرمة بين الجنسين في جميع مجالات الحياة ، ووجوب الحرص على التزام القيم والأخلاق الإسلامية ، وعدم الانجراف وراء السراب الخادع ، وألاعيب الشيطان من الإنس والجن وأعداء الله والدين والشرع ، ووجوب المحافظة على الهوية الإسلامية كاملة .

23- يسعى أهل الفساد والجشع المادي لوسائل متعددة ، ومنها استخدام الأطفال والصغار في الأعمال الشاقة ،وحرمانهم من حقوقهم ، واستغلال الجهل والفقر والحاجة ، ونهض العلماء والفقهاء والمصلحون والمربون المسلمون المعاصرون ، وطالبوا بمنع استخدام الأطفال والصغار في الأعمال الشاقة ، وطالبوا بوجوب تأمين التعليم الإلزامي والمجاني لهم ، ودعمهم الكافي للتعليم العالي ، وكفالتهم في الضمان الاجتماعي ، وغير ذلك ، رعاية لصغرهم ، وأنهم جيل المستقبل ، وذخيرة الأمة .

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لويفيل - كنتاكي - الولايات المتحدة
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The validity of the birth certificate of an adopted child assigned to adoptive parents

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Abstract:

An adoption of a child can be understood as an effort to unify a child from another person into the family of his adoptive parents. He is treated as a child in terms of education, providing a living, fulfilling his needs, but that does not mean he is treated as a descendant or biological child in other cases. The definition of an adoption is stated in Government Regulation Number 54 of 2007 concerning the Implementation of Child An adoption in Article 1 paragraph 2, which means that an adoption is a legal act that transfers the power of the biological parents or legal guardians to the power of the adoptive parents' family environment. In terms of child an adoption, it is also inseparable from the rules regarding child an adoption procedures. This type of juridical normative research, with a statutory approach to examine primary legal materials, secondary legal materials, to tertiary legal materials. The results of the study indicate that the deed must be made in a form that has been determined by the law if the birth certificate is not following with the provisions of the law then the deed is not an authentic deed. Any counterfeiting/engineering problem for any reason can be categorized as a violation of the applicable norms. First, the norm of truth and secondly the norm of order in society. This also has implications for the position of adopted children in terms of inheritance.

Keywords: adopted children; certificate of birth; inheritance

Abstrak:

Pengangkatan anak dapat dipahami sebagai upaya penyatuan seorang anak dari orang lain kedalam keluarga orang tua angkatnya. Ia diperlakukan sebagai anak dalam segi pendidikan, pemberian nafkah, pemenuhan kebutuhannya, namun bukan berarti ia diperlakukan sebagai anak nasab atau

anak kandungnya dalam hal selain itu. Pengertian tentang pengangkatan anak ini tertuang dalam Peraturan Pemerintah Nomor 54 Tahun 2007 Tentang Pelaksanaan pengangkatan anak pada pasal 1 ayat 2, yang bermakna pengangkatan anak adalah suatu perbuatan hukum yang mengalihkan kekuasaan orang tua kandung atau walinya yang sah kedalam kekuasaan lingkungan keluarga orang tua angkat. Dalam hal pengangkatan anak juga tidak terlepas dari aturan tentang prosedur pengangkatan anak. Jenis penelitian yuridis normatif, dengan pendekatan perundang-undangan guna menelaah bahan hukum primer, bahan hukum sekunder, hingga bahan hukum tersier. Hasil penelitian menunjukkan bahwa akta harus dibuat dalam bentuk yang telah ditentukan oleh undang-undang jika akta lahir tersebut tidak sesuai dengan ketentuan undang-undang maka akta tersebut bukanlah akta otentik. masalah pemalsuan/rekayasa apapun alasannya hal tersebut dapat dikategorikan sebagai pelanggaran terhadap norma yang berlaku. Pertama, norma kebenaran dan kedua norma ketertiban dalam masyarakat. Hal ini juga berimplikasi pada kedudukan anak angkat dalam hal waris.

Kata Kunci: anak angkat; akta lahir; kewarisan.

Introduction

Basically every married couple wants to have children. Besides that, children can be entertainers and arouse a sense of love from parents. With the existence of a legal marriage relationship, it will also have an impact on their offspring in the future. The definition of an adoption can be interpreted as an act of taking other people's children based on applicable legal provisions. In article 1 of the Government Regulation of the Republic of Indonesia Number 54 of 2007 concerning the Implementation of Child An adoption, what is meant by child an adoption is "A legal act that diverts a child from the sphere of authority of parents, legal guardians, or other people who are responsible for the care, education, and raise the child into the family environment of the adoptive parents".[1]

An adoption of a child is an important event that must be carried out based on applicable rules, to obtain administrative order and legal certainty. As it is known that an adoption is a legal requirement which must be protected by the law as well. There is a need for legal recognition by registering the child. In Indonesia, an adoption can be carried out according to several rules, in addition to the applicable positive law, an adoption can also be carried out according to the customary law of the local community. However, whatever process the adoptive parents choose, do not let the process contradict the applicable law.

An adoption of a child is different from child care, because the an adoption of a child will have its own legal consequences. Child care is more comprehensive in nature, in contrast to an adoption. In adopting a child there are several things that must be fulfilled, including the existence of a child an adoption deed. A child who is adopted as someone's child as his child will be made a child by his adoptive parents as his biological child. Therefore, there is a need for clarity in the form of an

[1] I Ngurah Primayuda Bawananta, I Made Yudana, I made Yudana, and Ratna Artha Windari, "Pengangkatan Anak Dan Akibat Hukumnya Menurut Hukum Perdata Dan Hukum Adat Bali (Studi Kasus Di Banjar Gempinis Desa Dalang Kecamatan Selemadeg Timur Kabupaten Tabanan," *Jurnal Pendidikan Kewarganegaraan UNDIKSHA,* Vol.V no. 3 (2019): 9.

authentic deed from a notary. An adoption of a child can only be done in the best interest of both the adoptive parents and the adopted child himself. However, an adoption cannot break the blood relationship between the adopted child and his biological parents. Prospective adoptive parents must also be of the same religion as the religion or belief held by the prospective adopted child. As with raising their own children, adopted children should be treated well.

In the development of technology and information has brought a major influence in the socio-cultural system of today's society. These developments and changes are also accompanied by the development of science, including legal theory today. The development of legal science with various fields of study can be used as an analytical knife in solving various legal problems that have developed to date. The number of legal cases that occur today cannot be separated from a legal discovery in its settlement, this also applies to notarial studies, in this case the authenticity of a deed. As a public official, a notary has the authority to inaugurate various kinds of deeds under his authority.[2]

The making of a deed is the result of the existence of several rules to confirm a certain legal act that requires an authentic deed as evidence later in proof when it is needed in court. However, the making of a deed is not only limited to positive legal provisions, sometimes it is caused by the will of the parties to have an interest in the desired legal action. As in this article that to adopt a child, a deed of an adoption/an adoption is required but this can be a problem if it is not following the applicable rules. The purpose of making an authentic deed by a notary as an effort to minimize legal problems that arise with the an adoption of a child, in some cases this issue of an adoption can cause several problems in the future, for example in terms of inheritance distribution. This research is included in normative legal research using the statute approach. The sources of legal materials in this study are divided into three, namely primary legal materials, secondary legal materials, and tertiary legal materials. This paper also aims to review the validity of a birth certificate in which the adoptive parents assign their adopted child as a biological child, what are the juridical implications arising from the existence of the deed.

Literature review

Lineage and Inheritance Law

Nasab can be interpreted as family ties, genealogies, relatives. Relatives or family is the meaning of lineage according to Ibn Manzur from the meaning of Qorobah. But in general, the word nasab can be interpreted as a binding relationship between family members by blood ties. Lineage is very important in the legal dimension, both in civil law and criminal law. This nasab legal attachment as explained by al-Sartawi for example in child care, maintenance, education rights, wills, inheritance, and so on.[3] According to marriage law in Indonesia, nasab means that there is a blood relationship between a child and his father because of a valid marriage contract. In Islamic law the determination of lineage is very

[2] Irfan Iryadi, "Kedudukan Akta Otentik Dalam Hubungannya Dengan Hak Konstitusional Warga Negara," *Jurnal Konstitusi*, no. 4 (2018): 798, https://doi.org/DOI:https://doi.org/10.31078/jk1546. 15

[3] Mutiara Fahmi and Fitiya Fahmi, "Penetapan Nasab Anak Mulā'anah Melalui Tes DNA (Studi Atas Metode Istinbāṭ Yūsuf al-Qaraḍāwī)" Samarah: Jurnal Hukum Keluarga dan Hukum Islam 3 No. 1. Januari-Juni 2019 (n.d.): 151.

important because with this it can be seen the relationship between parents and their children. In the marriage law, there are several types of children, including biological children (legitimate children), adopted children, and children outside of marriage.[4] A legitimate child is a child born from a legal marriage relationship, while an adopted child is a child of biological parents but the child transfers his responsibilities to someone else because of the provisions in the law. 2002 concerning Child Protection, and Government Regulation Number 54 of 2007 concerning Child An adoption, while illegitimate children are children born outside of a legal marriage, such children only have a kinship relationship with their mother. A legitimate child is a child born in a legal marriage, this is as regulated in Article 42 of the UUP. Meanwhile, Article 99 of the KHI also states that.[5] In Islamic law, lineage is very important, because its existence is the basis for the determination of other laws, such as issues of living, guardianship, parenting, marriage, as well as wills, and inheritance.

The position of lineage in matters of will and inheritance is related to blood relations. In this case, Islam forbids to bequeath property to heirs who are related by blood. In that sense, a person's lineage can only be assigned to his biological parents from a legal marriage as well. Nasad in this case means kinship based on blood relations through a valid marriage contract. For that reason, the lineage of the child must be clear, so his affiliation will also clearly return to his biological parents. In Islam the law of an adoption of children is allowed and the procedure does not burden someone who does it.[6] Whereas in our positive law the consequences arising from an adoption are changes in the birth certificate, where the certificate should not change the name of the biological parents for any reason, and adoptive parents are also obliged to notify the origin of the child when the child is an adult, so as not to unexpected things happen in the future.

In Islamic law, the an adoption of a child does not affect the marriage between the adopted child and his adoptive parents. Because in this case the adopted child is not included in the elements of kemahraman, so that between the two parties there is no attachment to inherit each other. Seeing this, the nasab relationship between adopted children and adoptive parents does not affect blood relations with their biological parents. This habit of raising children is common among Arabs.[7] An adoption of children in Islam was first known in the time of the prophet Muhammad SAW, because at that time he adopted a child named Zaid Bin Harithah, and the Prophet did not change the lineage of his biological parents, because in Islam an adoption of children is not allowed to change the lineage of biological parents. Islam allows an adoption of children to provide a living, love,

[4] https://www.finansialku.com/5-jenis-anak-menurut-perkawinan-dan-hukum-indonesia/ (diakses pada Selasa, 27 Juli 2021 pukul 18.30 WIB)

[5] Afif Muamar, "Ketentuan Nasab Anak Sah, Tidak Sah, Dan Anak Hasil Teknologi Reproduksi Buatan Manusia: Antara UU Perkawinan Dan Fikih Konvensional," *Al-Ahwal* 6, no. 1 (2013): 45.

[6] Siti Aminah, Hanafi Arief, Hidayatullah, "Akibat Hukum Terhadap Anak Dari Akta Kelahiran Yang Mencantumkan Orangtua Angkat Menurut Hukum Islam," n.d., 10.

[7] Abd Ghaffar, "Kewarisan Anak Angkat Dalam Perspektif Hukum Islâm," *Al-Ihkam: Jurnal Hukum Dan Pranata Sosial* 2, no. 1 (September 28, 2019): 62, https://doi.org/10.19105/al-lhkam.v2i1.2615.

education, and all kinds of other children's rights.[8] In Islamic law the concept of an adoption does not recognize an adoption in the sense of being an absolute biological child, but it is only allowed to maintain it with the aim of fulfilling all matters relating to its needs, and this may not break the lineage between the child and his biological parents.[9]

Child An adoption Procedure

An adoption according to law is the transfer of a child from biological parents to adoptive parents as a whole and carried out according to the applicable rules. In this case, the obligations towards the child will be transferred to the adoptive parents, however, the biological parents still have a relationship with their child. Islamic law justifies and recognizes the an adoption of a child but in this case it is not permissible to change the lineage, and does not change the law in terms of inheritance and guardianship. According to M. Budiarto, an adoption of children in Islamic law is under with the following provisions:[10]

1. Not breaking the blood relationship between the adopted child and his biological parents and family.
2. The adopted child does not have the position of heir from his adoptive parents, but remains the heir of his biological parents, as well as the adoptive parents are also not domiciled as heirs of his adopted child.
3. Adopted children are not allowed to use the names of their adoptive parents in terms of lineage.
4. Adoptive parents cannot act as guardians in the marriage of their adopted child

An adoption institutions are common in our society. To guarantee the need for the increasing legal need for parents who want to adopt a child, in this case it can be obtained through a court order. Because in principle, an adoption must go through existing legal procedures with the aim of providing legal certainty. Orderly administration, to avoid causes that will arise in the future.

An adoption of a child can be understood as an effort to unify a child from another person into the family of his adoptive parents. He is treated as a child in terms of education, providing a living, fulfilling his needs, but that does not mean he is treated as a lineage child or biological child in other cases. The definition of an adoption is stated in Government Regulation Number 54 of 2007 concerning the Implementation of Child An adoption in Article 1 paragraph 2, which means that an adoption is a legal act that transfers the power of the biological parents or legal guardians to the power of the adoptive parents' family environment.[11]

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[8] Djanuardi Djanuardi, Hazar Kusmayanti, and Linda Rachamainy, "Sosialisasi Hak Mewaris Anak Angkat Berdasarkan Hukum Islam Dan Hukum Adat Untuk Mencapai Keadilan Keluarga," *Jurnal Pengabdian Dharma Laksana* 3, no. 2 (January 6, 2021): 154, https://doi.org/10.32493/j.pdl.v3i2.8840.

[9] Fahruddin Ali Sabri , "ADOPSI (Sebuah Tawaran Hukum Islâm Menuju Kebaikan Masa Depan Anak Terlantar)," *Al Ihkam: Jurnal Hukum & Pranata Sosial* 6, no. 2 (August 1, 2013): 201, https://doi.org/10.19105/al-ihkam.v6i2.309.

[10] Ika Putri Pratiwi, "Akibat Hukum Pengangkatan Anak Yang Tidak Melalui Penetapan Pengadilan," *Kumpulan Jurnal Mahasiswa Fakultas Hukum* 0, no. 0 (May 23, 2016): 23, http://hukum.studentjournal.ub.ac.id/index.php/hukum/article/view/1691.

[11] Wahyu Utami dan Peni Rinda Listyowati, "Analisis Yuridis Kedudukan Anak Angkat Yang Berstatus Anak Kandung Berdasarkan Akta Kelahiran," *Prosiding, Konferensi Ilmiah Mahasiswa Unissula (Kimu) 3*, 2020, 359.

Government Regulation Number 54 of 2007 concerning the Implementation of Child An adoption in Chapter III Article 12 describes the requirements for adopted children as follows: 1). If the child is not yet 18 years old; 2) child is a neglected child or neglected child; 3) being in family care or in a childcare institution; 4) and require special protection. These are some of the requirements for prospective adopted children. In this rule, the purpose of adopting a child is in the best interest of the child as an effort to realize their welfare and protection of the child.[12]

An adoption of children in western civil law is known as an adoption, in this case the source of an adoption law is the Staatsblad of 1971 Number 129 (Stb. 1917 No. 129) dated March 29, 1917, this rule is a complementary rule in the Civil Code which does not recognize an adoption issues. , because in the Civil Code it is only explained about the an adoption or an adoption of children out of wedlock.[13] An adoption regulated in the provisions of Stb. 1917 No. This applies only to the Chinese community, this is regulated in articles 5 to 15. In its development, the government made several regulations in the process of adopting children. An adoption of children for the Chinese group uses the Civil Code with a notarial deed, this is different from the indigenous group, where in the indigenous group the process of adopting children must go through a court decision following what has been regulated in PP. 54 of 2007. In the case of an adoption that will have a juridical impact, the most important thing is to carry out the procedures for adopting children under the applicable regulations.

Although in the Civil Code the issue of child an adoption is not regulated because the Civil Code only regulates the issue of acknowledging children out of wedlock in Book I Chapter XII Part Three, in articles 280 to 289 regarding the recognition of children out of wedlock. This is certainly different from the issue of an adoption/an adoption of children. There are various factors when someone adopts a child, including the desire to have a child for married couples who do not have children, wanting to add another type of child from existing biological children, sympathy for some children who have been neglected due to poverty, or orphans, and so on.[14] The process of adopting a child must also be considered with applicable law. As the function of law itself is for administrative order and the achievement of legal certainty. Under the applicable procedures. The process of adopting a child with the applicable rules must be based on a court decision. This is following the Article 47 paragraph (1) of Law no. 23 of 2006 concerning population administration which states that: "The registration of child an adoption must be carried out based on a court order where the applicant lives."

Inheritance System

There are various kinds of rules that regulate the relationship between humans and other humans, one of which is in the law of inheritance. When a

[12] Ni Made Delonik Regia, "Perbandingan Hukum Pengangkatan Anak Menurut Staatblad 1917 Nomor 129, Pp Nomor 54 Tahun 2007 Tentang Pelaksanaan Pengangkatan Anak, Dan Hukum Adat Bali" (skripsi, Universitas Mataram, 2018), 7, http://eprints.unram.ac.id/7450/.

[13]Ruth Tria Enjelina Girsang, 234

[14] Prabowo Setyo Aji, "Pelaksanaan Penerbitan Catatan Pinggir Pada Akta Kelahiran Sebagai Akibat Pengangkatan Anak Dan Akibat Hukumnya," *Pandecta: Research Law Journal* 9, no. 2 (December 1, 2014): 240, https://doi.org/10.15294/pandecta.v9i2.3578.

person dies, there is a rule regarding inheritance for his heirs. The property left by someone who dies requires arrangements regarding who is entitled to receive the property. Inheritance is the process of transferring one's inheritance to the heirs. This is also regulated in article 1833 paragraph (1) of the Civil Code which explains that: "the heirs by law, get ownership rights over all goods, all rights, and all obligations of the deceased."[15] The rule of law that regulates the consequences of a person's death in Indonesia is known as inheritance law. This inheritance law regulates the rules on how to regulate the distribution of inheritance for someone who has died to his heirs. A.Plito said that inheritance law is a series of provisions relating to the death of a person and the legal consequences in terms of material matters, namely the transfer of inheritance from a person who has died to his heirs, both in the relationship between themselves and with other parties.[16]

There are several inheritance systems that exist in Indonesia apart from Islamic law and western civil law in this case the Civil Code, there is also inheritance law in indigenous peoples, namely:[17]

a. Individual inheritance system, is a system of distribution of inheritance individually to their respective share of the property, after the share is received it becomes the property of each individual and cannot be interfered with by other parties. Generally, this inheritance system is adopted by people who understand parental kinship
b. collective inheritance system, is an inheritance system that does not divide inheritance to individual heirs, but the assets are managed jointly within the scope of a large family, so that the property is not divided. This inheritance system can maintain the integrity of the family and property intact, not eliminating their origins. This is subject to mutual agreement.
c. Majorat inheritance system, this system does not transfer property to each heir, however, the eldest/eldest child is the sole heir. Whether this system is good or not depends on the eldest son in managing his property. If you can manage it well, then the other heirs can enjoy it well too. It also depends on the mutual agreement between the heirs.[18]

In the Civil Code there is no definition of inheritance law, but there are only various concepts regarding inheritance, people who are entitled to receive inheritance, and those who are not entitled to receive it. However, in the KHI article 171 letter a of Presidential Instruction Number 1 of 1991 it is stated that "inheritance law is the law that regulates the transfer of ownership rights to heirs' property (tirkah), determining who is entitled to become heirs and how much of each." Inheritance law is regulated in Book II of the Civil Code, the number of articles governing it is 300 articles, starting from article 830 of the Civil Code to Article 1130 of the Civil Code.[19] In an inheritance law, adopted children are not

[15] Oemar Moechtar, *Perkembangan Hukum Waris Praktik Penyelesaian Sengketa Kewarisan Di Indonesia*, 1st ed. (Jakarta: Prenadamedia Group, 2019), 5.
[16] Ali Afandi, *Hukum Waris, Hukum Keluarga, Dan HukumPembuktian* (Jakarta: Rineka Cipta, 2004), 6.
[17] Soerjono Soekanto, *Hukum Adat Di Indonesia*, Cet.X (Jakarta: Raja Grafindo Persada, 2010), 262.
[18] Maimun Nawawi, *Pengantar Hukum Kewarisan Islam* (Surabaya: Pustaka Radja, 2016), 189, http://repository.iainmadura.ac.id/id/eprint/24.
[19] Salim HS, "Pengantar Hukum Perdata Tertulis (BW)" (Jakarta: Sinar Grafika, 2008), 137.

included as heirs, because people who are entitled to become heirs according to law are:[20]

a. Blood relatives, both legal and out of wedlock
b. The husband or wife who has lived the longest.

If the first group exists, then the next group does not get anything from an inheritance of the heir. On the other hand, if all the groups of heirs do not exist, then all an inheritance becomes the property of the state. The state is obliged to pay off the debt of the deceased heir as long as the property is sufficient.[21]

Results and Discussion

The Validity Of Birth Certificates For Adopted Children Whose Lineage Is Assigned To Adoptive Parents

Protection and legal certainty contained in PP No. 54 of 2007 on the status of the deed of an adoption made by a Notary in the process of adopting a child through a court decision, this is to ensure legal certainty, and protection in terms of child an adoption. The definition of a birth certificate, according to the Legal Dictionary compiled by Drs. M. Marwan, S.H. and Jimmy P., S.H., are*: Birth certificate is an authentic certificate issued by a civil registry office that has perfect legal force before a judge, provides legal certainty, ensures a person's legal role and has an unlimited validity period; a deed made by a civil registry employee that contains an explanation of the birth of a child and is proven in the civil registry register.*

From the definition above, we can see that a birth certificate is an authentic certificate issued by the relevant agency or agency that is authorized to make it. The certificate contains some information related to a person's birth, which includes the identity of the owner of the certificate, and the identity of his parents.[22] This deed aims to provide legal certainty in all matters, both for the identity of the child, and in other legal positions, for example as evidence. The an adoption of a child based on the applicable rules before the prospective adoptive parents submit an application to the District Court or the local Religious Court must first obtain a recommendation from the local social service, this is as regulated in Article 14 paragraph (3) of the Minister of Social Affairs RI No. 110/HUK/2009 concerning the Requirements for An adoption of Children. These requirements must be met first before submitting an application for an adoption in court. Juridically the definition of an application is a problem that is submitted in court to obtain a determination of a problem.

Article 55 of the Marriage Law explains that "the origin of a child can only be proven by having an authentic birth certificate issued by an authorized official. If the birth certificate is not available, a determination of the origin of a child can be requested to the court after a careful examination based on evidence that has met

[20] Dijelaskan pada pasal 832 KUHPerdata tentang orang-orang yang berhak menjadi ahli waris. Selanjutnya ahli waris karena hubungan darah ini dijelaskan kembali pada pasal 852 KUHPerdata. Plito, membagi ahli waris menurut undang-undang dalam empat golongan, yaitu: 1) Golongan pertama, terdiri dari suami/isteri dan keturunannya; 2) golongan kedua, terdiri dari orang tua, saudara dan keturunan saudara; 3) Golongan ketiga, terdiri dari leluhur lainnya; 4) golongan keempat, terdiri dari sanak keluarga dan lainnya.(Plito, 1986)

[21] Salim HS, Pengantar Hukum Perdata Tertulis (BW), 140

[22] htmtps://www.hukumonline.com/klinik/detail/ulasan/lt5188a4eecc621/risiko-hukum-mengubah-keterangan-dalam-akta-kelahiran/

the requirements. On this basis, the birth registration agency in the jurisdiction of the court can issue a birth certificate for the child. However, this can be a problem if the deed made by the authorized official is not following the conditions that must be met. Article 1868 of the Civil Code is the source of the birth of authentic deeds and implicitly contains orders to the legislature to make a law governing public officials and the form of authentic deeds. This can be seen from the formulation of the article which states that an authentic deed is a deed made in the rules that have been determined by law and is brought before the authorized official for that. This article explains the limitations of what is meant by an authentic deed, namely:[23]

1. The deed must be made before a public official
2. The deed must be made in the form determined by law
3. The public official must have the authority to make the deed

In article 15 of Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the position of a Notary, hereinafter referred to as the Law on the Position of a Notary in paragraph (1), it is stated that a notary has the authority to make an authentic deed regarding all acts, agreements, and stipulations made required by law or required by the interested party to be stated in an authentic deed.[24] In Law Number 23 of 2006 concerning Population Administration, it is explained about the an adoption of children as follows: Registration of child an adoption in the territory of the Unitary State of the Republic of Indonesia is regulated in Article 47 based on a court order at the place of residence of the applicant. no later than 30 days after receipt of a copy of the court order, then the civil registration official makes a margin note on the birth certificate register and the birth certificate quote.

Basically children have basic rights that have been regulated in law, as attached in Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection in article 5 it is explained that each child has the right to get a name and status. citizenship. Self-identity as stated in Article 27 and Article 28 of Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 is stated in the form of a birth certificate. There are children whose existence is recognized de jure because of a birth certificate, or there is an identity, but there are also many children who are de facto but de jure are not recognized by the state. The importance of legal protection for children is related to the welfare of the child. Children whose births are not registered in state documents and they do not have a certificate, their rights as a community cannot be fulfilled, this can be called a non existent individual.[25]

Then what about the child's birth certificate, in which case the birth certificate is falsified? Is this deed included in the authentic deed? Seeing the problems in this research, the birth certificate made has been issued by an authorized official, and the official has the authority to issue the deed, but the problem is at point b the

[23] Irfan Iryadi, "Kedudukan Akta Otentik Dalam Hubungannya Dengan Hak Konstitusional Warga Negara," 802.

[24]Ruth Tria Enjelina Girsang "Perlindungan Hukum Dan Kepastian Hukum Terhadap Anak Angkat Yang Proses Pengangkatannya Melalui Akta Notaris Di Luar Sistem Pengangkatan Anak Angkat/Adopsi Yang Aktanya Wajib Dibuat Dengan Akta Notaris (STB.1917 NO 129) Law Review," 232, accessed July 6, 2021, https://ojs.uph.edu/index.php/LR/article/view/844/338.

[25] Triyuni Soemartono and Sri Hendrastuti, *Administrasi Kependudukan Berbasis Registrasi* (Jakarta: Yayasan Bina Profesi Mandiri, 2011), 112.

certificate must be made in the form determined by law and the problem in this research, the certificate the birth is not following what is stipulated by law, where the status of the adopted child who should have gone through the court ruling process is not passed, and the writing of the biological child in the birth certificate is an engineered identity. In fact, the issuance of the certificate in addition to using the parents' data, in this case using a marriage book, must also be based on a birth certificate from either a midwife or other maternity home. But why can a birth certificate be issued if one of them has not been fulfilled, this is a big problem for population administration activists. In addition, the existence of management in court is also considered a problem because it has to incur costs, the process is difficult, and it takes a long time, so that our society does not follow the procedure. Waiting for a decision from the court on an application for an adoption is also not easy. This needs to be a correction so that in the future this arrangement will be even better. There needs to be socialization in our society that the management of child an adoption is not as complicated as many people imagine, so that our society is aware of the importance of following the applicable procedures, as well as providing legal understanding so that they avoid legal entanglements that they do not know about.

If you look back at the importance of this lineage issue, then this issue should be kept pure. In the sense not to damage the lineage of the child. This is very guarded in Islam. In the KHI article 171 letter h, it is explained that an adopted child is a child who in the maintenance of his daily life, education costs, and so on, transfers his power and responsibility from his biological parents to his adoptive parents based on a court decision. So in this case there is a decision from the court. If this procedure is followed by the prospective adoptive parents, then the deed of an adoption can be said to be an authentic deed according to law.[26]

Islam views that one's efforts to adopt a child so that separating him from his biological parents cannot change the nature of the child itself, so that there is no fraud and abuse of the child's status in terms of lineage. The Quran recommends calling the child by the name of his biological father. With the aim of no mixing or falsification of lineage in life. Moreover, if the act is based on elements of lies, then Islam views this as a lie. Unlike the case with the applicable positive law, the process of issuing a deed must go through the actual procedure. The stages must be followed, if you change any of the stages then the deed is invalid. Law Number 1 of 1974 has clearly explained that a legitimate child is a child born in a legal bond, namely marriage. This is explained in article 42. So even though the biological child is written in the deed, the procedure that is followed is not under the law.

The Legal Position Of An Adopted Child Assigned To His Adoptive Parents In Terms Of Inheritance

There are various factors that encourage someone to adopt a child, but all of these factors do not have to change the identity of an adopted child into a biological child. As happened in several cases where the adopted child must refer to the lineage of the biological parents, not the adoptive parents, but what if this is ignored by the prospective adoptive parents, where the adoptive parents change the identity

[26] Abdurrahman, "Kompilasi Hukum Islam Di Indonesia," Universitas Indonesia Library (Akademika Pressindo, 2007), 121.

of the adopted child into a biological child, so that in the future there will be some of the problems faced, one of which was about the authenticity of the birth certificate in terms of proof in court, and the status of adopted children in terms of inheritance, when the adoptive parents died.

There are several legal problems that are often faced by our society, one of which is the issue of this adopted child. Various inheritance problems that arise in our society are due to several factors, including the ignorance, and ignorance of the community regarding the existing inheritance law, or because of the desire to get as much inheritance as possible so that there is a desire to dominate in excess. This inheritance problem is something that can be resolved in a familial way if only the heirs agree on a fair distribution so that this can minimize conflicts that may arise during the distribution of inheritance later.[27]

However, a person who is entitled to an inheritance must meet the requirements as an heir, namely:

a. The existence of blood relations, both legitimate children, and illegitimate children who receive recognition from their father, and can be proven medically. This is in line with the decision of the Constitutional Court Number: 46/PUU-VIII/2010 concerning the Judicial Review of the Provisions of Article 43 of Law Number 1 of 1974 concerning Marriage.
b. The heir must be present when the testator dies, except for what is stated in Article 2 of the Civil Code which means: "The child in a mother's womb is considered to have been born as the interests of the child wanted it, when the child dies at birth, then he is considered to have never existed. ."
c. People who become heirs are not included in the person who is not worthy, incompetent, or refuses to inherit.[28]

The issue of wills or inheritance is part of the many problems that occur in our society. According to Syahrur, when fiqh is applied in everyday life, it causes various problems, including: prioritizing inheritance and legal issues, but putting aside other things, in this case the will and the legal basis that accompanies it, forcing the abolition of wills, both in the word of God and in the law. Hadith, the third mixes between two different concepts, namely Al-hazz (allocate on inheritance) and al-nashib (part of will), resulting in confusion in understanding an inheritance verse and the will verse.[29]

In the case of an adopted child whose status has changed to become a biological child, this is evidenced by the existence of a birth certificate, when there is a conflict with other heirs, in this case the biological child or other heirs. In an inheritance law contained in the Civil Code, the parties must be able to prove that they are part of the heirs. The problem of adopted children who are assigned to adoptive parents is basically this can damage the lineage. In the Fiqh of Mawaris

[27] Oemar Moechtar, Perkembangan Hukum Waris dan Praktik Penyelesaian Sengketa Kewarisan di Indonesia, 8
[28] Berdasarkan ketentuan pasal 1023 BW, bahwa seorang ahli waris berhak menerima secara murni atau menolah warisan yang ia terima.
[29] Rahadian Kurniawan Musda Asmara and Linda Agustian, "Teori Batas Kewarisan Muhammad Syahrur Dan Relevansinya Dengan Keadilan Sosial," *De Jure: Jurnal Hukum Dan Syar'iah* Vol. 12, no. No. 1 (2020): 23, https://doi.org/DOI: http://dx.doi.org/10.18860/j-fsh.v12i1.7580.

applies the principle that lineage is for the father.[30] In this case a person is considered to have a kinship relationship with another person only if the liaison is the father. For example, a grandson is considered to have a kinship relationship with his grandfather only if the liaison in this case is the child's father. Basically kinship because there is a blood relationship, so in this case a person has a kinship relationship both with his father and with his mother. The consequence in this case is that the kinship with the mother is no less strong than the kinship with the father. This statement is also supported by a number of verses regarding inheritance and the prohibition of marrying certain women.

Even though an adopted child is included as a biological child because of a birth certificate, it does not necessarily make the adopted child's position as a biological child. There are various ways to determine a person's lineage in this case through a predetermined procedure from various schools of thought, including:[31]

a. Through legal marriage,
b. Through an acknowledgment or lawsuit against a child, in this case there are conditions that must be met, among others, the child who conveys the confession is really unclear about his lineage because his father and mother are unknown, and the man who acknowledges the child's lineage can confirm that the child it is not the result of adultery
c. Through evidence, in this case the ulama are of the opinion that the witness must know the condition and history of the child. This provision is following the problem of evidence that must be proven, one of which is by witnesses in the law of evidence in the Civil Code.
d. Through estimates, for example with medical assistance. In this case, DNA (Deoxyribo Nucleic Acid) tests can be used which are able to obtain clarity on the identity of a child to determine their offspring.

If you look at several ways to determine a person's lineage, in this case the determination of lineage as evidenced by a birth certificate must also be accompanied by actual evidence when a dispute occurs in the future. This problem appears several times in our society, due to several factors. First, because people don't want to bother in making a certificate or other identity, many of our people are unfamiliar with the law so that problems like this are considered trivial. Similarly, when entering a person's identity in their family members (KK), people generally easily enter their family data, even though there are also those who are included in the KK are not family. This is what can be referred to as identity falsification or identity engineering.

A birth certificate that shows a person's identity cannot be considered as an ordinary certificate which in this case is only limited to including a person's name. Because this also has implications for other problems, for example in terms of inheritance. When someone finds out that he is someone's biological child, because in the deed he is written as a biological child, especially if his adoptive parents never tell him the origin of the child. Can this be justified by law? If you return to the problem of forgery/engineering for whatever reason, it can be categorized as a

[30] Akhmad Jalaluddin, "Nasab: Antara Hubungan Darah Dan Hukum Serta Implikasinya Terhadap Kewarisan," June 2012, 78, http://publikasiilmiah.ums.ac.id/handle/11617/2341.
[31] Amiur Nuruddin and Azhari Akmal Tarigan, *Hukum Perdata Islam Di Indonesia*, 6 (Jakarta: Kencana, 2016), 275.

violation of the applicable norms. First, the norm of truth and secondly the norm of order in society. If you see this, the position of an adopted child cannot be equated as a biological child. Thus, the share of the adopted child must be following with its portion in terms of inheritance. However, in the provisions of Article 832 of the Civil Code there is also an inheritance system according to a will (testament), this is a statement by an heir about what he wants, occurs after he dies and can be revoked by him if he wishes. The importance of lineage, one of which is to provide children's rights and achieve justice and order in administration. Let our society not think that such acts are commonplace. So that the purpose of law for orderly administration will be difficult to achieve.

Conclusion

The deed must be made in the form determined by law if the birth certificate is not following the law, where the status of the adopted child who should have gone through the court decision process is not passed, and the writing of the biological child in the birth certificate is an engineered identity, the certificate it is not an authentic deed. In fact, the issuance of the certificate in addition to using the parents' data, in this case using a marriage book, must also be based on a birth certificate from either a midwife or other maternity home. But why can a birth certificate be issued if one of them has not been fulfilled, this is a big problem for population administration activists. In addition, the existence of management in court is also considered a problem because it has to incur costs, the process is difficult, and it takes a long time, so that our society does not follow the procedure. Waiting for a decision from the court on an application for an adoption is also not easy. This needs to be a correction so that in the future this arrangement will be even better. There needs to be socialization in our society that the management of child an adoption is not as complicated as many people imagine, so that our society is aware of the importance of following the applicable procedures, as well as providing legal understanding so that they avoid legal entanglements that they do not know about. Even though an adopted child is included as a biological child because of a birth certificate, it does not necessarily make the adopted child's position as a biological child.

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Moral Violations on Commercial Advertising Broadcasting Through Indonesian Television Media

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Abstract:

The purpose of this study is to examine and to elaborate the foms of moral violations on commercial advertising broadcasting through Indonesian television media. The datas obtained through empirical research will be analyzed critically by using a screening method based on the perspective of Islamic moral values both related to the advertised product and the way the advertisement is broadcast itself. The findings of this study indicate that there are some moral violations in the broadcasting of commercial advertisements on the Indonesian television media. The most dominant form of moral violation is the sexual exploitation of advertisers through unetichal behavior and clothing that are not appropriate to be exposed for public. Advertisments that are not guided by Islamic values tend to have low ethical standards, so that if they are broadcast on television media, they have the potential to harm the public. The results of this study can be used as an evaluation material for advertising actors to uphold the regulations and Islamic moral values which more guarantee the safety of life in the world and the hereafter for all parties.

Keywords: moral violation; Islamic values; advertisements; television.

Abstrak:

Tujuan dari penelitian ini adalah untuk mengkaji dan mengelaborasi bentuk-bentuk pelanggaran moral pada penyiaran iklan komersial melalui media televisi Indonesia. Data-data yang diperoleh melalui penelitian empiris akan dianalisis secara kritis dengan menggunakan metode penyaringan berdasarkan perspektif nilai-nilai moral Islam baik yang berkaitan dengan produk yang diiklankan maupun cara iklan itu ditayangkan. Temuan penelitian ini menunjukkan bahwa terdapat beberapa pelanggaran moral dalam penayangan iklan komersial di media televisi Indonesia. Bentuk pelanggaran moral yang paling dominan adalah eksploitasi seksual pengiklan melalui perilaku tidak etis dan pakaian yang tidak pantas untuk diekspos ke publik. Iklan yang tidak berpedoman pada nilai-nilai Islam cenderung memiliki standar etika yang rendah, sehingga jika ditayangkan di media televisi berpotensi merugikan masyarakat. Hasil penelitian ini dapat digunakan sebagai bahan evaluasi bagi pelaku periklanan untuk menegakkan aturan dan nilai-nilai moral Islam yang lebih menjamin keselamatan hidup di dunia dan akhirat bagi semua pihak.

Kata Kunci: pelanggaran moral; nilai Islami; iklan; televisi.

Introduction

The development of public broadcasting technology allows advertisements to be delivered massively, but it is not uncommon for advertisements to appear that violate the boundaries of norms prevailing in society. Khuong's research (2015: 851) shows that television is the choice of most consumers in advertising. He stated that the public has 61% confidence in television advertising. This high level of trust has led to many moral violations in advertising. Yusnaidi, (2018) emphasized that there are several elements of violation in advertising, especially in advertisements that exploit sensuality. In line with Yusnaidi, Madni et al (2016: 15) see two controversial advertising categories that contain morality violations.

So far, the study of commercial advertising on television tends to three things. First, television is the most effective medium for conducting product advertising campaigns (Alemán Carreón, Nonaka, Hentona, & Yamashiro, 2019; Bernhardt et al., 2013; Qin et al., 2014). Second, commercial advertising on television has a great influence on society in consumption behavior and product purchase decisions (Anjum, Irum, & Dr. Naheed, 2015; Chan, Tsang, & Leung, 2013; Fossen & Schweidel, 2017; Madni et al. , 2016). Third, media studies are starting to explore the involvement of religion in advertising. Television advertising becomes a medium in conditioning religion and culture for product framing (Fauzi Harun et al., 2019; Setya, Amanda Gelgel, & Pradipta, 2020; Thadi, Novaldi, & Fitria, 2019). Of the three tendencies, there is no evaluative study, especially one that looks at the level of morality of commercial advertising on television in violating the norms of public morality with adequate standards.

This paper aims to complement the previous study which missed the discussion of the violation of morality in commercial advertising on television. Indonesia, as a country that has regulations in advertising law, seems to be doing things that are not in line with advertising ethics, it seems that it does not have control over the form of advertisements that are considered to be violating. This paper intends to show that several television advertisements in Indonesia have committed violations in the advertising law, especially related to the appearance of advertisements that prioritize rating so that they often come out of the religious norms of society.

This paper is based on three arguments. First, this article argues that there are many advertisements on Indonesian television that commit violations of morality from religious values. These violations occur in various forms of advertisements which is served to consumers. Second, the use of humans as advertising modelling often leads to the exploitation of sensuality so that it has a negative impact on society. Third, in television advertising there is also the use of props that are morally sensitive. Based on these facts, many people protest directly to advertising service providers or to consumer protection foundations, and even to the government through the broadcasting commission insitusion which was formed formally to carry out its supervisory function. This also proves the research of Hamaseed, Hameed, & Qadir (2020: 143) which confirms that television text and media content has challenged customs, traditions, religious beliefs, which are sacred and cannot be compromised.

Literature Review

Commercial Advertisement

Magatef & Momani (2020: 413) said that advertising is one way to promote goods and services, in addition to influencing purchasing decisions, as well as to distribute advertisement messages to consumers so as to encourage them to buy goods or services. Commercial advertising is the main source of revenue for television channels (TV). This is because commercial advertising in multimedia is an effective tool for delivering offer content, both verbal and visual communication. In 2003, 100 billion dollars were spent on TV commercials in the US (Alaei & Ghassemi-tari, 2011: 246). On the one hand, commercial advertising on TV is the most common way to broadcast a particular product or service because it can reach many people (Yang, An, Kafai, & Bhanu, 2015: 1). (Haque et al (2011: 40) say that advertising not only increases product sales but also enriches the brand with symbolic values. Advertising places a particular brand in the consumer's mind list, customers will respond with the most advertised 'famous' brand. Therefore, Chih-Chung, Chang, Lin, & Yau-Nang (2012:352) said that commercial advertising has played an important communication channel between companies and consumers, increasing consumer awareness, as well as being a way to show their brand image and products. Advertising provider also take advantage of every means of advertising by using the maximum design effect to attract consumer attention.

Effective advertising is advertising that helps advertisers achieve their goals. According to most research in various countries, it is revealed that TV has a big influence on viewers and invites them to start the buying process. Arora (2012: 9416) states that TV as an advertising medium has three advantages, namely: (1) Its influence on consumer tastes and perceptions is widespread; (2) It can reach a wide audience in a cost-effective manner; (3) TV's sound and moving images can create a strong impact. Television advertising creates, builds and grows brands, builds brand fame and keeps brands alive in the minds of customers for a long time. Then, according to research by Khuong (2015: 851), consumers say television is the most favorite tool they want to learn about new products that are reliable and comfortable, therefore, advertising agencies know television is indeed the most influential and attractive media, so the consumers have 61% trust in television advertising. Referring to coca-cola's advertising, Michael & Nedunchezhian (2012: 2) critically analyze the impact of the media on consumer brand preferences regarding the carbonated beverage market. Of the eight carbonated drink brands, coca-cola occupies the top position as the preferred brand for carbonated drinks. According to research by Michael & Nedunchezhian (2012: 2) it is clear that advertising is the main source of the rise of coca cola and television is the most effective medium to market it.

Islamic Values

Islam has been sent down to the Prophet Muhammad SAW since his prophecy in 609 AD to 632 AD. Islam is a religion that teaches values such as hospitality, responsibility, compassion and forgiveness (Paracha, Jehanzeb, & Yoshie, 2015: 172). Every Muslim country has a legal system based on a greater or lesser degree with Islamic law (Sharia) derived from the Qur'an (Muslim Revelation Book) and the Sunnah (the tradition of the Prophet Muhammad) in addition to the rules of Muslim scholars (Turnbull, Howe Walsh, & Boulanouar, 2016: 3). In line with

that, Pasaribu & Indupurnahayu (2018: 173) say that Islamic values are based on the qur'an and hadith that cover the oneness of god (*tauhid*) and sharia provisions. Sharia is an Islamic code of ethics in regulating the duties, morals and behavior of all Muslims individually and collectively, in all areas of life including marketing and trade (Naseri & Tamam, 2012: 69). In the field of marketing, Islamic values are used to determine standards and ethics in advertising products. Muslim majority of Malaysia establishes advertising regulations that adhere to Islamic values which leads to the rejection of offensive Western and religious symbols (Wang, Deshpande, Waller, & Erdogan, 2018: 2). Advertising in Saudi Arabia, for example, advertisers must understand Islam, consult religious authorities about unconventional advertising and practice self-compliance by conforming to the values of the Saudi Arabian state in order to be accepted (Mokhtar, 2018: 153).

Turnbull et al (2016:11) states that advertisements that apply ethics include six dimensions: (1) unity of God (*tauhid*); (2) faith (*iman*); (3) mandate (*khilafah*); (4) balance (*tawazun*); (5) justice (‘*adl*); (6) free will included in the advertising message. In addition, Islam also has values that must be followed when advertising products, namely truth, honesty, politeness, obligation and social responsibility (Naseri & Tamam, 2012: 69). Therefore, in Islamic business ethics it is not permitted to sell or advertise a product that the product is not owned. Islamic business ethics encourages communication that is based on truth and justice also must not cheat in selling a product (Bari & Abbas, 2011: 155). In line with this, Bari & Abbas (2011: 172) states that making advertisements in an Islamic ethical system needs to identify and ensure honesty, no exaggeration and deception, increasing sexual attractiveness. Saeed & Baig (2013:172) also noted the importance of honesty in advertising and selling products. Therefore, all information regarding defects in a product must be communicated honestly, Abuznaid (2012: 1488-1489) also gets several new promotional strategies based on the qur'an, which include abstinence from suggestive language, obscene behavior, sexual attraction. offensive, fraudulent, manipulative or misleading promotional behavior.

Television Morality

Advertising is a form of paid communication to influence target consumers effectively and efficiently for certain products. Television is the most popular form of mass media in advertising campaign broadcasting (Madni, Hamid, & Rashid, 2016: 14). Television advertising practice in the 21st century fulfills the goal of getting more profit by using sex appeal and emotional elements that have nothing to do with culture or religion (Anjum, Irum, & Dr. Naheed, 2015: 36-37). Therefore advertising must carefully and precisely identify the norms and values of advertising. Advertising values must be in accordance with or must be related to the norms and values of society, public beliefs, customs and even applicable regulations (Chan, Tsang, & Leung, 2013: 328). But in reality, the media are still believed to be a threat to local customary values. Hamaseed, Hameed, & Qadir (2020: 143) say that television media texts and content challenge customs, traditions, religious beliefs, which are sacred and cannot be compromised. Advertising in today's lifestyle shows a class of society that does not reflect values and norms. Advertising on television media intentionally or unintentionally affects social norms and morality. In line with that, Hamaseed et al (2020: 144) added that of the 150 participants, more than half watched up to 5-6 hours per day. Whereas television

advertising inspires anti-cultural and anti-social standards and it depends on the number of hours spent watching television (Hamaseed et al, 2020: 144).

Madni et al (2016: 15) state that there are two categories of controversial advertising that can contain morality violations, namely related to controversial / offensive products such as condoms and the execution of offensive ads (ads that feature racist, sexist or violence that offends consumers. Then, Waller, Deshpande, & Erdogan (2013: 405) stated that some television advertisements often feature controversial products when advertised, such as alcohol, underwear, cigarettes, condoms and contraceptives. Waller et al (2013: 403) called these products "cannot are called "," socially sensitive products "or" controversial products. Such products are against gentleness, politeness, morality, and violations. To maintain the morality of advertising, Islam has its own rules and standards in making regulations. Haque et al. (2011: 41-42) say that the concept of Islam pays special attention to the objectives of sharia and correct ethics. There are several types of Islamic concepts that must be followed in advertising such as: (1) The advertiser must have good intentions when advertising; (2) The advertiser must be honest in advertising the product; (3) Advertisers must avoid cheating in their advertisements; (4) Advertisers must advertise products that are not harmful to others; (5) Advertisers should not 'call' people to spend a lot of money because that is prohibited in Islam; (6) Advertisements may not invite anything that is prohibited by religion values; (7) The products advertised should not be too expensive so that the customer can afford them.

Methodology

This paper is a research result that examines the potential of moral violations that occur in broadcasting of commercial advertisements on the Indonesian national television media. The primary data source is comes from advertisements that was broadcast in ten most popular television stations of Indonesia which received reactions from the general public because of the product and the way of delivering the advertisements that were controversial. From each television station, researchers have taken sample randomly used as an object of analysis by using the perspective of Islamic moral values in society. Meanwhile, secondary data is obtained from literatures regarding advertising contained in journals and books. Then the collected data will be analyzed critically by using a screening method made based on the perspective of Islamic moral values. The scope of objects analysis are: (1) The appropriateness of advertised products to be broadcast to the public through television media; (and (2) The appropriateness of the way of advertisements broadcasting such as the advertisment actors behavior, the appearance of clothing, and the message conveyed. The analysis is carried out to reveal the fact that there are forms of moral violations in the broadcasting of commercial advertisements through televisions media that have not yet been studied. The pictures listed in the following discussion of result are only samples of various forms moral violation on commercial advertisements which ever broadcast through television media in Indonesia.

Result and Discussion

The Forms of Moral Violation of Commercial Advertisments on Indonesian Televisions

In this section, the author will describe the findings of moral violations in the delivery of commercial advertisements through various popular television media in Indonesia. The object of analysis is focused on both the advertised product and visualization of the advertisements itself. From the analysis, the forms of moral violations in the delivery of commercial advertisements on popular television in Indonesia are:

1.1 There are some controversial products which were advertised by television media in Indonesia. It is said to be controversial because there are differences opinion on legal interpretations related to a product (goods and / or services), and also because of the sensitive nature of the product when consumed by public consumption. These are commercial products as sample that cause controversy if advertised to the public through television media:

		
Picture 4.1.a	Picture 4.1.b	Picture 4.1.c

(1) Alcoholic a drink that causes intoxication for the drinker so that when it is advertised and sold in public it means that the medias have violated the morals of society. Until now, there are still many Indonesian entrepreneurs who trade alcohol either produced domestically or imported. Among the alcoholic products that have been advertised and populer in Indonesia for example branded heineken, guinness, anker, bintang and etc. Those alcohols have been advertised and sold to consumers, especially in tourist areasIn fact, in some areas there is mixed alcohol which is produced illegally as a home industry. This news often appears in the media when there is already a victim from the consumer who has drunk the alcohol which are produced and traded illegally.

(2) A controversial product advertised was the fiesta brand condom which has been advertised through the Indonesian television media publicly without paying attention to the age limit of television viewers. Advertisement of this product is considered has violated moral public because it is very sensitive for society, especially if it is used by unmarried people it will potentially facilitate free sex. Because this advertisment received protests from public, the Indonesia Broadcasting Commission (IBC) finally gave a

written warning Number 16/K/KPI/1/15 to that television. The main reason for the warning was because the advertisement broadcast of it was still below 22.00 PM so it could be accessed by children. It means that if the condom advertisement is broadcast after 22.00 at night it is still allowed by the government.

(3) Cigarettes are one of the products that cause controversy to be traded freely. There are Islamic organizations that consider trading cigarettes as haram so that they are not worth trading. However, because there is no law prohibiting them, cigarettes are still freely traded and even many brands are advertised through Indonesian television media. Among the impacts of cigarette advertisements is the large number of students under 17 years of age who have consumed cigarettes, which has the potential to hinder their intelligence and mental health. Although many people have protested against the broadcast of cigarette advertisements via television, they have never received serious attention from the government because business interests are more dominant than the safety of school-age children.

1.2 There were a moral violations related to the way of advertisements exhibting were broadcast on Indonesian television media. The appearance of advertisements on television is not a little disseminated by means of displays outside the substance of the advertising needs, and even to the point of violating the moral appropriateness of society. There are several forms of moral violations of commercial advertising on television media, such as sensual exploitation exhibited by advertisers, the use of language that is not educational, the use of musical instruments and posters supporting immodest behavior. The following descriptions are several examples of moral violations in the delivery of advertisements through television media.

(1) The fact that there are still commercial advertisements that exploit sensuality from advertisers to be shown to the wider community through national television media regardless of age boundaries. In a society that upholds local wisdom, exploiting sensuality in public is disrespectful for anyone, especially for children. This happens because television media is a public broadcasting institution that can be accessed by anyone, including school age children who are still vulnerable to mental destruction. It is not uncommon for advertisements on television to link their products by showing a body image outside the substance of the advertising product, so that sensuality in an advertising product is more dominant than the benefits of the advertising product. This can be seen through several advertisements featuring male and female figures in open clothes. As for the appearance of advertisements containing sensual content beyond the substance of the need for advertising products that have been shown on television and have generated various controversies and various responses from the Indonesian people can be seen from the findings in this study, including:

		
Picture 4.2.a	Picture 4.2.b	Picture 4.2.c

First, the dissemination of lipstick advertisements through television media often shows female figures that show more of a woman's limbs with sensual lips. This can be seen through advertising acting where the appearance of the advertisement shows the sensuality of a woman figure more than the quality of the lipstick advertisement product. Lipstick advertisements that contain sensual content can be seen through the display of picture 4.2.a, which shows the face of a beautiful white woman with pink lips, while holding pink lipstick. *Second*, underwear advertisements parodied in media television often show something other than the substance of the advertisement. Taking advantage of the sensuality of certain body parts, both men and women, is something that is sensitive for the audience. For example in an advertisement for underwear parodied in television media, it can be seen through the display picture 4.2.b. In the advertisement, a man is repairing a car, wearing a white T-shirt that is lifted up to reveal his underwear. Then in front of the man there are two women who wear short clothes that show their arms and chest, while looking and paying attention to the open men's underwear in front of them. *Third*, the appearance of soap advertisements produced by television media also often shows exaggerated things, and even comes out of the substance of the advertised product. The display of soap advertisements as exemplified in Figure 4.2.c tends to be excessive. In the advertisement, a man dressed neatly in a black suit hugs and strokes the woman in front of him who is wearing a pink open dress. Then in beside to the sensual acting, there are two clear small bottles only were shown containing liquid soap of Lux brand.

(2) Television advertising has the nature of stimulating the behavior of the messages contained in it. The public views that the existence of advertising carries a risk for the birth of a certain image and behavior. An advertisement can at least stimulate bad thoughts, increase people's permissiveness for something that is contrary to prevailing values, and enforce prohibited or un-idealized behavior in society. There are some evedances that advertisements can stimulate bad behavior in society such as permissive actions to destroy public facilities, exploitation of children to take dangerous actions, and other non-educational advertisements.

		
Picture 4.2.d	Picture 4.2.e	Picture 4.2.f

Picture 4.2.d is an advertisement acting of a coffee product with the Good Day brand on a television media. The Good Day advertisement was played by a community of teenagers who carry out activities by carrying a ladders and paint equipment, which then do the action of scribbling a wall on the roadside to draw a certain product brand. In Good Day advertisement has a slogan: "Slang Has Many Flavors". The meaning of this slogan is that adolescents have different community, creativity, and expression. One form of expression played by advertising actors is drawing the brand of a coffee product on the wall by the side of a public road. Even though sidewalk fences are part of public facilities that need to be kept clean from various impurities caused by people who are not responsible. Therefore, if public facilities are painted to make a picture to express a certain brand, it is an act of vandalism that violates the law. The Good Day ad containing "vandalism" content will certainly encourage other teenagers to imitate because it is considered permissive. The number of roadside walls that are painted at night in certain areas is one of the negative impacts of vandalism behavior introduced through advertisements on television. Whereas vandalism is an activity that is prohibited due to the fact that it has damaged public facilities.

Another form of television advertising offense is exploiting children to act out advertisements that stimulate harmful acts. The advertisement of Neon Wizard candy (*Permen Jagoan Neon*) that was broadcast on a number of televisions after being judged by the Indonesian Broadcasting Commission (IBC) was proven to have violated the Indonesian Advertishig Ethics and the regulations prevailed. A further assessment was carried out by the IBC after this institution received complaints from the public regarding the existence of advertisements that stimulated children to take dangerous actions. In Figure 4.2.e is an advertisement for candy branded "Neon Wizard" played by children. In the advertisement, there is a scene of four children on a bicycle stopping in front of a cliff because they look afraid to pass. However, after eating the advertised product, they had the courage to jump over the steep ravive. IBC assesses that the scene of that advertisement is easily imitated so that it can harm children. Therefore, IBC reminds that broadcasts involving children must comply with the ethics and regulations that govern this matter.

Figure 4.2.f is an advertisement acting from the Sampoerna A Mild cigarette brand which is broadcast on television. This cigarette advertisement is played by a male and female couple who kiss while embracing each other. In the ad acting, there is readable writing: "*At first shy, at a long time willing*" which has meaning that to inspire the honest people to start something that is prohibited so that it becomes a habit. In addition, the advertisement is also equipped with a cigarette logo that reads "*Go Ahead*" which shows that they are as an inspirators for the next people who will follow it. In this case the advertisers feel proud even though they have asked something perverted from the perspective of local wisdom. The advertisement has received protests from the public for showing courtship or perverted scenes in public because their behavior is considered not to educate goodness for young people.

This study shows that the broadcasting of advertisements on television in Indonesia has taken place with moral violations in three forms. First, advertising ignores the halalness of a product by legalizing products that actually conflict with the faith of the majority of the population (Bari & Abbas, 2011; Mokhtar, 2018; Pasaribu & Indupurnahayu, 2018; Saeed & Baig, 2013). This is emphasized by Hamaseed, Hameed, & Qadir (2020: 143) that the text and content advertising of television media challenge customs, traditions, religious beliefs, which are sacred and cannot be compromised. Second, advertisements on television manipulate and exploit humans, including reproducing social inequality (Lim & Furnham, 2016: 1610). Aspects of gender and sensuality are presented beyond the moral boundaries that apply in society. Third, in television advertising also stimulates things that are socially sensitive and often go beyond what society can accept (Bari & Abbas, 2011; Paracha et al., 2015; Saeed & Baig, 2013). Forms of moral violations that are common in commercial advertising on television can lead to changing moral standards in society (Hamaseed et al, 2020: 144).

The display of commercial advertisements on television does not provide completely relevant information. This is because advertising broadcasts have a tremendous impact on the morality standards of society. The low morality of commercial advertising on television can certainly affect the decline in moral standards in society, especially through receiving messages that appear on the screen every time. If the violation of the moral values behind the advertisement continues, it will be a sign of a negative change in society. massively in the future. Given that television has the power to socialize values and form opinion in society, the existence of violating advertisements can become a precedent for the birth of actions that are widely contradictory to morality in society (Hamaseed et al., 2020: 145). Therefore, the low morality of ad impressions can become a moral threat in the long run. The most dominant moral violation of commercial advertising on Indonesian television is showed by exploit sensuality of advertising actors in front of the camera to be published freely (Lim & Furnham, 2016).

The results of this study reaffirm previous findings which state that advertising has an important role in shaping opinion in society (Michael & Nedunchezhian, 2012). If the advertising broadcasting is educational, it will certainly have a positive impact on society. However, if advertising broadcasting is negative, it will affect society in many aspects, not only related to material damage but also mental

spiritual damage. The scope of the negative impact of advertising which is so wide that it has not been taken seriously so far, so it is still going on indefinitely. Research on advertising so far has mostly examined the effect of advertising on consumer purchasing power (Muhammad & Kartini, 2015), the effect of advertising on children's behavior, and other side effects, both positive and negative. The findings of previous research are certainly different from the findings of this research conducted by the author, which only focuses on violation foms of the morality which is carried out by commercial advertisers in television media as a result of differences interpretation of the standard of morality between advertising business actors with the authenticity of the text contained in the advertising ethics guidelines, regulations, religious values, and the reality of local wisdom.

Seeing the many intensities of violations of moral values that occur in the broadcasting of commercial advertisements through television media, an action is needed that can increase the moral awareness of advertisers, namely through: (1) Enforcement of the advertising code of ethics which is run by an advertising association; (2) Enforcement legal sanctions for perpetrators of advertising law (regulations) whether administrative, civil, or criminal; (3) Promote religious values to fortify the public from the negative impact of advertising. Increased understanding of religious values can be an "*early worning system*" for the public to screen and impose social sanctions on unqualified advertisements so that it can motivate advertisers to be more creative and be careful in serving advertisements to the public. In line with this, Husin et al (2020: 276) said that by displaying creative and innovative advertisements, it will give a deep impression to the audience as well as influence product purchasing decisions. The high level of public awareness in determining quality advertisements will force public broadcasting service providers to display quality advertisements as well.

Conclusion

The fact is that there is a massive threat behind the broadcast of commercial advertisements through television media as a public broadcasting institution. When viewed from the moral values inherent in the religiosity of local wisdom, Indonesia as the largest Muslim country in the world, it turns out that its people have received hidden threats from moral violations of commercial advertising broadcasting through television media. This threat is manifested in the form of the publication of the negative message behind the advertisement, which has implications for decreasing the moral standards of society along with the low morality of commercial advertisements broadcast on television media. The magnitude of the threat level depends on the fact the level of moral violations that occur in advertisements and the intensity of their broadcasts on television media. Because the threat presented is in the form of negative values, the impact is also in the form of values shifting that attached to every person who watched advertisments broadcast massively on television media.

Through the research methods and theoretical framework used, the writers have succeeded in achieving the goal to reveal the facts violations of moral values in commercial advertising through Indonesia television media. From the analysis results, the most dominant form of moral values violation is the spread of sensual behavior which is played by advertisers through the appearance of immodest clothing and seductive body movements. Then other forms of moral violations are

related to non halal products and negative advertising messages that stimulate dangerous actions for children, vandalism, a hedonistic lifestyle, and consumerism. Moral violation behind commercial advertising has presented a latent threat that has a negative impact on society. It is said to be a latent threat because the form of the threat is abstract and hidden behind the physical appearance of the advertising actors who seem "seductive" supported by various display instruments. Although this data is based on facts that have occurred on Indonesia televisions, but relating to the dynamics of advertsing that will come, further research is needed.

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Legal Dynamics in Asia During the Covid-19 Era: Focus on Korean Experience

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Abstrak:

The COVID-19 pandemic has had a significant impact on various aspects of human life. One of them is the change of law in many countries including South Korea. This article aims to describe the legal dynamics that occur in South Korea in handling the COVID-19 pandemic. This article is the result of doctrinal law research with a statutory and conceptual approach. The primary legal material of this study is various regulations that emerged during the pandemic. The results of this study indicate that the COVID-19 pandemic is an emergency condition that results in legal changes in South Korea. This change has been supported by the community. One of them is through an intensive communication process and information transparency.

Keywords: Law; COVID-19; Asia; Republic of Korea.

Preliminary

COVID-19 began with an outbreak that occurred in Wuhan, Hubei Province, China in December 2019.[1] COVID-19 significantly increased the mortality rate in the countries to which it infected a large portion of the population, including the U.S.A, Italy, and India. Policies for handling COVID-19 have brought changes in various sectors of life. For example, the lockdown and social distancing policies have an effect on decreasing people's incomet[2]. The public is not allowed to conduct social interactions in public spaces in order to suppress the spread of COVID-19[3]. Policies for handling COVID-19 also affect the psychological condition of the community.

[1] Marco Ciotti et al., "The COVID-19 Pandemic," *Critical Reviews in Clinical Laboratory Sciences* 57, no. 6 (August 17, 2020): 365–88, https://doi.org/10.1080/10408363.2020.1783198.
[2] Dave Altig et al., "Economic Uncertainty before and during the COVID-19 Pandemic," *Journal of Public Economics* 191 (November 1, 2020): 104274, https://doi.org/10.1016/j.jpubeco.2020.104274.
[3] Sudirman Sudirman et al., "The Family Corner for the Post-COVID 19 Revitalization of Family Function," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 5, no. 1 (June 30, 2021): 88–107, https://doi.org/10.22373/sjhk.v5i1.9122.

Lockdown causes fear, stress, depression, even suicide.[4] In the field of education, there is a transformation of face-to-face education into online learning. Ironically, online learning can only be enjoyed by families with upper middle income. Meanwhile, families with low incomes cannot enjoy the facilities due to limited access.

At the beginning of 2020, COVID-19 had spread to all countries without exception. In South Korea (Korea) the first confirmed case of COVID-19 was on January 20, 2020. In mid-February 2020, there was an increase in the spread of the COVID-19 virus in Korea. Until mid-January 2021, there have been 70,000 people infected with COVID-19.[5] The Korean government has taken fast and proactive policies in handling the COVID-19 pandemic, for example carrying out non-lockdown policies such as social distancing.[6] The Korean government has also actively conducted testing, tracing, and treatment to suppress the spread of COVID-19.[7] The Korean government used smart city technology to increase the effectiveness and efficiency of contact tracing for COVID-19 survivors.[8] Ryu and Chung's research shows that Korea is one of the countries that has managed to effectively deal with the COVID-19 pandemic at a low cost.[9]

The success of handling the COVID-19 pandemic and its impact in Korea cannot be separated from the role of government policy. A number of regulations were issued during the COVID-19 pandemic. Information dissemination and data transparency by the government are the main keys to getting the trust of the citizen. The Korean government has set the Korea Centers for Disease Control and Prevention (KCDC) as a control tower. Uniquely, the Korean government has succeeded in putting aside political interests in handling the COVID-19 pandemic. Policies are taken based on recommendations from health experts and involve the

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[4] A. K. M. Israfil Bhuiyan et al., "COVID-19-Related Suicides in Bangladesh Due to Lockdown and Economic Factors: Case Study Evidence from Media Reports," *International Journal of Mental Health and Addiction*, May 15, 2020, 1–6, https://doi.org/10.1007/s11469-020-00307-y; Amir H. Pakpour, Mark D. Griffiths, and Chung-Ying Lin, "Assessing Psychological Response to the COVID-19: The Fear of COVID-19 Scale and the COVID Stress Scales," *International Journal of Mental Health and Addiction*, May 29, 2020, https://doi.org/10.1007/s11469-020-00334-9; Irwan Abdullah, "COVID-19: Threat and Fear in Indonesia.," *Psychological Trauma: Theory, Research, Practice, and Policy* 12, no. 5 (July 2020): 488–90, https://doi.org/10.1037/tra0000878.

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[6] Yi-Hsuan Chen, Chi-Tai Fang, and Yu-Ling Huang, "Effect of Non-Lockdown Social Distancing and Testing-Contact Tracing During a COVID-19 Outbreak in Daegu, South Korea, February to April 2020: A Modeling Study," *International Journal of Infectious Diseases: IJID: Official Publication of the International Society for Infectious Diseases* 110 (September 2021): 213–21, https://doi.org/10.1016/j.ijid.2021.07.058.

[7] M. Jae Moon et al., "A Comparative Study of COVID-19 Responses in South Korea and Japan: Political Nexus Triad and Policy Responses," *International Review of Administrative Sciences* 87, no. 3 (September 1, 2021): 651–71, https://doi.org/10.1177/0020852321997552.

[8] Jung Won Sonn, Myounggu Kang, and Yeol Choi, "Smart City Technologies for Pandemic Control without Lockdown," *International Journal of Urban Sciences* 24, no. 2 (April 2, 2020): 149–51, https://doi.org/10.1080/12265934.2020.1764207.

[9] Shin-Kue Ryu and Soon-Gwan Chung, "Korea's Early COVID-19 Response: Findings and Implications," *International Journal of Environmental Research and Public Health* 18, no. 16 (August 5, 2021): 8316, https://doi.org/10.3390/ijerph18168316.

community actively.[10] By November 2021, the cumulative population of fully vaccinated Koreans increased to 78%. The Korean government enforces a policy called "Gradual Return to New Normal" which promotes the gradual recovery of daily life back to normal. The Korean government has announced official guidelines every 2 to 3 weeks with the changed condition of the covid infection and hospital capacity. As Roscoe Pound's opinion states law is a tool of social engineering.[11] Not only that, the use of technology plays a main role in dealing with COVID-19. Based on the above issues, this article aims to describe the legal dynamics that have occurred in South Korea in handling the COVID-19 pandemic. This article is the result of doctrinal law research with a statutory and conceptual approach. The primary legal material from this study is various regulations that emerged during the pandemic.

Results and Discussion

Legal Dynamics in Health in South Korea

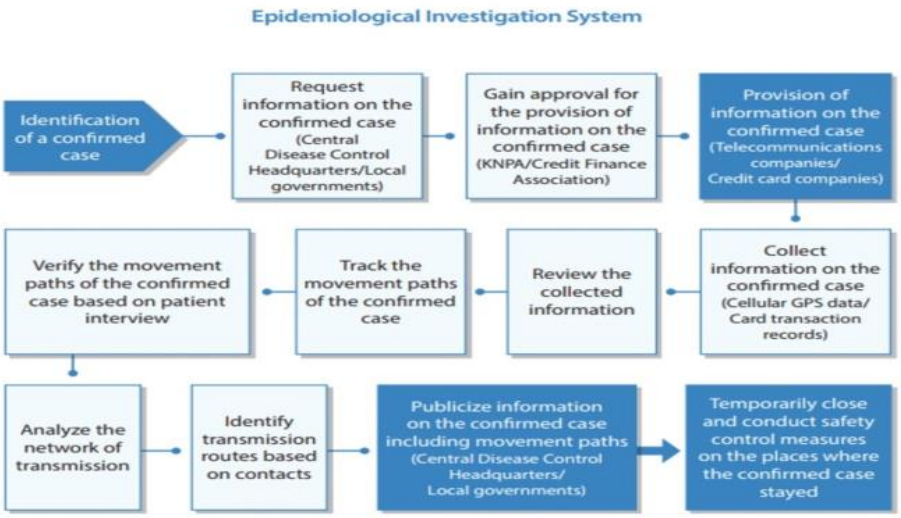
The government's handling of the COVID-19 pandemic in Korea is carried out in accordance with domestic law and the International Health Regulations (IHR). The IHR provides an overarching legal framework that defines the rights and obligations of states in dealing with public health events and emergencies that have the potential to cross borders.[12] Currently 196 member countries have been authorized to adopt regulations for IHR. Article 21 of the IHR states that "The Health Assembly has the authority to adopt regulations concerning: (a) sanitary and quarantine requirements and other procedures designed to prevent the international spread of disease....". Also, Article 12 of the IHR reads on the issue of 'Determination of a public health emergency of international concern', "The Director-General shall determine, on the basis of information received, in particular from the State Party in whose territory an event occurred, whether an event constitutes a public health emergency involving come to international attention in accordance with the criteria and procedures set out in this Regulation. Based on Article 12 of the IHR, WHO has assessed and characterized COVID-19 as a pandemic on March 11, 2020.

WHO provides four main areas. First, be prepared and ready. Second, detect, protect and treat. Third, reduce transmission. Fourth, innovate and learn. These four areas of concern also come with the authority given to them through Article 15 (temporary recommendations) of the IHR. It reads "... 2. Provisional recommendations may include health measures to be implemented by a State Party experiencing a public health emergency of international concern, or by another State

[10] Jae Moon et al., "A Comparative Study of COVID-19 Responses in South Korea and Japan."
[11] Suad Fikriawan, Syamsul Anwar, and Misnen Ardiansyah, "The Paradigm of Progressive Judge's Decision and Its Contribution to Islamic Legal Reform in Indonesia," *Al-Manahij: Jurnal Kajian Hukum Islam* 15, no. 2 (December 1, 2021): 249–62, https://doi.org/10.24090/mnh.v15i2.4730.
[12] LAWRENCE O. GOSTIN and REBECCA KATZ, "The International Health Regulations: The Governing Framework for Global Health Security," *The Milbank Quarterly* 94, no. 2 (June 2016): 264–313, https://doi.org/10.1111/1468-0009.12186; Annelies Wilder-Smith and Sarah Osman, "Public Health Emergencies of International Concern: A Historic Overview," *Journal of Travel Medicine* 27, no. 8 (December 23, 2020): taaa227, https://doi.org/10.1093/jtm/taaa227; Takuma Kayo, "Global Solidarity Is Necessary to End the COVID-19 Pandemic," *Asia-Pacific Review* 27, no. 2 (July 2, 2020): 46–56, https://doi.org/10.1080/13439006.2020.1841949.

Party, regarding persons, baggage, cargo, containers, conveyances , goods, and/or postal parcels to prevent or reduce the international spread of disease and avoid unnecessary interference with international traffic. Following WHO guidelines, the Korean government began to amend laws such as "THE INFECTIOUS DISEASE CONTROL AND PREVENTION ACT", " THE QUARANTINE ACT", THE MEDICAL SERVICE ACT" etc.

Not only is control of the health system a priority one, controlling anti-epidemic social measures is important. Right after the COVID-19 outbreak, the Korean government started holding press conferences twice a day, by the Minister/Vice Minister of Health in the morning and by the Director of KDCD and Director of the Korean National Institute of Health (KNH) in the afternoon. Transparent information has been provided to all citizens through official channels, and this has prevented the spread of much possible fake news. Testing, tracking and treatment are the 3 pillars that the government needs to take care of to prevent the further spread of COVID-19. COVID-19 screening stations are set up in the emergency room and outside to quickly collect and test samples. Drive-through screening stations and walk-through screening stations are open across the country to have effective testing and see the possible transmission. These ideas were brought to attention by doctors who had passed MERS-coV (Middle East respiratory syndrome coronavirus) in 2015 and were adopted.



Data collected through testing is shared with the public via emergency alerts. Alerts are given to all citizens about information about the traces of places visited by infected people to stop others from visiting the place. For tracing purposes, an epidemiological investigation is required. Laws also need to be amended to support and authorize emergency measures on data collection. Epidemiological investigation refers to the act of identifying the causes and characteristics of an infectious disease to establish appropriate measures for its prevention and control. Accurate investigations require tracing the point of contact.

New opportunities in the field of Health were also carried out during COVID-19. Korea conducts a remote health care system using Information technology. This

system is known as telemedicine.[13] Telemedicine has been introduced in many countries. However, this innovation raises concerns such as patient data protection, patient capacity to differentiate effective and valid applications. There is no comprehensive regulation related to telemedicine.[14] Limited remote health care services are permitted in December 2020 in Korea. The remote health care system is expected to provide better health access for people living in remote areas. As different variants of COVID emerge, remote healthcare systems have been applied to improve patient care and healing at home. Speeding up the remote healthcare system will also ease the COVID situation internationally. Within a year, an app called DrNow (drnow.co.kr) in Korea has more than 900,000 members domestically after launching and is growing very fast.[15] Having home-delivered drugs or having a doctor's advice over the phone provides a great amount of convenience to patients but the battle over the market among interest groups is still an ongoing issue over medicine delivery.

Economic Handling Policy During the Pandemic in Korea

Social distancing and containment measures are enforced by closing schools, limiting personnel at workplaces, putting mandatory measure of wearing masks at public transportation and restricting international travel and internal movement. The agreement on the tracking system eliminates the possibility of a complete lockdown. Subsidies supporting schools, workplaces even individuals including students are all distributed to support individuals as well as businesses. Different subsidies are also given to teachers who contract out after-school activities. Financial rescue packages for businesses were put in place during the pandemic 5th times until now. Income support, debt relief/contracts for households are other necessary measures using the main terms of strength. Fiscal measures such as lowering the base interest rate, raising the limits on future Forex trading, currency exchange agreements with the United States were taken to ease the burden on businesses. $47.5 billion for financial support for businesses and $16 billion for bond market stabilization funds set up was provided in 2020 and funds in 2021 and 2022 got bigger. Some of the policies in detail are 1) Individual businesses selling under $72,072 get VAT deduction in 2020 2) Owner deducting rental fees: 50% tax credit 3) Credit card income tax deduction percentage doubled for use March to June 2020 4) Job retention subsidy up to 90% of business deferment allowance regardless of the industry from April to June 2020.

All residents are provided with disaster subsidies. This subsidy is based on the Subsidy Management Act. This Act has the objective of appropriate management of subsidy budgets. Although it was recommended, THE FRAMEWORK ACT ON THE MANAGEMENT OF DISASTERS AND SAFETY has not applied to the COVID-19 pandemic due to the different governmental authority structures in charge. The government had decided that the Ministry of Health and welfare should be in charge for COVID-19 although it is also within the frame of the definition of disaster. The revised laws related to COVID-19 reached more than 20 Laws during the pandemic. In particular, legal changes were made to support social change. Rightly

[13] Yong Sauk Hau et al., "How about Actively Using Telemedicine during the COVID-19 Pandemic?," *Journal of Medical Systems* 44, no. 6 (2020): 108, https://doi.org/10.1007/s10916-020-01580-z.
[14] Chiara Crico et al., "MHealth and Telemedicine Apps: In Search of a Common Regulation," *Ecancermedicalscience* 12 (July 11, 2018): 853, https://doi.org/10.3332/ecancer.2018.853.
[15] "'Remote Medicine No. 1' Dr. Now... Over 900,000 Users in 1 Year of Launch," accessed January 30, 2022, https://view.asiae.co.kr/article/2022011210303152867.

based on the rule of law provides a solid basis for action when we face challenges.

Dynamics of Personal Data Protection Law in South Korea

Information technology is one of the efforts to control the spread of COVID-19 in various countries.[16] However, tracking individuals suspected of contracting the COVID-19 virus poses a paradox. Disclosure of personal data of COVID-19 survivors triggers acts of humiliation and exclusion. Restaurants, shops, and other places of business that have been visited by infected people often experience sudden loss of business. In Korea, the tracking strategy is hindered by the Personal Information Protection Act (PIPA) of 2011. This regulation prohibits the collection, use and disclosure of personal data without the prior consent of the individual whose data is involved. However, in 2015, the spread of the MERS virus caused the Korean government to amend the Infectious Disease Prevention and Control Act (CDPCA). This regulation overrides certain provisions of PIPA and other privacy laws.

In the 2020 revision, CDPCA included inclusive management system setup and management provision at Art.33-4 even connecting the education information system. The Ministry of Health and Welfare (MOHW) and the Korea Centers for Disease Control and Prevention (KCDC) may at times collect and profile infected individuals or those suspected of being infected. In particular, the data that may be collected includes location data (including location data collected from mobile devices); personally identifiable information; medical records and prescriptions; immigration records; card transaction data for credit, debit, and prepaid cards; transit permit records for public transport; and closed-circuit television (CCTV) recordings.[17] Article 34-2 (Disclosure of Information during Infectious Disease Emergencies)"states (1) Where the spread of an infectious disease that is harmful to the health of citizens results in the issuance of a crisis warning of a precautionary level or higher specified in Article 38(2) of the Framework Act concerning Disaster Management and Safety. The Minister of Health and Welfare must immediately disclose information with which citizens of the country are required to become acquainted to prevent infectious diseases, such as movement routes, means of transportation, medical care institutions, and contacts of infectious disease patients, by posting such information on the network. information and communication, distributing press releases, etc. (2) Where any information disclosed under paragraph (1) falls under one of the following sub-paragraphs, the relevant person may file an objection with the Minister of Health and Welfare, in writing, verbally, or using information and communication networks: 1. If the information disclosed is different

[16] Isobel Braithwaite et al., "Automated and Partly Automated Contact Tracing: A Systematic Review to Inform the Control of COVID-19," *The Lancet. Digital Health* 2, no. 11 (November 2020): e607–21, https://doi.org/10.1016/S2589-7500(20)30184-9; Aaqib Bashir Dar et al., "Applicability of Mobile Contact Tracing in Fighting Pandemic (COVID-19): Issues, Challenges and Solutions," *Computer Science Review* 38 (November 2020): 100307, https://doi.org/10.1016/j.cosrev.2020.100307; Rawan Jalabneh et al., "Use of Mobile Phone Apps for Contact Tracing to Control the COVID-19 Pandemic: A Literature Review," in *Applications of Artificial Intelligence in COVID-19*, ed. Sachi Nandan Mohanty et al., Medical Virology: From Pathogenesis to Disease Control (Singapore: Springer, 2021), 389–404, https://doi.org/10.1007/978-981-15-7317-0_19.

[17] Sangchul Park, Gina Jeehyun Choi, and Haksoo Ko, "Information Technology-Based Tracing Strategy in Response to COVID-19 in South Korea-Privacy Controversies," *JAMA* 323, no. 21 (June 2, 2020): 2129–30, https://doi.org/10.1001/jama.2020.6602.

from the actual facts; 2. Where he has an opinion on the information disclosed. (3) If the Minister of Health and Welfare considers that the objection raised under paragraph (2) is reasonable, he must take the necessary steps, such as correcting the information disclosed in relation to it. (4) Matters required for the scope, procedures, methods, etc. to disclose information and raise objections specified in paragraphs (1) and (2) shall be determined by the Ordinance of the Ministry of Health and Welfare. This article has changed twice on March 3, 2020, and August 11, 2020, due to content conflicts with the Personal Information Act. Due to the constant changes of the same legislation leaving the provisions of the conflict of parliamentary costs twice the work. A Big data-based analysis is also needed for the government to overcome the virus, even though the interests of the two parties conflict. Sacrificing and balancing interests and getting the best results using the right system is required at this point. The Personal Information Protection Act is at the center of the seesaw balancing the two sides.

The Dynamics of Law in the Field of Education in South Korea

With social distancing measures in place, many schools are closed at the beginning. Some exceptions can be open. Public schools with less than 50 students are under the sovereign decision of the principal who conducts classes. Private schools are under the sovereign decision of the principal with consideration of official government guidelines. Most of the classes and after-school activities continued at private schools unless there is a case of an infected student. Then again, students got tested and went back to normal classroom conditions with exception of self-isolated infectee at home. Many of the households took a chance of transferring to private schools during the pandemic. Most of the public schools have chosen to have online classes. With government guidelines, mixed online and offline classes has been applied. 1/2 students attend class Monday, Wednesday and 1/2 Tuesday and Thursday offline to adjust to school and stay safe.

Meanwhile, the digital resilience gap was huge at the start. Taking classes at home for those with computers and computer-related machines is easy to customize. However, those who do not have computers at home are left behind. To ease the gap, the Ministry of Education and Culture distributes tablet computers to students to take classes. The advantages of free internet during a pandemic for low-income children was one option and the advantages of free popular educational sites were also another welcome change. With all these efforts, the disparity gap in education becomes wider during the pandemic. The COVID-19 pandemic has brought significant changes to the implementation, system and procedure of education in various countries,[18] including Korea.[19] The learning model switched to online

[18] Tommaso Agasisti and Mara Soncin, "Higher Education in Troubled Times: On the Impact of Covid-19 in Italy," *Studies in Higher Education* 46, no. 1 (January 2, 2021): 86–95, https://doi.org/10.1080/03075079.2020.1859689; Maria Irene Bellini et al., "COVID-19 and Education: Restructuring after the Pandemic," *Transplant International: Official Journal of the European Society for Organ Transplantation* 34, no. 2 (February 2021): 220–23, https://doi.org/10.1111/tri.13788; Nina Bergdahl and Jalal Nouri, "Covid-19 and Crisis-Prompted Distance Education in Sweden," *Technology, Knowledge and Learning* 26, no. 3 (September 1, 2021): 443–59, https://doi.org/10.1007/s10758-020-09470-6; Shawna J. Lee et al., "Parenting Activities and the Transition to Home-Based Education during the COVID-19 Pandemic," *Children and Youth Services Review* 122 (March 1, 2021): 105585, https://doi.org/10.1016/j.childyouth.2020.105585.

[19] William H. Stewart and Patrick R. Lowenthal, "Distance Education under Duress: A Case Study

mostly.[20] At the beginning of the COVID-19 pandemic, the Korean government completely lockdown schools and universities. Therefore, the regulation relating to the general univerisity must be amended. The Ministry of Education proposed an amendment of 100% online class attendance at the general university compared to cyber university to be recognized. This proposal must be accepted due to unforeseen disastrous situations. The surge of COVID-19 cases has caused the Korean government to change its learning model policy to 100% online from elementary school to general university. Otherwise, only cyber-universities were allowed to have 100% online classes.

Adoption of an online class policy is considered effective in preventing the spread of the COVID-19 virus. However, policy changes bring up sentiment in society,[21] and inequalities in access to educational facilities. Students who come from high-income families are able to provide maximum support for learning activities, such as new IT gadgets, adequate internet access, and online courses. Meanwhile, students who come from families with low incomes cannot perform online learning activities optimally.[22] Considering this, exceptions are also allowed. Schools with less than 50 students are under the sovereign decision of the principal who conducts classes since most of the rural area schools have a small number of students in Korea. Still, 2 years of the experiment under COVID-19 shows a big discrepancy between those who have had all the possible excess to the educational service in full and those who are limited to public education service.

One of the important issues in the education sector during the COVID-19 pandemic was the revision of the private tutoring or hagwon rules. Korea is one of the countries with the largest private tutoring industry in the world.[23] Korean households spent an average of 291,000 won (USD359.38) per month per child on hagwons in 2019. This expenditure continues to grow while those looking for work, applying to become civil servants, the selection at companies cost an average of 2.08 million won (USD1,747) in 2019.[24] Local education departments, such as the

of Exchange Students' Experience with Online Learning during the COVID-19 Pandemic in the Republic of Korea," *Journal of Research on Technology in Education* 0, no. 0 (May 27, 2021): 1–15, https://doi.org/10.1080/15391523.2021.1891996.

[20] Wei Bao, "COVID-19 and Online Teaching in Higher Education: A Case Study of Peking University," *Human Behavior and Emerging Technologies* 2, no. 2 (2020): 113–15, https://doi.org/10.1002/hbe2.191; Shivangi Dhawan, "Online Learning: A Panacea in the Time of COVID-19 Crisis," *Journal of Educational Technology Systems* 49, no. 1 (September 1, 2020): 5–22, https://doi.org/10.1177/0047239520934018; Eric Liguori and Christoph Winkler, "From Offline to Online: Challenges and Opportunities for Entrepreneurship Education Following the COVID-19 Pandemic," *Entrepreneurship Education and Pedagogy* 3, no. 4 (October 1, 2020): 346–51, https://doi.org/10.1177/2515127420916738.

[21] Imatitikua D. Aiyanyo, Hamman Samuel, and Heuiseok Lim, "Effects of the COVID-19 Pandemic on Classrooms: A Case Study on Foreigners in South Korea Using Applied Machine Learning," *Sustainability* 13, no. 9 (January 2021): 4986, https://doi.org/10.3390/su13094986.

[22] Sooyeon Byun and Robert Slavin, "Educational Responses to the COVID-19 Outbreak in South Korea," *Best Evidence of Chinese Education* 5 (July 16, 2020): 665–80, https://doi.org/10.15354/bece.20.or030.

[23] Hoon Choi and Álvaro Choi, "Regulating Private Tutoring Consumption in Korea: Lessons from Another Failure," *International Journal of Educational Development* 49 (July 1, 2016): 144–56, https://doi.org/10.1016/j.ijedudev.2016.03.002.

[24] Patrik Hultberg, David Calonge, and Ty Choi, "Costs and Benefits of After-School Tutoring Programs: The South Korean Case," *International Journal of Social Economics* 48 (February 20, 2021),

Gyeongsangnam-do Changwon Office of Education, have classified shadow education providers into three categories: hagwons, training centers (Gyo Seup So), and private tutors. Hagwons can tutor hundreds of students in unlimited subjects, training centers tutor a limited number of students in only one subject, while private tutors are typically college and graduate students who provide private tutelage as a part-time job.[25]

Table 1. Three Types of Tutoring Providers

Types of tutoring providers	Hagwons	Training centers (Gyo Seup So)	Private Tutors
Number of students per class	>10	≤ 9	≤ 9
Subjects	Unlimited	Single	Unlimited
Establishment of branches	Allowed	Not allowed	No standard
Average area per student	>1 m^2 per student	>3.33m^2 per student	No standard
Facilities	Having standards	Having standards	No standard
Set up in a basement	Not allowed	Not allowed	No standard
Education background of lecturers	College degree or above	College degree or above	No standard

Hagwon is an educational facility that has been developed since 1885.[26] At first, hagwon was used as a means of learning English for children in Korea[27]. In its development, hagwon was used by parents to improve their children's academic and non-academic abilities. Parents want their children to go to well-known educational institutions or colleges. Or in other cases, parents want their children to have non-academic abilities such as music or sports. Hagwon caused controversy and tension in society. This condition makes the Korean government consistently implement the policy of closing the hagwon.[28] At first the hagwon was forbidden to exist. The goal is to provide equal and fair education for all levels of society. In addition, in order to avoid competition in the quality of education provided by formal and hagwon schools. However, competition between students and efforts to obtain an education at well-known schools/universities make the demand for private lessons increase every year. Once, the Korean government enacted law by making private tutoring an illegal business in 1980 August. It lasted 20 years until the constitutional court decides illegalization of private tutoring restriction is an excessive restriction on the right to have private tutoring by limiting parents' right to educate children as well as children's

https://doi.org/10.1108/IJSE-12-2019-0722.

[25] Huiyan Piao, Hyuna Hwang, "Shadow Education Policy in Korea During the COVID-19 Pandemic", *ECNU Review of Education,* (2021): 652-666, https://doi.org/10.1177%2F20965311211013825.

[26] Deutsche welle, "South Korea's struggle to clamp down on 'cram schools' as the private tutoring industry remains lucarative", Frontline, 2021, August, 07. https://frontline.thehindu.com/dispatches/south-korea-struggles-to-clamp-down-on-cram-schools-as-the-private-tutoring-industry-remains-lucrative/article35789513.ece

[27] *Ibid*.

[28] Young Chun Kim, "History of Shadow Education in Korea," *Shadow Education and the Curriculum and Culture of Schooling in South Korea*, 2016, 15–32, https://doi.org/10.1057/978-1-137-51324-3_2.

right to express personality[29]. Back in 1980, only people with the highest socio-economic level can get tutoring services and this sparked illegalization of private tutoring.

Since then, the Korean government has exercised control over the Hagwon, Training center, private tutoring together by a number of regulations. For Hagwon, there is a limitation of operating hours although it differs depending on the local regulation, controlling and opening course fees to the public, and prohibiting the involvement of formal school teachers in hagwon teaching. For training centers and private tutoring, there are conditions on the place, time, maximum enrollment and registration requirements.

Since 2019, the government implemented physical and social distancing policies and revised accordingly depending on the COVID-19 situation. The pandemic has caused hagwon in city areas with heavy infection rates to be closed to prevent the spread of COVID-19. However, the latest revision of the decision made by the administrative court on hagwon closure suspended the execution of administrative order of having vaccine pass to be applied to Hagwon making age 12~18 students get vaccination mandatory in practice. Although the government can give a recommendation for getting the vaccination, enforcing vaccination to a teenager is a measure of direct invasion to the teenager's self-determination of one's body.[30] With this administrative court decision, applying vaccine pass to ①Hawon ② study café, library ④ museum/art museum/science museum ⑤ department store and large mart[31] ⑥ movie theatre and performance arena have been lifted. The administrative order of closing the hagwon depends on determining and monitoring population density. Social distancing rules and prohibition of gathering orders. In the Hagwon Law Enforcement Decree, several new regulations were added to respond to changes in the learning system during the COVID-19 period. Examples are student isolation; operational hours; meeting reimbursement standards for students who choose not to attend class; and the appropriate standard of punishment if the student does not receive tuition reimbursement on time.

In addition, policies regarding Korean hagwon during the pandemic focus on adjusting course fees. On April 2, 2020, the Korean Ministry of Education issued a policy guideline that the cost of online courses be 30% lower than face-to-face tutoring.[32] Local education offices—such as the Seoul Nambu District Education Office and the Gyeonggi-do Hwaseong Osan Education Office issue guidelines for online tuition fees. These measures are part of the tuition advice and control guidelines for online education developed during the COVID-19 pandemic. This policy has received different responses, such as the permission to open online classes is temporary so that the price reduction has no legal legitimacy. Under the Hagwon

[29] Constitutional Court 2000. 4. 27 sentence 98HunKa429.
[30] "[Decision] Court Puts a Brake on the Application of the 'Quarantine Pass' for Educational Facilities," accessed January 30, 2022, https://www.lawtimes.co.kr/Legal-News/Legal-News-View?serial=175544.
[31] "Seoul Administrative Court Opposes Quarantine Pass for Supermarkets and Department Stores on the Same Day," accessed January 30, 2022, https://imnews.imbc.com/news/2022/society/article/6333089_35673.html.
[32] Deutsche Welle, "South Korea's Struggle to Clamp down on 'Cram Schools' as the Private Tutoring Industry Remains Lucrative," Frontline, accessed January 30, 2022, https://frontline.thehindu.com/dispatches/south-korea-struggles-to-clamp-down-on-cram-schools-as-the-private-tutoring-industry-remains-lucrative/article35789513.ece.

Act, if an offline hagwon wants to provide online tutoring, he or she must re-register as an online hagwon. During the COVID-19 pandemic, the government has temporarily simplified the complex procedures involved in this process and lowered institutional thresholds, allowing off-line hagwons to take online tutoring. For example, in February 2020, the government suggested that hagwon be closed and that online tutoring be allowed to temporarily comply with reduced tuition fees. As a financially motivated institution, the hagwons do not consider these actions or price cuts reasonable. Some students believe that online hagwon tutoring is neither convenient nor effective. So, it is necessary to reduce the cost of the course. On the other hand, the large workload of Hagwon tutors makes cost reductions irrational. Changes in the learning system in the era of the COVID-19 pandemic resulted in difficulties guaranteeing the minimum public education. The flexibility of the online platform makes supervising tutoring time much more difficult and complicated compared to offline tutoring providers. Some hagwons have taken advantage of the lack of online tutoring times during the pandemic, providing online tutoring services during school hours. This condition will result in formal schools losing their central role in providing education in Korea. According to Chang and Bray, the legislation and revisions to the hagwon closure guideline are intended to protect schools as dominant providers of public education and maintain the subordinate position of shadow education.[33]

Conclusion

Changes in the domestic regulations and putting administrative orders reflecting urgent emergency changes on a global scale are needed. The Korean government has chosen transparency as a means of communication. Testing, tracing, treatment were possible due to urgent changes in existing laws. Nearly two years have passed, and the vaccination rate is high enough to achieve a normal life in Korea. Confidence in the government was based on transparent information as well as the application of advanced IT technology. However, Korean citizens also used the court system of interpreting laws to lift administrative government orders. To clear the risk, differences among countries in distributing vaccines are another important issue. We now live on a global scale. The solution must also come on a global scale.

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Legality of Medicine of Something Forbidden: Legal Analysis of Measles Rubella Vaccine According to Fuqaha'

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Abstract:

The majority of Muslim intellectuals argue that legal treatment is mandatory. This is different when talking about the consumption of drugs from an illicit element. Today, there is much debate about *the Measles Rubella Vaccine (VAKSIN-MR)* regarding its legal use according to *syara'* because in the process it contains pigs and human organs. Considering the Minister of Health will give *Vaccine-MR* for newborns (Immunity). The Indonesian Ulema Council (MUI) issued a fatwa against *Vaksin-MR* but became *mubah* with sharia rule principles, namely *dharurat.* According to the researchers, this is ambiguous in taking legal formulation. Whereas there is the concept *of Istihalah* in the manufacture of *Vaccine-MR* which makes an element of haram become halal. This research is a type of qualitative-discrete research, using literature method with *tarjih*approach, using primary and secondary data in research. This study resulted in: *First,*rubella vaccine is legal even though it contains pigs or human organs, not because of emergency elements, but has changed from a normal form that is forbidden to something else either from dzatiyah or its nature. *Second,* the concept of *Istiḥālah* using *the al-Tafā'ul al-Kimiyawī* method is the most powerful basis for stating that the Rubella vaccine is halal and holy.

Keywords: *Medicine, Something Forbidden, Measles Rubella Vaccine.*

Introduction

There is a debate between Muslim intellectuals who focus on the field of jurisprudence regarding the law of medicine. Different debates on it are divided into 4 laws, namely: 1) Hanafiyah and Malikiyah think mubah law for treatment.[1] 2) According to Shafi'iyah and Ahmad the law is obligatory.[2] 3) Mayority of hambali mazhab considers the ruling mubah, but leaving it is one of the steps tawakal in Allah.[3] 4) According to some of the Shafi'iyah, Ibn Al-Aqīl, Ibn al-Jawzī, it is sunnah.[4] Judging from the differences in medical law from Muslim intellectuals above, the law of taking the drug itself becomes the material difference also. From

[1]Jamal al-Din Muhammad bin Abdullah al-Zailai, *Tabyin al-Haqaiq Syarh Kanz al-Daqaiq*, (Bairut: Dar al-Kutub al-Ilmiyah, 2010), 6/32.
[2] Yahya bin Syarf al-Nawawi, *al-Minhaj Syarh Shahih Muslim bin al-Hajjaj*, (Bairut: Dar Ihya' al-Turats, 1392), 14/191.
[3]Mansur bin Yunus bin Idris, *Kasyf al-Qina' an Matan al-Iqna'*, (Bairut: Dar al-Fikr, 1402), 2/76.
[4]Al-Nawawi, *al-Minhaj Syarh Shahih*, 14/191.

the four things above, which are included in the discussion of this study focused on the argument that the law of medicine is mandatory, because the argument is favored by the majority of Muslim intellectuals.

Regarding the obligation of thistreatment, there is still a difference of opinion among Muslim intellectuals regarding the legality of taking drugs containing banned elements. The meaning of the forbidden element is medicine mixed with something that has been confirmed forbidden in the Qur'an and al-Sunnah as well as dogs, pigs, human organs, rooms, human or animal urine, and others. This distinction can be mapped into three major opinions, namely: 1) haram. Seeing from the law the origin of the mixture of something forbidden.[5] 2) *tafshīl*. It is haraam if there are other drugs, and it is halal and mubah if no medicine is found other than something haraam.[6] 3) halal. This is because something haraam has changed the shape of both datiyah and its name.[7]

One health cause is to treat and take medicines either for people who are sick or for disease prevention. One of the diseases discussed today is rubella disease. According to research this type of Rubella disease can hit in children and young adults.[8] The impact of Rubella disease is not very noticeable for children, but can be characterized by the presence of red spots on the skin, fever, and flu.[9] The impact of rubella virus is clearly seen when the woman is pregnant young. This disease can cause miscarriage, outward defects for the fetus, or even death for the fetus.[10] Rubella virus according to medical experts is a virus that is easily spread and contagious. Transmission of this virus can be from breath, sneezing, coughing, or physical touch.[11]

Judging from the impact and process of transmission of rubella virus needs attention and proper handling, so that the virus does not spread widely that causes loss of physical health for Indonesian citizens. The steps taken by the Indonesian government are the right steps, because the vaccine becomes the basis for preventing rubella virus. However, what is a concern of academics is that the vaccine contains something that is clearly forbidden in the Qur'an and al-Sunnah, namely pigs. There have been a variety of studies related to the Measles-Rubella vaccine issue in the focus of different studies mainly over the past five years. Some studies focused solely on the characteristics of the extraordinary occurrence of the measles-rubella virus in one of the communities, written by Nur Hanna,[12] This study discusses the case of measles in one of the areas in Lampung by showing that measles is spread outside and

[5]Muhammad bin Isa al-Tirmidzi, *al-Jami' al-Kabir,* (Bairut: Dar al-Gharb al-Islami, 1998), 5/338.
[6]Ahmad bin Abd al-Halim bin Taimiyah, *Majmu' al-Fatawa,* (Bairut: Dar al-Wafa', 2005), 12/481.
[7]Ibid. 12/601.
[8]Sarwo Handayani, Dkk. "Imunisasi Terhadap Rubella pada Balita dan Wanita Usia Subur di Kota Surabaya dan Kabupaten Tabanan", Bul. Panel. Kesehatan, Vol. 36, No. 2, (Januari, 2008), 83.
[9]S. Darmadi, Indonesia Journal of Clinical Pathology and Medical Laboratory, "Gejala Rubela Bawaan (Kongenital) Berdasarkan Pemeriksaan Serologist dan RNA Virus", Vol. 13, No. 2, (Maret, 2007), 69.
[10]Ibid. 70.
[11]Acep T. Hardiana, dkk, Jurnal Farmasi Klinik Indonesia, "Analisis Penyebaran dan GenotipeRubela di Jawa Barat Tahun 2011-2013", Vol. 4, No. 1, (Maret, 2015), 5.
[12] Nurlaila dan Nur Hanna, "Jurnal Keperawatan, "Karakteristik Kejadian Luar Biasa Campak Pada Salah satu Desa di Kabupaten Pesawaran Propensi Lampung", Vol. XII, No. 2, (Oktober, 2016).

resulting in a harmful impact on sufferers or others in the vicinity. There is also related side of knowledge about the MR vaccine (measles rubella) and the level of education of parents to the participation of MR immunization,writtenby Alisa Putri et al.[13] On the other hand, there are some research that explain the law of something that is forbidden by using the concept of *istihalah* such as the writing of Anjahana Wafiroha.[14] Meanwhile, a study conducted by Muhammad Danusiri,[15] talking about the Islamic view of immunization with the final conclusion of this study is allowed immunization of something that is forbidden when no immunization drugs are found from something that is permitted.

MUI (Majelis Ulama Indonesia) in charge of tracking the halallan and haraam something that can be consumed by the People of Indonesia provides illegal laws against the rubella vaccine. The legal decision from MUI is based on the results of research into the content of the vaccine in the form of pigs. However, with the element of *darurah,* then something haraam can turn into legal. Therefore, the final conclusion of MUI's decision on rubella vaccine is haram but mubah.[16] When viewed from the poses *istimbāṭ al-Aḥkām* used by mui based on the word of Allahsurat al-Baqarah: 173, al-Naḥl: 115, and al-Anam: 145. Reviewing and re-examining the concept chosen by mui above, after conducting deeper research, researchers feel less fitting about the concept, because MUI seems not to review the concept *of istiḥlāl* in various Muslim intellectual views that focus in the field of jurisprudence and science. From this, it is necessary to re-research the law using the rubella vaccine using a comparison of the concept *of istiḥlāl* according to Muslim intellectuals.

This research is included in the type of qualitative-discrete research because this research is pure literature research, in the sense that all the data sources come from written data that has something to do with the topic discussed. The data sources in this study are divided into two parts: the primary sources (fiqh books such as, *al-Muḥalā, Tabyīn al-Ḥaqāiq Sharh Kanz al-Daqāiq, al-Kāfī fī Fiqh Ahl al-Madinah)*and secondary*(Tafsīr al-Ṭabarī, Ṣaḥīḥ Muslim, Sharh al-Muhadzab).* The study used *a tarjih* approach, which is to gather two conflicting arguments and then look for a meeting point between the two and favor one of two or more arguments. Departing from the doubts of Muslims in Indonesia regarding the legality of using rubella vaccine containing pig elements and has been diharmkan by MUI, this study aims to obtain a law that is more relevant to the space and time in Indonesia so that there is no doubt in using the rubella vaccine that is still a polemic among Muslims in Indonesia.

[13] Alisa Putri, Aslinar, Desiana, "Jurnal Ilmu Kedokteran Dan Kesehatan", Hubungan Pengetahuan Tentang Vaksin Mr (Measles Rubella) Dan Tingkat Pendidikan Orang Tua Terhadap Keikutsertaan Imunisasi Mr Di Desa Lam Bheu, Kecamatan Darul Imarah, Kabupaten Aceh Besar. Volume 7, Nomor 1, Januari 2020
[14] Anjahana Wafiroha, Jurnal Isti'dal, Tinjauan Konsep Istihalah Menurut Imam Al-Syafi'I Dan Imam Abu Hanifah, Dan Implementasinya Pada Percampuran Halal-Haram Produk Makanan), Volume 4, No 1, Tahun 2017
[15] Muhammad Danusiri, "Pandangan Islam Tentang Imunisasi," (Universitas Muhammadiyah Semarang, 2018).
[16]Putusan MUI Tahun 2018 No 33 tentang vaksin MR.

Discussion

Concepts and Methods of Istiḥālah The Perspective of Ulama Fiqh

1. The Concept of *Istiḥālah* The Perspective of Ulama Fiqh

Before entering into the discussion of the concept of *Istiḥālah* the perspective of fiqh , first to be understood is the meaning of *Istiḥālah* itself either from a language or term point of view. After doing some research from the Arabic dictionary. The word *Istiḥālah* in the language perspective is *isim maṣdar* which follows *wazn* استفعالة. *Istiḥālah* is *the isim maṣdar* of *fi'il* حال يحول.[17]

The meaning of the word *Istiḥālah* in the language commentaries has the meaning of changing from its nature and behavior(تغير عن طبعه ووصفه).[18] Fairuz Abadī means *Istiḥālah* with three meanings: 1) the transfer from one place to another or from one position to another. 2) move on to something else. 3) leaning from one position and change.[19]Al-Manāwī explains the meaning of the word *Istiḥālah,*"changes*something as it heats water and cools it even though its form and type still remain. And in al-Miṣbāḥ it is defined by the change of something from its nature."*[20]Ramaúān Ḥamdun 'Alī further asserts in one of his articles after compiling all the meanings of *Istiḥālah* in the language, "of all the Arabic dictionaries *Istiḥālah* isim *maṣdar* of *fi'il Māúī* حال يحول when there is a change, displacement, or loss of something from its nature and nature of origin."[21]

If *Istiḥālah is* seen from the definition in terms of the scholars of fiqh, it is permissible that the meaning of *Istiḥālah* is to change something in something else. Although there is an agreement that the meaning of *Istiḥālah* as described above, there is a difference between the fiqh scholars when describing *Istiḥālah* in detail. Alā' al-Dīn al-Ḥanafī defines, "changing its attributes and habits from something unclean, to coming out of the dzatiyah something unclean, due to the loss of existing *najasah*.[22] Regarding *this Istiḥālah* Ibn 'Abidīn asserts, "when something *najis* has changed to something else, then something *najis* has become sacred. This is because *al-Shāri'* makes something unclean because it is unclean, and when some of its *kenajisan* is gone, then the law of uncleanness is gone. If some of his *kenajisan* has been unpunished, then what about the law when all its nature has changed?"[23]

Mengenai *Istiḥālah* these companions and tabi'in legalize and often apply it. It can be proven that 'Alī bin Abū Ṭālib, Ibn 'Abbās, Abū Dardā', 'Aṭā' bib Abū Rabāḥ, 'Umar ibn 'Abd al-'Azīz, and others argue that when liquor has occurred

[17]Al-Fayyumī, Aḥmad bin Muhammad bin ‘Alī, *al-Miṣbāḥ al-Munīr fī Gharīb al-Sharḥ al-Kabīr li al-Rāf‘ī* (Bairūt: Dār al-Kutub al-‘Ilmiyah, t.t.), 1/157.
[18]Ibid., 60.
[19]Fairūz Ābadī, Muhammad bin Ya‘qūb, *al-Qāmus al-Muḥīṭ* (Bairūt: Muassasah al-Risālah, 2005), 3/532.
[20]Al-Manāwī, ‘Abd al-Rāuf bin Tāj al-‘Ārifīn bin ‘Alī, *al-Tawqīf ‘alā Muhimmāt al-Ta‘ārīf* (Kairo: ‘Alām al-Kutub, 1990), 55.
[21]Ramaḍān Ḥamdūn ‘Alī, Impossibility in Islamic Jurisprudence (Fiqh), *Majallah Kuliyyah al-‘Ulūm al-Islāmiyah*, Vol. 2, No. 14, (2013), 3.
[22]Al-Kāsāinī, ‘Alā’ al-Dīn Abū Bakar bin Mas‘ūd bin Aḥmad, *Badāi‘ al-Ṣāni‘ fī Tartib al-Sharā‘i* (Bairūt: Dār al-Kutub al-‘Ilmiyah, 1986), 1/85.
[23]Ibn ‘Ābidīn, Muhammad bin ‘Umar bin ‘Abd al-Azīz, *Radd al-Mukhtār* (Bairūt: Dār al-Fikr, t.t.), 1/218.

*Istiḥālah,*then it is halal. This is as explained by al-Tahānawī.[24] Therefore, it is not wrong if Ibn 'Abidīn and Ṭahmās give examples when unclean goods have been burned and become ashes or fat of najsi animals have been processed and become soap, then it becomes holy.[25]

If *Istiḥālah is* described with shari'a perspective, then according to Ramaẏān Ḥamdūn is a change produced in unclean goods, thus changing its nature. Furthermore, because *of this Istiḥālah his* name changed due to a change of nature and was given a name that corresponds to his new nature.[26]Al-Hawāwī defines *Istiḥālah* using modern science, "the chemical change of something to another element. It's like turning oil and fat from something into soap."[27] Abū al-Wafā' also defines, "the change of something to something else is caused by a mixture of chemical elements. Like the change of alcohol into vinegar."[28]

After knowing the definition of *Istiḥālah* both in terms of language, terms, sharia, and modern science switched the next discussion regarding the concept of *Istiḥālah* itself the perspective of the great fiqh madzhab al-Ḥanafiyah, al-Shāfi'iyah, al-Mālikiyah, and al-Ḥanābilah. Below is a descriptive breakdown of the explanation to the scholars about *Istiḥālah* the perspective of the Ulama fiqh :

a. Ulama Ḥanafiyah

In general, there are three great thoughts of the Ḥanafiyah madzhab when discussing the issue of *Istiḥālah.* These three great thoughts are revealed by Ibn 'Abidīn, al-Kāsānī, and al-Sharanbilālī. Al-Kāsānī thinks that every thing that is *najis* when *Istiḥālah* has happened and there has been a change in its nature and meaning, it cannot be said *najis* anymore because it has changed and its name follows a new nature. *Kenajisan* can be said to be lost when its nature has been lost.[29] Furthermore Ibn 'Abidīn explained, From the agreement of the missionary scholars punished holy and halal. Although basically mission made of blood, but there has been a change. The point of change here is that *Istiḥālah* happens to something good. Thus, it is punishable sacred and halal.[30]Al-Sharanbilālī said that unclean things can become sacred when there has been a change in shape like a carcass that has become salt or ash.[31]

From the view of *Istiḥālah* the perspective of the al-Ḥanafiyah scholars can be found that the concept of *Istiḥālah* must meet three criteria, namely: 1) when

[24]Al-Tahānawī, Ẓafr Aḥmad al-'Uthmāinī, *I'lāl al-Sunan* (Pakistan: Idārah al-Qur'ān wa al-'Ulūm al-Islāmiyah, 1418), 18/41.
[25]Ibn 'Ābidīn, *Radd al-Mukhtār*, 1/316. Lihat juga, Ṭahmās, 'Abd al-Ḥamīd Maḥmūd, *al-Fiqh al-Ḥanafī fī Thawb al-Jadīd* (Mesir: Dār al-Shāmilah, t.t.), 1/47.
[26]Ramaḍān Ḥamdūn, Impossibility in Islamic Jurisprudence, 4.
[27]Al-Harāwī, Muhammad, *Istiḥālah al-Najāsāt wa 'Alāqatuh Aḥkāmiha bi Isti'māl al-Muḥaram wa al-Najs fī al-Ghadā' wa al-Dawā'*, *Majelis al-Urupa li al-Iftā' wa al-Buḥuth.* Dalam http://www.islameqh.com/Nawazel/Nawazelltem.aspx?NawazelltemlD+1145
[28]Idris 'Abd al-Fattāḥ Maḥmūd, Istikhdām al-Jīlātīn al-Khinzirī fī al-Ghadā' wa al-Dawā', *Majjalah al-Buḥūth al-Fiqhiyah al-Mu'āṣirah*, Vol. 2, No. 31, (2017), 19.
[29]Al-Kāsāinī, *Badāi' al-Ṣāni'*, 1/85.
[30]Ibn 'Ābidīn, *Radd al-Mukhtār*, 1/209.
[31]Al-Sharanbilānī, al-Ḥanafī, *Nūr al-Īḍāḥ wa al-Najāh al-Arwāḥ fī Fiqh al-Ḥanafī* (Mesir: al-Maktabah al-'Aṣriyah, t.t.), 42.

there is a change of its original nature. 2) the change from something ugly */ najis* to something better. 3) the existence of such changes is a complete change from before the change of both dzatiyah and its nature. Regarding these three concepts *Istiḥālah* is also explained by'Alī Muhammad 'Alī Mahdi 'Uthmān:
إذا فالإستحالة عند الحنفية تطلق على ما تغيرت أوصافه, وعلى ما تغيرت أوصافه للطيبة, وعلى ما تغيرت ذاته وصفاته.[32]

b. Ulama Mālikiyah

As a representative of the Mālikiyah madzhab on the concept of *Istiḥā, the* author presents three figures, al-Zurqānī, al-Dardīr, and al-Ḥaṭṭāb. Al-Zarqānī in his *Sharḥ al-Zurqānī 'alā Mukhtaṣar Khalīl* explains that anything unclean when it has turned to something good, then it is sacred.[33] Al-Dardīr revealed that the cause of its unclean vomiting was a change in something bad."[34]Furthermore, al-Ḥaṭṭāb explains the problem of *Istiḥālah* when discussing whether or not a person prays while the person uses a mission on his body or clothing. He argues that his prayers are punished lawfully by a missional argument that has become sacred, because *Istiḥālah* occurs in terms of his nature and name. Initially in the form of blood (foul smell) becomes a fragrant smell and which was originally called blood into perfume.[35] From the view of al-Ḥaṭṭāb, it is indicates that when unclean goods change their nature and become something useful or good, then the law is sacred and halal.

From all the commentaries that have been explained in the Mālikiyah madzhab it can be said that the concept of *Istiḥālah* used by the madzhab is *istiḥālah* can make something to be halal or sacred, but on condition that something unclean has changed shape and contains something good or *maslahat*. This is as revealed by al-Ḥaṭṭāb, If an something unclean that has undergone the *process of Istiḥālah* but does not contain good or benefit, then it cannot be punished as a sacred or halal item. This is something described by al-Dardīr.

c. Ulama Shāfi'iyah

Imām al-Ḥaramain, Ibn Ḥajar al-Haytamī, and al-Ḥaṣanī became representatives of the al-Shāfi'iyah figure chosen by researchers in giving an overview of the concept of *Istiḥālah* possessed by this madzhab. Regarding *this Istiḥālah* al-Ḥaramain gives the description *istiḥālah* that can change unclean to holy with enough just a change in the nature of something unclean and do not need a change in it's dzatiyah.[36] Furthermore, al-Ḥaramain gives the

[32]'Alī Muhammad 'Alī Mahdi 'Uthmān, al-Istiḥālah wa Atharuha fī Taṭhīr al-Najāsah, *Journal Ḥawliyah*, Vol, 1. No. 32, (2017), 2064.
[33]Al-Zurqānī, 'Abd al-Bāqī bin Yūsuf bin Aḥmad, *Sharḥ al-Zurqānī 'alā Mukhtaṣar Khalīl* (Bairūt: Dār al-Kutub al-'Ilmiyah, 2002), 1/48.
[34]Al-Dardīr, Aḥmad bin Muhammad al-'Adawī, *al-Sharḥ al-Kabīr* (Bairūt: Dār al-Kutub al-'Ilmiyah, 2000), 1/51.
[35]Al-Ḥaṭṭāb, Muhammad bin Muhammad bin 'Abd al-Raḥmān, *Mawāhib al-Jalīl li Sharḥ Mukhtaṣar al-Khalīl* (Bairūt: Dār 'Ālam al-Kutub, 2003), 1/97.
[36]Al-Juwainī, 'Abd al-Mālik bin 'Abdullah, *Nihāyah al-Maṭlab fī Dirāyah al-Madhhab* (Kairo: Dār al-Minhāj, 2007), 1/26.

example of liquor, liquor can become halal if the element that causes the severity of the hangover has been drained, without having to be in the form of other dzatiyah.[37]

Not much different from al-Ḥaramain, al-Haytamī also titled, *"Basically Istiḥālah* only needs to change its nature without having to change its shape."[38]In addition, al-Ḥaṣanī also gives the same explanation as the two figures above, he explains that *Istiḥālah* is a change of something from its original nature to another trait.[39]

From the above commentary it can be concluded that the concept *of Istiḥālah* used by madzhab al-Shāfi'īyah is simpler than the concept *of Istiḥālah* used by the two previous madzbah. It can be seen that something unclean when it has changed its nature even though its shape is still fixed, then *Istiḥālah* remains valid and can change something that was originally haraam or unclean into something halal or sacred. Thus, the concept of *Istiḥālah* used by madzhab al-Shāfi'īyah only needs to change nature without needing anything else.

d. Ulama Ḥanabilah

Not much different from the argument of the Ulama madzhab that has been explained earlier. Ḥanābilah also argues that *Istiḥālah* can make something that was originally unclean or haraam to be holy or sacred. As evidenced by the Ḥanābilah, *istiḥālah* can be seen from the opinion of one of his mandzhab, Abū Faúl al-Ba'lā. He explained:

الاستحالة : إستفعال من حال الشيء عما كان عليه زال. وذلك مثل أن تصير العين النجسة رمادا او غير ذلك.[40]

From the above editorial it is understood that *istiḥālah is* a change from a situation that can eliminate the state of asilnya. The example proposed by al-Ba'lā is not much different from the example used by the Ḥanafiyah and Mālikiyah madzhabs that is the change of uncleanness to dust. With the change of something unclean into dust, the dust that was originally a unclean object became holy. This is due to a change from one state to another that can eliminate the original nature of the unclean goods.

After exposing the four famous jurisprudences concerning *Istiḥālah,* it can be quoted several important points regarding the concept of *Istiḥālah* which is justified from one madzhab to another. Important points that can be typed can be summarized as follows: (1) From the Ḥanafiyah and Maliki madzhabs it *istiḥālah* with a change of the whole nature of the goods. It is the difference between the Shāfi'iyah and the Ḥanābi that can only make changes to some of them. (2) From the Shāfi'iyah and Ḥanafiyah madzhabs make it clear that

[37]Al-Juwainī, ‘Abd al-Mālik bin ‘Abdullah, *Nihāyah al-Maṭlab*, 1/27.
[38]Al-Haytamī, Aḥmad bin Muhammad bin ‘Alī, *Tuḥfah al-Muḥtāj fī Sharḥ al-Minhāj* (Mesir: al-Maktabah al-Tijāriyah al-Kubrā, 1983), 1/303.
[39]Al-Ḥaṣanī, Abū Bakar bin Muhammad bin ‘Abd al-Mu’min, *Kifāyah al-Akhyār fī Hall Ghāyah al-Ikhtiṣār* (Damaskus: Dār al-Khayr, 1994), 73.
[40]Al-Ba‘lā, Muhammad bin Abū al-Fatḥ, *al-Maṭla‘ ‘ala Abwāb al-Fiqh* (Bairūt: Maktab al-Islāmī, 1981), 35.

Istiḥālah can purify unclean things simply by changing their nature even if their form does not change. (3) From the Mālikiyah madzhab gives the requirement regarding the sanctity of something that happens *Istiḥālah* must have benefits or something in the form of a good thing. This requirement of the Mālikiyah was not used by the Shāfi'iyah and Ḥanafiyah madzhabs. Even the Ḥanafiyah madzhab declared that it is sacred for something that has happened *Istiḥālah* even though something is useless and not good.

***Istiḥālah* Method in the Perspective of Ulama Fiqh**

After conducting research on methods considered valid by Ulama fiqh regarding the sacredness of something unclean due to *Istiḥālah,*it can be concluded that there are seven methods of *Istiḥālah* namely:

1. *Al-Iḥrāq*

   The meaning of *al-Iḥrāq* here is to burn unclean or unclean objects with burning fire. This *al-Iḥrāq* is explained by al-Manāwī, "putting something into a burning fire."[41] Furthermore, there is an opinion of the Ḥanafiyah scholars who assert that this method can be made holy something unclean. Al-Zayla'ī said:

   والعذرة اذا صارت ترابا اواحرقت بالنار. فان يحكم بطهارتها للاستحلال.[42]

   "Dirt when it has become dust or burned with fire, it can be sacred, because there has been *Istiḥālah*."

2. *Al-Takhalul*

   Al-Takhalul here is more focused on something that can change by itself because of a long time. Al-Shāfi'ī in his work *al-um* explains:

   المسلم يرث الخمر او توهب له لا تحل. فاذا صارت خلا حل ثمنها.[43]

   "A Muslim is not allowed to bequeath or give liquor. But the absence has become vinegar, allowed."

   From the above editorial it can be understood that al-Shāfi'ī legalized to take the price of khamar which had become vinegar. Thus, it can be concluded that the wine that has become vinegar is sacred. This method was agreed upon by the four madzhabs as one of the methods to purify unclean or mutant goods. This is evidenced by the explanation of al-Kāsanī from the Ḥanafiyah madzhab, which is the cause of *al-Takhalul's* method of *Istiḥālah* is: when something unclean has changed and changed both its nature or meaning, then something is out of uncleanness, because something is not included in the new name that characterizes it.[44]

3. *Al-Istihlāk*

[41]Al-Manāwī, ‘Abd al-Rāuf bin Tāj al-‘Ārifīn bin ‘Alī, *al-Tawqīf ‘alā Muhimmāt al-Ta‘ārīf* (Kairo: ‘Alām al-Kutub, 1990), 40.
[42]Al-Zayla‘ī, Uthmān bin ‘Alī, *Tabyīn al-Ḥaqāiq Sharḥ Kanz al-Taqāiq wa Ḥashiyah al-Shilibī* (Kairo: al-Maṭba‘ah al-Amiriyah, 1313), 1/76.
[43]Al-Shāfi‘ī, Muhammad bin Idrīs, *al-Umm* (Bairūt: Dār al-Ma‘rifah, 1990), 7/234.
[44]Al- Kāsāinī, ‘Alā’ al-Dīn Abū Bakar bin Mas‘ūd bin Aḥmad.*Badāi‘ al-Ṣāni‘ fī Tartib al-Sharā‘i*. Bairūt: Dār al-Kutub al-‘Ilmiyah, 1986, 1/85.

According to the Ulama Fiqh, *al-Istihlāk* is to include something unclean on something else that is not unclean until there is a mixing between the two and can not be sorted again. With this model, the scholars agreed that something unclean is no longer known as unclean because there has been a intermingling between two elements, namely unclean and unclean. Al-Rāfi'ī in his *al-'Azīz Sharḥ al-Wajīz* gives the example, uncleanness that is put in a lot of water and has been mixed, so it can not be punished as unclean anymore. Furthermore al-Rāfi'ī gives a more detailed example, the person who drinks liquor that has been mixed with something and has mingled, then the person is not sanctioned as a drinker of liquor. Similarly, the person who runs ihram when he eats food mixed with perfume, then he gets fidyah.[45]

4. *Al-Tabakhur*

Al-Tabakhur in the dictionary of the term fiqh is defined by the change of solid or liquid objects into gases that compound with smoke.[46]*Al-Tabakhur* is one of the methods to purify unclean objects from the perspective of some scholars such as only the Ḥanafiyah madzhab. Ibn 'Abidin explained, "anomia is collected from unclean things, the law is sacred."[47] Although the Ḥanafiyah sect recognizes the *al-Tabakhur* method as one of *the Istiḥālah* methods, this method is not considered correct by the Shāfi'iyah. It can be proven that al-Ramlī and Sulaymān Jamal gave affirmations:

واما النوشادر وهو مما عمت به البلوى فإن تحقق انه انعقد من دخان النجاسة او قال عدلان خبيران انه لا ينعقد الا من دخانها فنجس.[48]

From the above editorial, it can be understood that all unclean things that have happened *al-Tabakhur* still unclean. The person who is exposed to the smoke must purify himself. This can be justified when it is clear that the smoke is actually from unclean objects or by the presence of two fair witnesses who give explanations.

5. *Al-Ta'aruḍ li 'Awāmil al-Ṭabi'iyah*

One of the method of *Istiḥālah that* can purify unclean things is the natural change of the unclean object itself due to time. As the carcass is held then over time the carcass turns into dust, becomes clay, or caused by sunburn and rain so that it becomes another object. With this change, the originally unclean carcass became sacred.

This method is explained by al-Sarkhasī in his *al-Mabsūṭ:*

النجاسة تحرقها الشمس, وتفرقها الريح وتحول عينها, وينشفها الهواء فلا تبقي عينها بعد تأثير هذه الاشياء فيها فتعود الارض كما كانت قبل الاصابة.[49]

[45]Al-Rāfi'ī, 'Abd al-Karīm bin Muhammad bin 'Abd al-Karīm, *al-'Azīz Sharḥ al-Wajīz al-Ma'rūf bi al-Sharḥ al-Kabīr* (Bairūt: Dār al-Kutub al-'Ilmiyah, 1997), 9/556.
[46]Muhammad Rawās Qal'ah Jī, *Mu'jam Lughah al-Fiqh* (Bairūt: Dār al-Nafāis, 1985), 120.
[47]Ibn 'Ābidīn, Muhammad bin 'Umar bin 'Abd al-Azīz. *Radd al-Mukhtār*. Bairūt: Dār al-Fikr, t.t., 1/325.
[48]Al-Ramlī, Muhammad bin Abū 'Abbās Aḥmad bin Ḥamzah, *Nihāyah al-Muḥtāj ilā Sharḥ al-Minhāj* (Bairūt: Dār al-Fikr, 1984), 1/248.
[49]Al-Sarkhasī, Muhammad bin Aḥmad bin Abū Sahl, *al-Mabsūṭ* (Bairūt: Dār al-Ma'rifah, 1993), 1/205.

"Something unclean when it has been burned by the sun, blown by the wind, and exposed by the air so that there is no longer the form of unclean objects, then the soil affected by something unclean is still punished holy as before the famous unclean object."

From the explanation above it can be understood that natural changes caused by time can make unclean objects become sacred objects.

6. *Al-Dibāgh*

Al-Dibāgh is one of the methods of *Istiḥālah* agreed upon by all jurisprudence. The agreement concerning *al-Dibāgh* became the method of *Istiḥālah* because of the hadith of the Prophet explaining the sacred skin in the same. This hadith about *al-Dibāgh* is as narrated by the Muslim from Ibn 'Abbās in his Book of *Saḥīḥ:*

قال الرسول الله صلى الله عليه وسلم: اذا دبغ الارهاب فقد طهر.[50]

Al-Dibāgh in fiqh review means to remove more and more skin of animals affected by blood or feces.[51] Animal skin that has been tanned from the perspective of ulama fiqh can be used for blankets, clothing, and others. Equally this is the same as changing the shape of a different unclean into a holy object.[52]

7. *Al-Tafā̃ul al-Kimiyawī*

This method developed in modern times, when advanced tools were found from the laboratory. Nowadays, this method is more dominant to be used as *istiḥālah*process. Alī Muhammad explained about this method, "with the development of technology and chemicals can change something that was originally unclean to be holy on the condition of strict supervision. Just like animal oil taken from carcasses that are used as food or medicine so that it can be used by humans.[53]

The Law of Producing and Utilizing *Najis* or *Mutanajjis* After *Istiḥālah*

Basically the classical Ulama Fiqh have discussed this problem in the matter of soap made from unclean objects such as pork oil or oil mixed with something unclean. Researchers think this discussion needs to be re-raised with a review, if for beauty furniture is allowed, then for more medicine is allowed. This can be understood by using the concept of *mafhūm awlawī* in the study of *uṣūl fiqh.*

Regarding the controversy that occurred between Ulama Fiqh regarding the use of soap made of unclean oil or mixed with unclean goods Qadāfī 'Izzāt al-Nanānim tried to weigh the power of the two opposing opinions which ultimately

[50]Muslim bin al-Ḥajjāj al-Naysabūrī, *al-Musnad al-Ṣaḥīḥ al-Mukhtaṣar bi Naql al-'Adl 'an 'Adl ilā Rusūlillah* (Bairūt: Dār al-Iḥyā' al-Turāth al-'Arabī, t.t.), 1/277.
[51]Muhammad bin Qāsim al-Ghazzī, *Fatḥ al-Qarīb al-Mujīb fī Sharḥ Alfāẓ al-Taqrīb* (Bairūt: Dār al-Kutub al-'Ilmiyah, 1978), 27.
[52]Muhammad Khāṭib al-Sharbīnī, *Mughnī al-Muḥtāj ilā Ma'rifah Ma'ānī Alfāẓ al-Minhāj* (Bairūt: Dār al-Fikr, t.t.), 1/238.
[53]'Alī Muhammad, al-Istiḥālah wa Atharuha fī Taṭhīr al-Najāsah, 2075-2056.

concluded that the first opinion is superior to the second opinion. This is because *Istiḥālah* is a concept agreed upon by the majority of fiqh scholars to purify unclean objects or goods.[54] The refusal of Abū Yūsuf and some of the followers of the Ḥabābilah madzhab who rejected *istiḥālah* as one of the concepts of *Istiḥālah* to purify the difference of uncleanness is considered to be in violation of the opinion of the majority of scholars.

The Level of Utilizing Objects That Have Experienced *Istiḥālah* And Its Laws

When reviewed from the scales of science fiqih against the needs of mankind on everything can not be separated from three things. This is also true when discussing something that has happened *istiḥālah* to be used by humans in general. These three scalesof fiqih are often referred to as *al-Maqāṣid al-Sharī'ah: al-Ɣarūriyāt* (when human needs are so urgent that they cannot avoid them or seek anything else), *al-Ḥājiyāt* (the need for them is not so urgent, but it can be), and *al-Taḥsīniyāt* (the need for it is only a complement to the nature of human perfection alone). Below is an explanation of the three elements when included in the discussion of *Istiḥālah:*

1. *Al-Ḍarūriyāt*

   When something that has happened *istiḥālah* is an urgent need for people, then in these circumstances it is legalized to take advantage of it. Even the law of the use of it can reach the rank of obligation. Just as sick people need certain medications or capsules that contain something that has been forbidden. In these circumstances taking drugs or capsules is legal even if there is no substitute drug can be punished mandatory to consume the drug.

2. *Al-Ḥājiyāt*

   The need for something that has happened *Istiḥālah is* not so urgent and when not using it does not come to death. Just like using soap made from unclean oil or mixed with unclean oil, using unclean oil directly, or using drugs that are not so urgent for the safety of his soul. In these circumstances the law uses something that has happened *Istiḥālah* mubah law on condition that there should be no danger that threatens him after using the goods. However, if there is a danger that threatens after using it, then it is haraam. Nevertheless it is still essentially legalized.

   As for the legality of something that has happened *Istiḥālah* in this position *al-Ḥājiyāt* is something that has happened *Istiḥālah is* basically sacred law and legal to use it under any circumstances. While the basis of haraa when there is a danger based on the rule of jurisprudence "it is not allowed to harm yourself or others."[55]

3. *Al-Taḥsīniyāt*

   Using it is not urgent for the user, but it is used to embellish its appearance only. Just like using cosmetics mixed with unclean objects that have happened *Istiḥālah*

[54]Qādafī 'Izzāt al-Nanānim, *al-Istiḥālah wa Aḥkāmuha fī al-Fiqh al-Islāmī* (Urdūn: Dār al-Nafāis, 2007), 193.
[55]Al-Suyūṭī, 'Abd al-Raḥmān bin Abū Bakar, *al-Ashbāh wa al-Naẓāir* (Bairūt: Dār al-Kutub al-'Ilmiyah, 1403), 88.

with the aim of beautifying yourself. Regarding this situation, there is a difference of opinion. Some of them are forbidden and some are legal. But according to the personal author's view, using cosmetics mixed with something unclean after the *istiḥālah is* legal. However, if using it can pose a danger, then it is haraam to rule based on the rules that the author has explained in the discussion of *al-Ḥājiyāt*.

The Law of Treatment with *Muḥramāt*

Regarding the ruling on medicine with something clearly forbidden the scholars of jurisprudence there are still differences of opinion among them some are legalized and some are forbidden. This dissent arises because of the hadith of the Prophet Muhammad from Ibn Mas'ūd which explains the prohibition of treatment with something that is forbidden. The editorial of the hadith is as follows:

إِنَّ اللَّهَ لَمْ يَجْعَلْ شِفَاءَكُمْ فِيمَا حَرَّمَ عَلَيْكُمْ.[56]

"Allah does not put healing on anything that is forbidden to you."

In addition, there are other hadiths that are similar to the explanation above. This hadith is narrated by Abū Dāwūd of Abū al-Dardā':

إِنَّ الله عزّ وجلّ أَنْزَلَ الدَّاءَ والدَّواء، وجَعَلَ لِكُل داءٍ دَوَاءً، فَتَداووا، ولا تَدَاووا بحرَام.[57]

"Surely Allah has sent down sickness and medicine. And Allah created the disease and the cure. Therefore, seek treatment and never seek treatment with anything haraam."

In addition, there is a difference of opinion between Ulama Fiqh regarding medicine and something that is forbidden arises from the basic principle in *istimbāṭ al-Aḥkām* in the matter of whether the sick and do not find a remedy legalized by *al-Shāri'* is classified as an emergency so that it is permissible to consume something that is forbidden as explained in the word of Allah (Q.S. al-Baqarah: 173). From this issue, Ulama who consider such conditions included in emergencies allow to consume something that is forbidden, but with certain conditions. While scholars who think such conditions do not belong to the emergency assume it is not permissible to consume something that is forbidden.

From the two hadiths of the Prophet Muhammad above, Ulama differed because of the interpretation of the hadith. Ulama who declare haram based on the textual understanding of the hadith. While the legal Ulama try to reinterpret the redaction of hadith and contextualize the hadith above. From the two hadiths above it clearly shows that it is not permissible to use something that is forbidden to be used as medicine, because there can be no good in something that is clearly forbidden by the conditions of Islam.

[56]Al-Bayhaqī, Aḥmad bin al-Ḥusain bin ‘Alī, *al-Sunan al-Ṣaghīr li al-Bayhaqī* (Pakistan: Universitas Dirāsāt al-Islāmiyah, 1989), 4/84.
[57]Abū Dāwūd, Sulaymām bin al-Ash‘at bin Isḥāq, *Sunan Abū Dāwūd* (Bairūt: Dār al-Risālah al-‘Ilmiyah, 2009), 6/23.

While the basis of Athār used by this group is the word Ibn Mas'ūd which explains that God could not provide healing to man through something that has been forbidden to man. The editorial of Ibn Mas'ūd's words is as follows:

إِنَّ اللَّهَ لَمْ يَجْعَلْ شِفَاءَكُمْ فِيمَا حَرَّمَ عَلَيْكُمْ.[58]

"Allah does not put healing on anything that is forbidden to you."

After explaining and weighing two opinions that are opposite regarding the law of medicine with *maharramāt* above, researchers are more inclined to the opinion of scholars who legalize consuming something that is forbidden or unclean for treatment in an emergency. Researchers can argue that, because in an emergency everything that was originally haraam turned into halal. In addition, maintaining self-safety is more important than avoiding something that is forbidden. Here, the basis used by Ulama who stated the legality of medicine from something that is forbidden is quite stronger than those who claim not legalized.

Rubella Action Vaccine Content Analysis From Experts' Perspective

Rubella is also known as German measles caused by a virus called Rubella. Measles and Rubella are infectious diseases of the airways caused by the Measles and Rubellavirus.[59] Indonesia's health profile in 2016 reported 6,890 cases of 2016, with 5 deaths.[60]

Through the Ministry of Health took measures to prevent such epedemi by disseminating mr vaccine from serum institute of India (SII). However, after a study on the content or composition contained in the MR vaccine from SII was found to contain pork gelatin. For this matter, it is important to know the stages of vaccine production in more detail.

Below is an explanation of the two usnur mentioned by mui in his fatwa so as to issue a fatwa against the MR vaccine.

1. Gelatin derived from pig skin

   Gelatin is a protein derivative compound obtained by extracting animal collagen and drying itAs for the source ofgelatin itself is collagen substance extracted from farm animals on the skin, bones, and connective tissue.

2. Enzyme tripsin from the pancreas of pigs

   Tripsin is an important enzyme for both research andpharmaceutical, medicinal and health industries, especially to be developed as a raw material for digestive enzymes. When viewed from the function of this trispine can be used to reduce allergy symptoms, it can also be used as a dietary supplement and show the effects of queue-tumor.[61]

[58]Al-Bayhaqī, Aḥmad bin al-Ḥusain bin ‘Alī, *al-Sunan al-Ṣaghīr li al-Bayhaqī* (Pakistan: Universitas Dirāsāt al-Islāmiyah, 1989), 4/84.

[59]IDAI, 2017. Imunisasi Campak - Rubella (MR). http://www.idai.or.id/artikel/klinik/imunisasi/imunisasi-campak-rubella-mr.

[60]Depkes RI (2017) Pedoman Pengelolaan Vaksin Jakarta: Dirjen Bina Farmasi dan Alat Kesehatan.

[61]Trismilah, dkk, Isolasi dan Karakterisasi Protease Serupa Tripsin (PST) dari Lactobacillus Plantarum FNCC 0270, *Jurnal Ilmu Kefarmasian Indonesia*, Vol. 12, No. 1, (April, 2014), 57.

The enzyme tripsin made from pig pancreas is needed for the process of making vaccines to grow seeds of several vaccines. Until now, no substitute for the tripsin making material has been found.[62]

Vaksin Rubella dalam Tinjauan Konsep *Istiḥālah*

Below is a detailed explanation of the law of gelatin made of something forbidden:

1. Gelatin Law Controversy

a) Legalized groups

The perspective of this group is all gelatin made from the carcasses of halal animals or pigs is halal law and can be used by Muslims. It is reviewed that the gelatin has occurred in its entirety in terms of its nature that is different from its original form. This argument arose from the final decision in 1419 conducted in Kuwait. The conclusions that can be drawn from the results of the muktamar are:

ان الجيلاتين المتكون من استحالة عظم الحيوان النجس وجلده واوتاره طاهر, واكله حلال.[63]

"indeed gelatin made of unclean animal bones, skin, or tail after the process *of Istiḥālah*, then the ruling is sacred and lawful to consume it."

From this explanation it is clear that the gelatin law made of something that is forbidden remains legalized and sacred law. However, provided that there must have been a process *of Istiḥālah.* In addition, according to this group, *Istiḥālah* that occurred in the process of making gelatin has changed in its entirety, thus the concept of *Istiḥālah* has occurred in this matter.

b) Illegal arguing groups

This group assumes that the scattered gelatin does not change completely, but only changes in part. Thus, it is not haraam to use gelatin made from carrion or animals that are forbidden in the Qur'an and hadith of the Prophet Muhammad, because the requirements *of Istiḥālah* which is considered true by this group must change as a whole. This illegal law arises from the results of the world fiqh majma' muktamar held in 1914 issued the following conclusions:[64]

[62]Majelis Ulama Indonesia, Fatwa MUI No 4 Tahun 2016. Tentang Imunisasi. Komisi Fatwa Majelis Ulama Indonesia. 2016.
[63]Http://www.islamset.com/arabica/abioethics
[64]Faṭmah Muhammad Rashād, *Aḥkām Isti'māl al-Mawād al-Kimiyawiyah fī al-Fiqh al-Islāmī,* Tesisi (Jami'ah Um al-Qurā, 2018), 174.

يجوز استعمال الجيلاتين المستخرج من المواد المباحة, ومن الحيوانات المذكاة تذكية شرعية, ولا يجوز استخدامه من محرم كجلد الخنزير وعظامه وغيره من الحيوانات والمواد المحرمة.

> "it is permissible to make use of gelatin produced from something that is added and animals that have been slaughtered with the slaughter of conditions. It is not permissible to take advantage of gelatin from anything that is forbidden such as pig skin, bones, from forbidden animals, and something that is clearly forbidden.

2. The basis of the halal rubella vaccine containing pigs according to ulama fiqih

Entering the discussion of rubella vaccine containing elements of pigs or human cells as described by mui in his fatwa and after a deeper study of the concept of *Istiḥālah,*and after presenting arguments from health experts, it can be concluded that rubella vaccine mixed with elements from pigs and humans in the view of legal researchers is absolutely legal for human consumption. Thus this after reviewing that the elements of pigs and other mixtures have changed from their annealing form to other forms. Apart from the change in the whole or not, because some of the Shāfi'iyah have considered halal and holy unclean objects or mutants when *istiḥālah* has occurred even though only a part has changed.[65]

Moreover, the explanation that has been collected from medical experts states that gelatin from pigs only serves to breed the seeds of the vaccine and after that is separated from the vaccine. Furthermore, for the process of achieving a vaccine that can be consumed by humans, it takes a long process, either from the purification process or re-washing.[66] With this process, it is clear that rubella vaccine is not a pig and although it has mixed with pigs, but this has happened *Istiḥālah*. If *Istiḥālah*has occurred, then it is not appropriate forthe Rubella vaccine to be punished as haraam, because *Istiḥālah* can purify something unclean and in the permissible something that was originally haraam.

If it has been determined as described above, then rubella vaccine can be consumed by anyone and under any circumstances. The emergency foundation is very inappropriate to legalize the Rubella vaccine. Researchers can argue that, because there is no basis for preventing something that has not happened so as to legalize something that is forbidden by emergency reasons. There is an emergency when it has actually struck, not a mirage.

Therefore, researchers strongly disagree with the MUI fatwa decision that explains that rubella vaccine from SII is illegal but mubah with emergency reasons and no other halal vaccines are found.[67] Impressed from mui fatwa in order to legalize rubella vaccine under the pretext of emergency. Though there

[65]Al-Juwainī, *Nihāyah al-Maṭlab*, 1/26.
[66]Endang, Peran Enzym Tripsin, dalam https://seruji.co.id/iptek/kesehatan/peran-enzym-tripsin-babi-dalam-proses-produksi-vaksin/
[67]Majelis Ulama Indonesia, Fatwa MUI No 4 Tahun 2016. Tentang Imunisasi. Komisi Fatwa Majelis Ulama Indonesia. 2016.

is no emergency at all on the condition of babies who get rubella vaccine. The position of the baby can be categorized as an emergency if the baby who gets the Rubella vaccine has a real rubella virus infection. If it has not been completely infected, then the law of mubah with emergency reasons cannot be justified. This is true if MUI still thinks that rubella vaccine is illegal.

Moreover, from the fatwa MUI seemed not to explain in detail the concept *of Istiḥālah*. Whereas with a more detailed explanation of the concept *of Istiḥālah* can give a more accurate decision in his fatwa. However, this was not mentioned by mui when formulating rubella vaccine problem. In fact, MUI focuses more on the emergency issue of the perspective of the fiqh rules and opinions of fiqh scholars. This is what makes mui fatwa results tend to prohibit rubella vaccine but mubah because there is no substitute for other vaccines other than those issued by SII. When there are other vaccines that do not contain anything that is forbidden, then it is haraam to use rubella vaccine from SII.

If MUI focuses more on the concept *of Istiḥālah,*then it can be certain that the decision of fatwa is not so, but it is more likely to be permissible, because *istiḥālah* has occurred with the method *of Al-Tafā'ul al-Kimiyawī*[68] as the researcher have explained in the previous discussion.

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Conclusion

From this study can be concluded three main points. (1) that the law prevents the disease from being forbidden has no solid basis regarding its legality even though it is illegal to use drugs, and if a person has been afflicted with a disease and there is no cure other than something clearly haraam, then the law and in this case fall into the category of emergency. (2) that the law of immunization with rubella vaccine containing pigs according to the scholars fiqih: there is a difference of opinion between the scholars fiqih regarding drugs containing elements of pigs or human organs. Some scholars have legalized it and some have forbidden it. However, according to the author, rubella vaccine is legal even if it contains pigs or human organs, not because of emergency elements, but rubella vaccine containing pigs or human organs has changed from the original form of something that is forbidden to something else either from dzatiyah or its nature. (3) that the halal foundation of rubella vaccine containing pigs according to the scholars fiqih: the concept *of Istiḥālah* using the method *of Al-Tafā'ul al-Kimiyawī* is the most powerful basis for stating that rubella vaccine is halal and sacred. Thus, it can be used by Muslims.

In this study only focused on legal issues using rubella vaccine using *istiḥālah*conceptapproach. This research can be a consideration to formulate the law of problems related to the halal industry. Exploring the concept *of Istiḥālah* became

[68] Alī Muhammad, al-Istiḥālah wa Atharuha fī Taṭhīr al-Najāsah, 2075-2056.
[69] Alī Muhammad, al-Istiḥālah wa Atharuha fī Taṭhīr al-Najāsah, 2075-2056.

very important in modern times, because it is thus not easy to say something that is haraam. The obstacle in this study is to focus only on the problem of argumentation of Islamic scholars and health experts without looking directly from the laboratory to prove the truth. Therefore, this study needs to be reviewed in terms of its authenticity in the laboratory.

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