Hukum Islam
Hukum Yang Hidup di Indonesia

Bunga Rampai
Tulisan Para Partisipan 5th ICILI 2020
(Online Mode)

Editor:
Heru Susetyo, S.H., M.Si., LL.M., M.Ag., Ph.D.
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KATA SAMBUTAN
LEMBAGA KAJIAN ISLAM DAN HUKUM ISLAM

Assalamualaikum warrahmatullahi wabarakatuh,

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

Wassalamu'alaikum warrahmatullahi wabarakatuh,

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

DAFTAR ISI

RESTRUCTURING OF SHARIA FINANCING PRESFECTIVE NATIONAL SHARIA COUNCIL-INDONESIA ULEMA COUNCIL (DSN-MUI) AT THE TIME OF THE COVID-19 PANDEMIC AND MERGER OF SHARIA BANKS

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Abstract

The issue of restructuring came to the fore during the Covid-19 pandemic. The National Sharia Council as an institution that has the authority to issue fatwas related to Islamic financial institutions certainly has a concern for this issue as well. Meanwhile, efforts to encourage the development of Islamic banking institutions are also being pursued. One of these efforts is the plan to merge three State Owned Enterprices Islamic Commercial Banks. This paper seeks to elaborate the fatwas of the National Sharia Council regarding problematic financing solutions, what theoretical and legal solutions the The National Sharia fatwas offer for financing institutions and their customers. This paper also elaborates the objectives of the merger of state owned enterprice Islamic Commercial banks and their agendas. The research method in this paper is normative juridical. Based on the results of the study, it was found that there have been several The National Sharia fatwas aimed at resolving financing problems faced by Islamic financial institutions and their customers. Efforts to merge state owned enterprice Islamic commercial banks have positive goals for the development of Islamic banking in Indonesia so that they can compete with conventional banks and banks of international class.

Keywords: Islamic banking, The National Sharia Council, Fatwa, Indonesian Bank, Merger, Conversion, Spin-off.

1. INTRODUCTION

There are two important issues in the current problem of Islamic financial institutions, especially in the face of the Covid-19 pandemic. The first issue is related to the problem of restructuring, where the impact of the existence of Covid-19, the community faces economic problems including community difficulties in resolving their transaction problems with financial institutions, including Islamic financial institutions and especially Islamic banking institutions. The second issue is related to the planned merger of three state-owned sharia banks, namely BRI Syariah, Bank Mandiri Syariah and Bank BNI Syariah. With the merger of the three Islamic Banks, it is hoped that the acceleration of the development of Islamic banking in Indonesia will occur.

The National Sharia Council -Indonesia Ulama Council has issued more than 130 fatwas related to sharia economics and of these fatwas have also been discussed related to how to resolve problematic financing issues. This paper will try to describe the provisions related to the settlement of sharia financing from the perspective of The National Sharia Council fatwa.

This paper will also describe the issue of the merger of Islamic Commercial Banks owned by BUMN. What is the basis for joining the Islamic comercial banks business and what is its goal. In addition, it will also discuss the conversion of conventional banks to Islamic banks.

As of June 2020, assets owned by Islamic financial institutions in Indonesia have reached 9.63% of Indonesia's total financial assets. Sharia Banking has assets of IDR 545.39 trillion, Sharia insurance companies IDR 40.84 trillion, Islamic Financing Institutions IDR 24.77 trillion, other Sharia Non-Bank Institutions IDR 41.61 trillion, Corporate Sukuk IDR 29.39 trillion, Mutual Funds Sharia 58.07 trillion, State Sukuk Rp. 868, 43 trillion. Interestingly, in the midst of the Covid pandemic, between January and June 2020 Islamic financial assets grew 20.45%. Islamic banking assets alone account for 6.18% of the total assets of all banks in Indonesia. Where the assets of Islamic banking amount to IDR 545.39 trillion while the total assets of banking in Indonesia amount to IDR 8,830.89 trillion. [1]

1.2. Research Method and Benefit

This study uses a qualitative method with a normative juridical approach. The collected primary, secondary and tertiary legal materials were analyzed in depth with the support of data from documents managing Islamic banking in Indonesia. This research will elaborate the provisions related to the settlement of shari'a financing from prespective of fatwa's National Shari'a Council. This paper also will describe the issue of the merger of Islamic comercial banks in Indonesia.

1.3. Paper Structure

This paper will focus on discussing the fatwa of the National Sharia Council relating to financing settlement issues. This study discusses the legal foundations issued by the DSN by referring to the source of Islamic Law. Several fatwas issued by the National Sharia Council are discussed in this paper. This paper also discusses the purpose of merging of commercial Islamic banks in Indonesia.

2. BACKGROUND

2.1.1. Establishment of a Sharia Bank

Historically, the process of establishing Islamic banks in Indonesia began in 1983 with the issuance of the December 1983 Package which contained several regulations in the banking sector and one of which contained regulations that allowed banks to provide interest-free payments. After the publication of the December 1983 Package, the Minister of Finance issued a number of policies in the banking sector as outlined in the October 1988 Package (Pakto 88). In Pakto 88, which contained banking deregulation, there were facilities for the establishment of new banks, so that the banking industry at that time experienced very rapid growth [2]. Commercial banks increased 50% between 1989 where the number was around 111 to 176 in 1991.

This regulation was the beginning to become the spearhead of Islamic banking in the national banking system which was responded to by Muslims at the time with the establishment of Bank Muamalat Indonesia in 1991 as the only commercial bank with an operating system based on the profit sharing principle [3]. The struggle of Muslims to establish banking based on Islamic principles is a long journey since before independence where Tjokroaminoto with his Islamic company introduced economic teachings based on Islamic values.

The legal basis for the bank based on the profit sharing principle refers to Law no. 7 of 1992 concerning banking and PP. 72 of 1992 concerning banks based on the principle of profit-loss sharing. To encourage the growth of Islamic banking due to pressure from the grass root community in Indonesia, the government has amended Government Regulation no. 7 (1992) as outlined in Law no. 10 of 1998 which reinforces the existence of Islamic banking in Indonesia operating in a dual banking system [4]

This policy has provided an opportunity for conventional commercial banks to provide sharia services through the Islamic window mechanism by first establishing a Sharia Business Unit (UUS). As a result, many conventional banks are taking part in providing sharia services to their customers, which is facilitated by the concept of office channeling as stipulated in Bank Indonesia Regulation (PBI) No. 8/3 / PBI / 2006. To provide sharia services via this office channeling, conventional commercial banks that already have a UUS at their head office, no longer need to open new branch offices / sub-branch offices, but simply open sharia counters in conventional branch offices / sub-branch offices [2]. With the issuance of Law No. 21 of 2008 concerning Islamic Banking, the position of Islamic banking in Indonesia has become stronger.

On the other hand, in order to ensure the compliance of sharia banking products, a number of fatwas have been issued by the National Sharia Council-Indonesian Ulema Council (DSN-MUI), including Fatwa No. 04 / DSN-MUI / IV / 2000 regarding Mudharabah financing, Fatwa No. 08 / DSN / MUI / IV / 2000 regarding Musharaka financing. The contents of the fatwa issued by the DSN-MUI have been used as material content in various PBIs.

For example, PBI No.7 / 46 / PBI / 2005 has regulated an agreement for the collection and distribution of funds for banks that carry out business activities based on sharia principles. This PBI has been revoked with PBI No. 9/19 / PBI / 2007 concerning the implementation of sharia principles in the activities of raising funds and services for Islamic banks, as amended by PBI No. 10/16 / PBI / 2008. Furthermore, based on Law no. 21 of 2011 concerning the Financial Services Authority (OJK) which transferred the authority of Bank Indonesia in the licensing process and supervision of sharia banking to the OJK's authority. As for drafting regulations from the Financial Services Authority (OJK), the content of which is derived from the Fatwa of the DSN-MUI, as the holder of national banking supervision, OJK has established a sharia banking committee which aims to synergize the DSN-MUI fatwa with POJK.

The Indonesian government has made a strong commitment to developing Islamic banking in the country. One of the government's commitments is to implement the main recommendations of the 2016 Indonesian Sharia Financial Architecture Master Plan (MAKSI) by establishing the National Sharia Finance Committee (KNKS). KNKS was established based on Presidential Regulation No. 91 of 2016, and chaired by the President. KNKS has the task of accelerating, expanding and advancing the development of Islamic banking in order to support national economic development. In addition, to complement the existing recommendations and strategies from MAKSI, KNKS also launched the 2019-2024 Indonesian Sharia Economics Master Plan (MEKSI). The Masterplan for Sharia Economics in Indonesia contains a roadmap and key strategies to achieve Indonesia's vision of becoming "an independent, prosperous and civilized Indonesia by becoming the world's leading sharia economic center". [5]

2.1.2. Financing Restructuring and Fatwa DSN

The issue of restructuring has surfaced regarding the impact of covid-19 on the health of banking transactions. Many parties face business difficulties which have an impact on financial health. The National Sharia Council as an institution that has the authority to issue fatwas related to sharia economic transactions and as an institution that is involved in developing the sharia economy has several fatwas related to how to solve restructuring problems or a model for solving customer financial problems.

The legal basis related to the problem of restructuring is contained in the Al-Qur'an surah Al-Baqarah verse 280:

"And if (the person who owes it) is in trouble, then give him a grace period until he gets a leeway. And if you give, it is better for you, if you know ".

According to Ibn Kathir in this verse Allah SWT commands the lender to be patient if the person who pays is in trouble paying the debt, where he does not get something that can be used to pay. This contrasts with what is done to the people of Jahiliah, where if the borrower is unable to repay the debt then the lender will tell him when the debt is due: "Paid or added to the interest". [6]

Furthermore, this verse also Allah SWT recommends just to erase it. Allah SWT provides goodness and abundant rewards for it.

In a hadith it is stated that Abu Qatadah once had a debt from someone, then he signed it to collect it, but that person hid from him. One day he came back, and a child came

out, then Abu Qatada asked the boy about the person's whereabouts, and the boy replied: "Yes, he is at home. "So Abu Qatadah even called him saying:" O Fulan, come out, I know that you are inside. "So that person came out to meet him. And Abu Qatadah asked: "What caused you to hide from me?" The man replied: "Verily I am really in trouble, and I do not have anything." "Allah, are you really in trouble?" asked Abu Qatadah. "Yes, he replied. So Abu Qatadah cried, then told me, I once heard

Rasulullah SAW, say: "Whoever gives concessions to debtors-or eliminates them-, then he will be in the shade of 'Arsy on the Day of Resurrection." (HR. Muslim).[6]

In another hadith narrated by Al-Hafizh Abu Ya'la al-Mushili, from Hudzaifah bin al-Yaman, he tells that Rasulullah Saw, once said: "Allah will bring one of His servants on the Day of Resurrection. He asked: 'What have you done in the world for Me? He replied: 'I do not do anything for You, my Rabb, even though it is only as big as an atom in the world, for which I hope in You. 'He said that three times. And in the last sentence the servant said: 'O my Rabb, verily You have given me excess wealth, and I am a person who trades with people. Among my traits is to make things easier. So I make it easy for people who are able and give tough to people who are in trouble. After that Allah SWT said: "I have more right to provide that convenience, go to heaven." [6]

The National Sharia Council has accommodated the problem of restructuring or solving problematic financing. These fatwas are:

1. DSN-MUI Fatwa No.46 / DSN-MUI / II / 2005 concerning Murabahah (Khashm fi al-murabahah) Bill;
2. DSN-MUI Fatwa No. 47 / DSN-MUI? II / 2005 concerning settlement of murabahah receivables for customers unable to pay;
3. DSN-MUI Fatwa No. 48 / DSN-MUI / II / 2005 concerning Rescheduling of Murabahah Bills;
4. DSN-MUI Fatwa No. 49 / DSN-MUI / II / 2005 concerning Murabahah Agreement Conversion;
5. DSN-MUI Fatwa No. 31 / DSN-MUI / VI / 2002 concerning Debt Transfer;
6. DSN-MUI Fatwa No. 89 / DSN-MUI / XIII 2013 concerning Sharia refinancing;
7. DSN-MUI Fatwa No. 90 / DSN-MUI / XII / 2013 concerning Transfers of Murabahah Financing between Islamic Financial Institutions (LKS);
8. Fatwa DSN-MUI No. 103 / DSN-MUI / 2016 concerning Subjective Novation based on sharia principles;
9. DSN-MUI Fatwa No. 104 / DSN-MUI No. 104 / DSN-MUI / X / 2016 concerning Subrogation based on Sharia Principles. [7] (DSN-MUI, 2020)

In the DSN-MUI Fatwa NO. 48 / DSN-MUI / II 2005 states that Sharia financial institutions may reschedule murabahah bills for customers who cannot complete / repay their financing according to the agreed amount and time, provided that: a. Do not add to the remaining bill amount; b. Charges of costs in the rescheduling process are real costs; c. The extension of the payment period must be based on the agreement of both parties.

Meanwhile in the DSN-MUI fatwa No. 49 / DSN-MUI / II / 2005 Regarding the Murabahah Agreement Conversion, it is stated that a Sharia Financial Institution may convert by making a new contract for customers who cannot complete / pay off their murabahah financing according to the agreed amount and time, but it is still prospective, provided that :

1. Murabahah contract is terminated by:
    - Murabahah objects are sold by customers to Sharia Financial Institutions (LKS) at market prices;
    - The customer pays off the remaining debt to the LKS from the sales proceeds;

- If the sales proceeds exceed the remaining excess debt, it can be used as an advance for the ijarah contract or part of the capital from mudarabah and musyarakah;
- If the proceeds from the sale are less than the remaining debt, the remaining debt will remain a debt of the customer in which the payment method is agreed between the LKS and the customer;

2. LKS and ex-murabahah Customers can make a new contract with the following contracts:
   - Ijarah Muntahiyah bit Tamlik on the above items by referring to the DSN-MUI fatwa No. 27 / DSN-MUI / III / 2002 concerning Al Ijarah Al-Muntahiyah Bi At Tamlik;
   - Mudharabah by referring to the DSN-MUI fatwa No. 07 / DSN-MUI No. 07 / DSN-MUI / IV / 2000 concerning Mudharabah (Qardh) Financing: or
   - Musyarakah by referring to the DSN-MUI fatwa No. 08 / DSN-MUI / IV / 2000 concerning Musharaka Financing.

From the DSN-MUI Fatwa perspective, there are several forms of financing restructuring. The first form is rescheduling, which is a change in the schedule for payment of customer obligations or the time period. The second form is the requirements of Return (Reconditioning). In the form of reconditioning, changes are made in part or all of the financing requirements without adding to the remaining principal obligations of the customer that must be paid by the LKS, which include: payment schedules, changes in the amount of installments, changes in time period, changes in the ratio of mudharabah financing or musyarakah financing and / or deductions

The third form is restructuring, namely by adding funds for bank financing facilities, converting financing contracts and / or converting financing into temporary equity participation in customer companies.

The forms of financing restructuring are reduction / postponement of obligations, leeway time, utilization of customer assets, participation, termination of the contract with ibra '(elimination of obligations or reduction of obligations), and state subsidies.

While some forms of restructuring that are not allowed in the perspective of the DSN-MUI fatwa are:

a. Extension of the time from the murabahah contract to the murabahah contract;
b. Extension of time after the expiration of the default Bank Guarantee (Col V) by issuing BG again plus Margin;
c. Murabahah contracts are restructured using a scheduling pattern with unreal administrative costs;
d. Restructuring with a pattern of transferring the contract from murabahah to musyarakah contract while the murabahah object is no longer there;
e. The mudharabah contract restructuring was converted into musyarakah but the mudharabah assets were gon.

2.1.3. Conventional Bank Conversion and Sharia Commercial Bank Merger

a. Conversion of Conventional Banks to Islamic Banks

The conversion from conventional banks to Islamic banks has received a lot of attention. This conversion process has increased in the Middle East region, where over the last decade several banks have been successfully converted to Islamic banks in Kuwait, Saudi Arabia and the UAE. In addition, banks in the region have also managed to offer Islamic banking branches to work side by side with conventional banks. This conversion

phenomenon has also been found in other Muslim countries around the world, some are successful, some are stagnant.[8]

According to Abdalla et al. [9] who conducted a study by testing the validity of the conversion model which was considered successful from conventional banks to Islamic banks in Libya, this study used four independent variables, namely the availability of quality human resources in Islamic banks, the availability of Islamic capital markets, the tendency of employees to switch to banks. sharia, and successful sharia banking experience. In this study it was found that the successful experience of converting Libyan banks into Islamic banks as the dependent variable, and found that the tested factors had a positive impact. [9]

Another study was conducted by Abo-Homera and Aswaysy [10] in a study of the Valitidas conversion between the Jumhouria Bank and Bank of Commerce and Development cases. The study states that around 76% agree to the conversion of conventional banks in Libya to Islamic banks and 79% of respondents agree that the Libyan environment is the right environment for the conversion process in terms of its basic constituents. The findings also show that 91% of respondents believe that religious factors are a major factor in the conversion process.

In the case study of Saudi Arabia, Mustafa's research [11] after conducting interviews with five bank regulators in Saudi. This study shows six categories of barriers, namely administrative, human resource, technical, product development and market development problems and valid controls. This study shows several positive impacts of conversion including the development of Islamic banking products, enriching knowledge of the Islamic banking sector among employees, customers and the public.

Another study by Karbhar et.al [12] also highlights conversions in British Islamic banks with collected data and reveals that the main challenges facing Islamic banks in UK are client heterogeneity (current and potential), regulatory issues, power competitiveness, and the lack of qualified and experienced human resources. Meanwhile in Indonesia, the government through OJK regulates the Financial Services Authority Regulation Number 64 /POJK.03/2016 concerning Changes in Business Activities of Conventional Banks to Sharia Banks regulates that Conventional Banks can change their business activities to become Sharia Banks. However, Sharia Banks are prohibited from changing their business activities to become Conventional Banks. Changes in the business activities of a conventional bank to become a sharia bank can only be done with the permission of the Financial Services Authority. The granting of this license is carried out in the form of a license to change business activities (Article 4 of OJk Regulation No. 64 of 2016). Then in article 5 of the OJK Regulation, there are provisions regarding the obligation to include bank conversion plans in its business plans. Furthermore, a conventional bank that will change its business activities to become a sharia bank must adjust its articles of association, meet capital requirements, adjust the requirements of the Board of Directors and the Board of Commissioners, form a Sharia Supervisory Board (DPS), and present the initial financial report as a sharia bank. Conventional Commercial Banks that will change their business activities to become Sharia Commercial Banks must establish DPS. Prospective DPS members must meet DPS requirements as stipulated in the provisions concerning Islamic Commercial Banks.

b. Spin-Off of Sharia Business Units to Become Sharia Commercial Banks

The change in the banking operation system from conventional banks to Islamic banks is known as conversion. The main reference which is the foundation stone of the strong desire to convert is the affirmation by Bank Indonesia (BI) and the Financial Services Authority (OJK) that encourages the existing Sharia Business Units that are still under their conventional parent to separate themselves. and stand alone as a sharia commercial bank.

According to the rules issued by Bank Indonesia, namely Bank Indonesia Regulation (PBI) No. 11/10 / PBI / 2009 states that the Sharia Business Unit of a bank must be separated or spin off from its parent if:

1. The asset value of the Sharia Business Unit has reached 50% of the total asset value of the parent Conventional Commercial Bank.
2. No later than 15 years since the enactment of Law Number 21 of 2008 concerning Islamic Banking (year 2023).

PBI No.11 / 10 / PBI / 2009 concerning Sharia Business Units (UUS) has actually been amended by PBI No.15 / 14 / PBI / 2013 concerning Amendments to Bank Indonesia Regulation No.11 / 10 / PBI / 2009 concerning Business Units Sharia, however, the editorial of a number of articles is still maintained as before. As according to Article 41 there are two ways to separate UUS from BUK, namely:

1. Establishing a new Islamic Commercial Bank (BUS), or
2. Transfer the rights and obligations of UUS to an existing BUS.

Separation of UUS by Establishing a BUS can only be done with a license from the Financial Services Authority, where the paid-up capital is at least five hundred billion rupiah (Rp. 500,000,000.00). If the paid-up capital is insufficient, additions can be made in cash and / or land and buildings used for BUS operations resulting from the separation. The paid-up capital of BUS resulting from separation must be increased to be at least one trillion rupiah (Rp. 1,000,000,000,000.00) no later than 10 (ten) years after the BUS business license is granted.

The issuance of a license for establishment of BUS resulting from separation is carried out in 2 (two) stages, namely approval in principle to undertake preparations for establishment of BUS resulting from separation and business license issued after BUS resulting from separation is ready to carry out operational activities.

It is important to note, if the principle license has been granted to BUK, but within 6 months after the principle license is granted BUK has not applied for a BUS business license resulting from the separation, then the principle approval that has been given becomes invalid.Therefore, BUK must prepare all the requirements as needed as possible.

Based on the Sharia Banking statistics issued by the OJK until the end of 2018 there were 14 BUS and 20 UUS. This number increased significantly with the efforts of several UUSs to spin-off into BUS. Based on the Sharia Banking Law, in the next three years, these 20 UUSs must spin-off to become BUS so that the number of Islamic Banks will increase and develop in Indonesia.

2.1.4. Mega Merger of BUMN Sharia Commercial Banks

In order to increase the efficiency of the national banking industry and the development of Islamic banking by optimizing the resources of Islamic public bodies. The Ministry of State-Owned Enterprises (BUMN) plans to complete the mega merger of Islamic banks into one bank entity from three state-owned bank subsidiaries in February 2021. The three Islamic banks that will be merged are PT Bank Syariah Mandiri, BRISyariah, PT Bank BNI Syariah. This syariah banking merger is intended to increase the competitiveness of BUS in providing services to customers so that it is equal to commercial bank services.

Previously, this plan had been announced long ago by the National Sharia Finance Committee (KNKS). According to the KNKS, seeing the development of Islamic banking if it is carried out with zero intervention or business as usual, the projected growth in the next 5 years, the total assets of Islamic banking will only be around Rp. 1,000 trillion, with a modest increase in market share of the overall banking industry. However, if there is full intervention from the government (full intervention) there is a possibility that the total assets of Islamic banking can increase more moderately (27%) or aggressively (36%), so that the

total assets of Islamic banking can reach IDR 2,000 trillion or IDR 3,000. trillions. Therefore, it is necessary to carry out the intervention of Islamic banks by the government on a large scale that can increase the effectiveness of Islamic banking, one of which is through the merger of Islamic state-owned banks. [13]

This mega merger effort aims to intervene in policies in order to increase the assets of the Islamic banking industry inorganically and create exponential growth for the industry.

However, there are a number of notes that the government needs to pay attention to, in this case the Ministry of BUMN regarding the mega merger effort. First, there is a concern that Islamic banks are only targeting large corporate financing, while financing for small bussinesses is not important, even though the main principle of being established by this Islamic bank is its siding with small businesses. Second, the mega merger of government-owned Islamic banks should involve a pioneer of Islamic banks, namely Bank Muamalat Indonesia in order to save from financial pressure. Bank Mumalat Indonesia is currently experiencing a high ratio of non-performing financing (NPF), on the other hand, its capital is running low. Based on monthly financial reports reported to the OJK, Bank Muamalat has total assets of IDR 48.56 trillion as of August 2020. With the addition of the first Islamic Bank in Indonesia, the merger of Islamic BUMN banks will have total assets of IDR 293 trillion.

3. CONCLUSION

Based on the results of a study related to the DSN-MUI fatwas regarding the restructuring of sharia financing, it can be concluded that the National Sharia Council has issued several fatwas related to this matter, of course the main basis is the Al-Quran as stated in the Surah Al-Baqarah verse 280, which essentially seeks a suspension for those who have difficulty in making payments, and if it is necessary to do ibra 'or liberation for sufficient reasons then that is even better, and also the hadiths of the Prophet regarding convenience for those who face difficulties in paying debts. These fatwas are Fatwa No. 31 of 2002, Fatwa No. 47 of 2005, Fatwa No. 48 of 2005, Fatwa No. 49 of 2005, Fatwa No. 89 of 2013, Fatwa No. 90 of 2013, Fatwa No. 103 of 2016, and Fatwa No. 104 of 2016.

The merger of three BUMN Sharia Commercial Banks aims to increase Islamic banking assets and also so that Islamic banks can compete with conventional banks and also to compete at the global level. There are only a few things that need to be considered related to the orientation of the Islamic bank itself, where the Islamic bank must be oriented towards financing the middle to lower class business community compared to large corporations considering the vision of the Islamic bank itself in improving the public economy. Another thing is the need to involve the first Islamic bank in Indonesia, namely Bank Muamalat Indonesia in the merger process so that the stronger Islamic banks in Indonesia, which at the same time resolve the problems faced by Bank Muamalat Indonesia. *Allah 'alam bisshawab.*

4. ADVICE

There are many DSN fatwas related to problematic financing solutions. Of course, these fatwas should be used as guidelines by Islamic financial institutions in solving the problems they face. Easing the burden faced by customers is something that is glorified in Islam, but also the lack of discipline of Islamic financial institutions in resolving problematic financing which causes customers to neglect to carry out their obligations will have a negative impact on the development of the Islamic economy itself. Thus, a joint commitment between Islamic financial institutions and customers is needed in resolving problematic financing so that it can realize the blessings of the Islamic economy itself.

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LOCAL GOVERNMENT AUTHORITY IN THE FIELD OF RELIGION; A STUDY OF REGIONAL REGULATION ON ZAKAT IN RIAU PROVINCE

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Abstract
Zakat as one of the five pillars of Islam is the obligation of every Muslim who can afford it and is reserved for those who have the right to receive it. With proper management, zakat is a potential resource that can be utilized for the progress and prosperity of society. In 2018, The Government of Riau Province established a regional regulation (Perda) on zakat but did not obtain a Register Number from the Minister of Home Affairs so that the regional regulations could not be enacted in regional papers. Formulation of the problem in this study: How is the authority of the Local Government in making regional regulations on zakat in Riau Province?. Based on the discussion, it was found that the authority of the Local Government in the field of religion related to zakat, is only limited to being able to propose the formation of the National Zakat Agency (BAZNAS) to the Minister while the arrangement of zakat through Perda violates statutory regulations considering that the mandate of forming a regional regulation is only related to the implementation of regional autonomy in the context of concurrent affairs. On the other hand, the management of zakat which is regulated by Perda as in Bengkalis Regency managed to make the receipt of zakat has increased compared to before the existence of Perda. The government is inconsistent in conducting executive previews of Perda on zakat because the Province of West Nusa Tenggara has a Zakat Perda in No. 9 of 2015 as well as Bengkalis Regency has a Perda on zakat, No.3 of 2018 and got a Register Number from the Governor as the Representative of the Central Government.
Keywords; Authority; Local Government ; Perda ; Zakat

1. INTRODUCTION

Indonesia is a Unitary State in the form of a Republic in its explanation which explains that it protects the entire Indonesian nation and all Indonesian bloodshed on the basis of unity by realizing social justice for all Indonesians[10]. As a constitutional state, Indonesia has a constitution known as the Constitution of 1945 the Republic of Indonesia (UUD 1945) [11]. The basics of the government of an Indonesian state lie in the Constitution of 1945. As in Article 18 paragraph (1), the Law of 1945, it is stipulated that "The Unitary State of the Republic of Indonesia is divided into provincial areas and the provincial areas are divided into regencies and cities that each province, district and city has a local government governed by law" [23]. Indonesia adheres to a regional autonomy system that has a wide range of government implementation and the presence of the Local Government is in desperate need of legislation that applies specifically to a region. As stipulated in the Constitution of 1945 Article 18 paragraph (6), it is mentioned that "The local government has the right to establish local regulations and other regulations to carry out autonomy and auxiliary duties" [23].

Legislation that is and applies specifically to a region is very important because Indonesia has heterogeneity both social, economic, cultural, and diversity levels of public education so that decentralization of the power/authority of the central government needs to have flowed to the autonomous regions [9]. The policy of regional autonomy and authority decentralization does not only concern the transfer of authority from top to bottom but essentially needs to be realized on the basis of initiatives from below to encourage its growth. Based on Law No. 23 of 2014 concerning Local Government, the classification of government affairs consists of 3 functions: absolute government affairs, concurrent government affairs, and general government affairs. Absolute governmental affairs are government affairs which are fully under the authority of the Central Government. Concurrent governmental affairs are governmental affairs that are divided between the central government, provincial regions and regency/city regions. If referring to Law no. 23

of 2014 Article 10 paragraph (1), “Absolute governmental affairs as referred to in Article 9 paragraph (2) include: a. foreign policy; b. defense; c. security; d. judicial; e. national monetary and fiscal; and f. religion ”[25].

In Article 10 paragraph (1) Law no. 23 of 2014, it has been clearly stated that absolute government affairs at point f are one of them religion. In carrying out governmental affairs, the government conducts its own or can delegate part of government affairs to government apparatus or local government representatives or can assign to local government and/or village government. However, the governor as the representative of the Central Government in carrying out religious affairs which is the authority of the Central Government can exercise this authority by handing over authority from the Central Government, so that there is a form of delegation of authority from the Central Government to the governor in accordance with the principle of deconcentration.

Then, the explanation of Article 10 paragraph (1) point f of the Law on No. 23 of 2014 describes that what is meant by absolute government affairs in the form of "religious affairs" e.g. establishing a nationally valid religious holiday, acknowledging the existence of a religion, establishing policies in the organizer of religious life, and so on. The regions can provide grants for the implementation of religious activities as an effort to increase regional participation in developing religious life, such as organizing *Musabaqah Tilawatil Qur'an* (MTQ), developing the field of religious education, etc. [25].

Through the principles of decentralization and deconcentration which are very important parts of a democratic state system and it is the duty of the Regional Regulations (Perda) that fill and regulate the heterogeneity conditions [13]. The authority to form regional regulations is a form of regional independence in regulating regional household businesses or regional government affairs [22]. Perda is essentially a strategic instrument as a means towards decentralization [20]. Perda has a strategic position in national and state life, so it is very instrumental in carrying out government affairs.

Perda is an instrument in the implementation of regional autonomy to determine the direction and policies of regional development and its supporting facilities [2]. However, in the development of the practice of regional autonomy, issue after issue arises with regard to the determination and implementation of this Local Government, until then the Government (Central) is overwhelmed to carry out supervision until its cancellation. Perda is a unique regional product, as it results from a process dominated by local political interests [20]. In Law No. 12 of 2011 on the Establishment of Legislation in Article 7 paragraph (1) the hierarchy of legislation is as follows:1). Constitution of the NRI 1945. 2).TAP MPR. 3). LAW/ PERPU. 4). Government Regulations. 5). Presidential Regulations. 6). Provincial Regulations. 7). District/City Regulation [24].

A Perda serves as a further elaboration of higher laws and regulations and should not conflict with public interests, other regional regulations, and higher laws and regulations. Governing local regulations are enacted by placing them in regional papers and thus have binding legal powers [1]. The phenomenon that occurs in the field of religion is that the government has taken over all of these affairs and its implementation can only be delegated to vertical agencies and the governor as representatives of the Central Government, of course in matters relating to religion this must be reviewed deeply regarding the role of local government in carrying out the authority in the field of religion because seeing the explanation of article 10 point f, it is said that regions can provide grants for the implementation of religious activities, thus the exercise of this religious authority is not unlawful as commanded by law. [2].

The second problem is the establishment of the regional regulation on zakat which is problematic by the Local Government. Zakat management in Indonesia has undergone dynamic development over a very long period of time. Practiced since the beginning of

Islam's entry into Indonesia, Zakat has developed as an important and significant socio-religious institution in strengthening Muslim civil society. In a long period of time, there has also been a tug of war of interest in the management of Zakat in the public domain [7]. In recent developments, the tug-of-war between the state and civil society has the potential to hinder the performance of the national zakat world and at the same time weaken the independent civil society movement [27]. The emergence of national and local regulations on zakat management raises questions about the relevance and significance of the local regulation if the law regulates similar matters.

Based on Law no. 23 of 2011 concerning management of zakat, that the organizations that have the right to manage zakat are divided into two parts; organizations that grow on the initiative of the community and are called the Amil Zakat Institution (LAZ) and the organization formed by the Government and called the Amil Zakat Agency (BAZ). (26)]. In this case the author assesses that zakat is included in one of the absolute governmental affairs in the field of religion which is the absolute authority of the Central Government. In 2018, the Governor of Riau as the Head of Region submitted a Draft Regional Regulation (Ranperda) on zakat to the Minister of Home Affairs for a Register Number. However, Ranperda of Riau Province did not get a Register Number from the Minister of Home Affairs so that it is in accordance with the provisions of the Minister of Home Affairs Regulation No. 80 of 2015 concerning the Establishment of Regional Legal Products regulated in Article 103 that "Draft Regional Regulations that have not received a Register Number as referred to in Article 102 paragraph (1) have not been able to be assigned a Regional Head and cannot be promulgated in regional papers" [16].

However, several regencies/cities in Riau Province already have local regulations on zakat. As shown in the Table below:

Table I.1.
The Regencies/Cities in Riau Province that Have Local Regulations Regarding Management of Zakat

No	Regency / City	Number Legislation and Regulation Title
1	Kampar	Regional Regulation Number 2 of 2006 concerning Management of Zakat, Infaq and Shadaqah
2	Dumai	Regional Regulation Number 4 of 2008 concerning Management of Zakat
3	Rokan Hulu	Regional Regulation Number 7 of 2012 concerning Management of Zakat
4	Siak	Regional Regulation Number 6 of 2013 concerning Management of Zakat
5	Kepulauan Meranti	Regional Regulation Number 5 of 2015 concerning Zakat
6	Bengkalis	Regional Regulation Number 3 of 2018 concerning Management of Zakat, Infaq and Shadaqah

Source of data: The Law Firm of Regional Secretariat of Riau Province

On data from the Table 1.1 above, the Local Government in Riau has formed as many as 6 perda and the most recent formed in 2018 is the regional regulation on zakat in Bengkalis Regency. Of course, this can be used as a comparison with Ranperda Riau Province which equally regulates zakat and in the same year, but Ranperda Riau Province does not get register number from the Minister of Home Affairs while Ranperda Bengkalis about Zakat gets register number from the Governor as Representative of the Central Government so that Ranperda Bengkalis can be legalized in the regional sheet as Perda. In addition, in the scope of the province there is also a Perda that regulates zakat which is found

in West Nusa Tenggara Province, Perda No. 9 of 2015 on the Implementation and Management of Zakat, Infak and Shadaqah. Based on the above phenomenon, the author will review the authority of the Local Government in establishing a regional regulation on zakat in Riau Province according to Law No. 23 of 2014.

2. RESEARCH METHOD

In this study, the researcher used normative law research method by library study. The data used is secondary data those are Indonesian Law No. 23 of 2014, Law No. 23 of 2011, Regional Regulation of West Nusa Tenggara No. 9 of 2015, Regional Regulation of Bengkalis No. 3 of 2018, Draft Regional Regulation of Riau 2018 on Zakat Management, and from the results of research, journals, books and legislation.

Data is qualitatively analized. The analysis phase begins with data collection, then presented by selecting, classifying systematically, logically and juridically to know the description specifically related to the problem in research, after which the writer do interpretation or interpretation. Then the authors compare with theories and concepts of secondary data consisting of books of scientific books, journals, and related legislation and legal opinion of the expert of constitutional law.

3. DISCUSSION

The law in a broad sense covers the entire normative rule that governs and becomes a code of conduct in public and state life supported by a certain system of sanctions against any deviation against it. Such normative forms of rule grow themselves in the association of public and state life or are deliberately made according to the procedures specified in the organizational system of power in the society concerned. The more advanced and complex a society's life becomes, the more it develops on the demands of regularity in patterns of behavior in people's lives. The need for this rule then gave birth to an organizational system that developed into a kind of organizational imperative [3].

The establishment of legislation should take into account the rules of its formation, as follows: a). The philosophical basis in the establishment of legislation is that the legislation can be said to have a philosophical basis if the formula or norms get justification after philosophical review; b). The sociological basis in the establishment of legislation is that a rule of law can be said to have a sociological basis when in accordance with public beliefs, public legal awareness, values and laws living in society; c). The juridical basis in the establishment of legislation is that the legislation can be said to have a judicial basis if there is a legal basis, legality or basis contained in the provisions of the law higher in degrees. d). Political Foundation is a political policy line that becomes the next basis for the policy and direction of the implementation of the State government [3].

The laws and regulations in Indonesia are hierarchical as stipulated in Article 7 paragraph (1) Law No. 12 of 2011, i.e. : 1). Constitution 1945 2). TAP MPR 3). Law/Perpu 4). Government Regulation 5). Presidential Regulation 6). Provincial Regulation 7). District/City Regulations [24]. This type and hierarchy determines the legal power of the legislation, the higher the rule, the stronger the legal force, and vice versa. The meaning is that the legislation below should not be contrary to the above laws and regulations.

From the Hierarchy presented above, the Author judges more precisely Indonesia adheres to the theory of the statutory hierarchy put forward by Hans Nawiasky as he divides the statutory hierarchy into four groups namely *Staatsfundamentalnorm* (Pancasila), *Staatsgrundgesetz* (Constitution 1945 and TAP MPR), *Formell Gesetz* (Law and Regulation), *Verordnung* (Government Regulation and Presidential Regulation) and *Autonome Satzung* (Regional Regulations) [12].

The authority to establish local regulations stems from the attribution of authority i.e. granting by the Constitution of 194, Article 18 paragraph (6) states that the Local Government has the right to establish local regulations and other regulations to carry out regional autonomy and auxiliary duties" [23]. Regional autonomy is implemented with the concept of decentralization. Decentralization actually has an impact on the growth of democracy and citizen participation in all development activities that in turn can promote equality between factions, expand social justice and improve the quality of people's lives. The concept of representative and participatory democracy, for example, is easier to implement at the local government level, due to the scale of the region and its proximity to local communities.

Public participation in the implementation of local government is one manifestation of the implementation of democratic principles and state law which one of the characteristics is recognition of human rights, in relation to the establishment of legislation, specifically the establishment of local regulations, a regional regulation is considered accountable and transparent when involving the community as stakeholders proportionately, let alone in the preparation of local regulations concerning the life of the people. This is in accordance with one of the elements mentioned by Arend Lijphart which is that in the formulation of a policy the government must accommodate the wishes of the people. This shows that the public has the right to submit its aspirations to every decision. So that the material content in the local regulations in accordance with the aspirations of the people [3].

If we refer to the content material of the regulation stipulated in Article 14 of Law No. 12 of 2011, it is mentioned that "The material of the content of provincial regulations and district/city regulations contains content materials in order to maintain regional autonomy and auxiliary duties and accommodate special conditions of the region and/or further elaboration of the laws and regulations". The material content of regional regulations is also stipulated in Article 236 paragraph (3) of Law No. 23 of 2014 that "Perda contains the content of material:

a. Implementation of regional autonomy and auxiliary duties;
b. Further description of the provisions of the higher Legislation [25].

The same provision is also found in Article 4 of the Minister of Home Affairs Regulation Number 80 of 2015 concerning the Formation of Regional Legal Products which states that "Perda contains the following contents:

a. Implementation of regional autonomy and auxiliary duties;
b. Further elaboration of the provisions of the higher legislation [16].

The content material in the framework of the implementation of regional autonomy and the auxiliary duties means that the establishment of the government must be based on the division of affairs between the Government, provincial government and regency/city government as stipulated in Law No. 23 of 2014 and other sectoral legislation. The material of the local charge in order to accommodate the special conditions of the region, contains the meaning that the regulation as a regulation that abstracts the values of the community in the area containing the material of the content of values identified as special conditions of the region. Further elaboration of the provisions of higher legislation means that the juridical establishment of the regulation is sourced to higher legislation. In other words, the establishment of a government must be based on the delegation of higher legislation.

The provisions of Article 9 paragraph (4) of Law No. 23 of 2014 are mentioned that "The Affairs of the Concion Government submitted to the region form the basis of the implementation of regional autonomy" [25]. This means that the affairs of the concion government are carried out by the local government as a form of the implementation of autonomy in the region. Where the area reserves the right to regulate its own area. This provision is then linked to the content material of the Regulation itself both stipulated in

Article 14 of Law No. 12 of 2011, Article 236 paragraph (3) of Law No. 23 of 2014 and Article 4 of the Regulation of the Minister of Home Affairs No. 80 of 2015 on the Establishment of Regional Legal Products.

Thus, the attribution authority of local government which is the business of conctrition government is mandatory and the choice is exercised by the local government in the form of a local government [14]. Based on the above exposure it is very clear that the authority of the local government in establishing regional regulations only for concren affairs is both choice and mandatory while absolute affairs and the general government of the local government is not authorized to form the regional regulations.

One of the most frequently discussed issues in Riau Province is related to zakat, this is none other than because the majority of the population is Muslim and the potential of zakat is great. Zakat as the pillar of Islam is the obligation of every Muslim who can afford it and is reserved for those who are entitled to receive it [4]. With proper management, zakat is a potential resource utilized for the advancement and general welfare of the whole community. Sociologically zakat is a reflection of the sense of humanity, justice, faith, and deep dignity that must arise in the attitude of the rich[6], so the question is whether the local government has the authority to make local regulations on zakat. Because Riau Province and the regencies/cities in Riau want that zakat can be regulated by a regional regulation (Perda), even though there are already laws governing it and the body that manages it.

The Perda of zakat is not in the framework of the implementation of regional autonomy and auxiliary duties, nor in the category of accommodating special conditions of the region let alone local cargo materials. Associated with higher legislation and zakat policy regulations, there is not 1 (one) article that delegates zakat regulatory authority to the Local Government. Thus, the Local Government is not authorized to establish the Perda of zakat as a shelter for specificity and diversity and distribution of people's aspirations in the region, but still in the corridors of the Unitary State of the Republic of Indonesia based on Pancasila and the Constitution of 1945.

Riau Province is one of the provinces that has drafted a Draft Local Regulation on zakat, but was not given a Register Number by the Minister of Home Affairs. So to address the vacancy of regional legal products related to zakat for members of the State Civil Apparatus (ASN) of Riau Province, the Governor of Riau issued the Governor's Instruction. Based on an interview with the Head of the Law and Human Rights Bureau, Ms. Elly Wardhani, regarding the Governor's Instruction she stated that the authority of government under Law No. 30 of 2014 on Government Administration, is the power of government agencies and/or government officials or other state organizers to act in the realm of public law. Any decision and/or action shall be determined and/or made by an authorized body and/or government official. According to her, the authority in regulating zakat in every Local Government becomes a right and in addition, the instruction of Riau Governor Mr. Syamsuar is to carry out Riau Provincial Government No. 2 of 2009, on management of zakat, which has been judged to be less than maximum.

As it is known that the formation of Perda through a very long process before being enacted in a regional paper. Unlike the drafting of the Law, the Bill if it has been approved by the House of Representatives and the President then if the President does not sign within 30 days then it is valid to become a Law and must be passed into the statute book. After obtaining joint approval of the Regional House of Representatives and Regional Heads, the Regional Regulation Draft can not be immediately validated into regional regulations and promulgated in regional papers but must pass through *an executive preview* mechanism by the Central Government through the Minister of Home Affairs, after being declared eligible, a Register Number will be obtained then it can be promulgated in regional papers.

After Law No. 38 of 1999 was replaced with Law No. 23 of 2011 on management of zakat, the determination of Perda zakat by the Local Government is still a trend, there is even a regulation of the regional head (Perkada) that also regulates the management of zakat, infak, shadaqah, waqf and other donations recognized and some are not recognized in the sense of not passing *executive preview*.

The draft local regulation on zakat that has been established by Riau Provincial Government does not get the Register Number so that in accordance with the Regulation of the Minister of Home Affairs No. 80 of 2015 on the Establishment of Regional Legal Products Article 103 paragraph (1) :"The draft regulation that has not obtained the Register Number as referred to in Article 102 paragraph (1) cannot be determined by the Regional Head and cannot yet be enacted in the regional sheet" [16].

As for the reasons given by the Minister of Home Affairs related to the release of Register Number for Regional Regulation of Zakat of Riau Province, it is very clear according to the regulation stipulated in the Local Government Law and Regulation of the Minister of Home Affairs that has been explained above the content material of the regional regulation shall contain the affairs of the government that becomes the local authority that is the concurrren affairs while zakat enters into the category of religious fields that are the absolute authority that is the absolute authority of the Central Government. Then the regulation of zakat in Law No. 23 of 2011 on zakat management along with various implementing regulations and policy regulations concerning Zakat is an attempt by the Central Government to unification of zakat management law without any delegation of authority for local government to regulate Zakat in local regulations, especially in the regional head regulations.

The author considers that the Central Government inconsistent in conducting *executive preview* in order to carry out the mandate of the Minister of Home Affairs Regulation No. 80 of 2015, it can be seen *First*, that the Central Government in this case the Minister of Home Affairs does not issue the Register Number of Riau Province regional regulations on the grounds that it is not the authority of the local government to regulate absolute authority in the local regulations but in West Nusa Tenggara (NTB) Province has local regulations on Zakat , No.9 Year 2015 [17]. As a comparison between the two, it is presented in the following table:

Table I.2.
Comparison of The Regional Regulations of NTB Province and The Draft Regional Regulation (Ranperda) of Riau Province

No	Specifications	Regional Regulation of West Nusa Tenggara Province No. 9/2015 on Zakat, Infaq and Shadaqah	Draft Regional Regulation of Riau Province 2018 on Zakat Management
1.	Forms	Regulation: Applying out in the sense of the local community of NTB Province is binding	Regulation: Applying out in the sense that the people of Riau Province are binding
2.	Agencies	Provincial Parliament and Regional Head	Provincial Parliament and Regional Head
3.	Executive Previews	Minister of Home Affairs	Minister of Home Affairs
4.	Number of Articles	21 Articles	64 Articles

5.	Contents	Regulates the principles and objectives, BAZNAS and LAZ of Province, the Collection of Zakat, Mustahik, Muzaki, Utilization, Supervision, and Financing	Regulating the principles and objectives, objects and subjects of zakat, recipients of zakat, assets zakat, BAZNAS and LAZ of Province, distribution of zakat, utilization, community participation, reporting, and administrative sanctions
6.	Status	Get a Register Number	Did not get a Register Number

Data Source : Processed from Perda Zakat of NTB and Academic Manuscript of Ranperda Zakat Riau

From the above comparison, it can be concluded that NTB regional regulation and the draft of Riau regional regulation design has a lot in common both from the content and executive preview that distinguishes only located in the year of formation then status and Article turns out the NTB Regulation is very concise while the draft of Riau regional regulation regulates more detail. So from the above differences it is not appropriate if still issued register number for perda NTB because zakat is in the scope of the field of religion in accordance with Law No. 23 of 2014 which is the religion included in absolute affairs, this means that it can only be bestowed by the President as head of government to vertical agencies or to the governor as a representative of the central government not to the local government. Considering the establishment of local regulations is the authority of the the Regional House of Representatives with the mutual approval of the Regional Head. As such, it is very clear that the Central Government is inconsistent in conducting *executive previews*; *Second*, in the same year that is 2018 the central government through the Governor issued a Register Number for the Government of Bengkalis Regency on Zakat which is No.3 year 2018. While the draft regional regulation of Riau Province on Zakat does not get register number. For more details on the comparison of bengkalis district regulations with the Draft regional regulations of Riau Province are presented in the following table:

Table I.3.
Comparison of The Regional Regulations of Bengkalis Regency and The Draft regional regulation of Riau Province

No	Specification	The Regional Regulation of Bengkalis Regency No. 3 of 2018 on Zakat, Infaq and Shadaqah	The Draft Regional Regulation of Riau 2018 on Zakat Management
1.	Forms	Regulation: Applying out in the sense that the people of Bengkalis Regency are binding	Regulation: Applying out in the sense that the people of Riau Province are binding
2.	Agencies	District Parliament and Regional Head	Provincial Parliament and Regional Head
3.	Executive Previews	Governor as Representative of the Central Government	Minister of Home Affairs
4.	Articles	39 Articles	64 Articles

5.	Contents	Regulating the principles and objectives, subjects, types and objects of zakat, BAZNAS and LAZ of district, zakat collection units, guidance and supervision, zakat collection, mustahik, muzaki, zakat on trade and profession, distribution, utilization and reporting, financing, community participation , Administrative Sanctions and Criminal Provisions	Regulating the principles and objectives, objects and subjects of zakat, recipients of zakat, assets zakat, BAZNAS and LAZ of Province, distribution of zakat, utilization, community participation, reporting, and administrative sanctions
6.	Status	Get a Register Number	Did not get a Register Number

Data Source:Processed from Perda Zakat of Bengkalis Regency and Ranperda Zakat of Riau Province

From the comparison, there is a difference in terms of the number of articles, the regional regulation of zakat in Bengkalis Regency is more concise consisting of 39 articles which then this regional regulation is further regulated by The Regent's Regulation No. 2 of 2020 concerning The Instructions for Implementation of Regional Regulation of Bengkalis Regency No. 3 of 2018 concerning The Management of Zakat, Infak and Shadaqah. In terms of content, it is interesting that the regional regulations of zakat in Bengkalis Regency regulate about trade and profession zakat whereas the local regulations are binding to the public not just a certain group of people. Then, in terms of *executive preview* at first glance it does look different between the Governor as a representative of the central government and the Minister of Home Affairs but both remain one, under the auspices of the central government. Thus, there is a Perda of zakat given a Register Number and Ranperda of zakat which is not given a Register Number even though it is done by a different institution. Ideally it should be the same and in line with the disparity, this creates confusion for the local government over the central government's inconsistency in implementing the mandate of local government legislation.

On the other hand, it is undeniable that the urgency of zakat management is regulated by local regulations is as an effort made so that zakat collection runs maximum because of its great potential. For example, in Bengkalis Regency, since the local regulation on zakat, the Local Government of Bengkalis regency received more zakat income than the previous year. The improvement can be seen in the following table:

Table I.4.
The Acceptance of Zakat at Amil Zakat Agency in Bengkalis Regency

No	Years	Total
1	2016	Rp. 265.000.000
2	2017	Rp. 811.727.027
3	2018	Rp. 1.593.129.791
4	2019	Rp. 2.138.549.372

Data source: National Zakat Agency of Bengkalis

In addition to the increased income of zakat, the number of Muzaki also increased. With the income increased and Muzaki increased certainly brings blessings to Mustahik. The improvement can be seen in the following table:

Table 1.5.
Recapitulation of Muzaki and Mustahik on National Zakat Agency of Bengkalis

No	Years	Muzaki	Mustahik
1	2017	134	1327
2	2018	476	1068
3	2019	1156	1545

Data source: National Zakat Agency of Bengkalis

Overall, the receipt of zakat of Riau Province in 2019 is fantastic. With the amount of income in zakat, it can help the Muslim community in terms of the economy so as to indirectly help the Local Government realize social welfare. The amount of receipt and expenditure of zakat in Riau Province can be seen in the table below:

Table 1.6.
Zakat Receipts and Expenditures for Riau Province 2019

No	LPZ	Receipt	Expenditure
1.	BAZNAS Riau	12.650.479.972.00	9.132.129.518.00
2.	BAZNAS Kampar	10.238.430.406.00	10.460.536.357.00
3.	BAZNAS Kuantan Singingi	7.322.990.609.00	8.191.024.776.00
4.	BAZNAS Kabupaten Siak	15.974.957.947.00	11.942.548.229.00
5.	BAZNAS Kota Dumai	5.778.374.063.00	5.106.526.292.00
6.	BAZNAS Bengkalis	2.138.549.372.00	1.732.007.654.00
7.	BAZNAS Indragiri Hulu	2.190.202.960.00	2.137.063.685.00
8.	BAZNAS Rokan Hulu	4.551.078.296.00	4.503.082.967.00
9.	BAZNAS Kota Pekanbaru	6.828.266.132.00	5.848.393.800.00
10.	BAZNAS Kep.Meranti	1.801.755.997.00	1.828.767.158.68
11.	BAZNAS Indragiri Hilir	4.653.324.383.00	4.770.971.546.00
12.	BAZNAS Rokan Hilir	4.662.268.600.00	1.829.734.600.00
13.	BAZNAS Pelalawan	6.250.292.668.00	5.674.731.610.00
14.	LAZ Rumah Zakat Riau	7.644.022.551.00	7.331.679.436.00
15.	LAZ Ibadurrahman Bengkalis	4.428.698.122.50	4.989.407.485.13
16.	LAZ Swadaya Ummah	2.691.746.936.00	2.361.326.623.00
17.	LAZ Madani Human Care Dumai	3.000.505.953.00	2.976.365.226.00
18.	LAZ Izi Riau	2.639.502.744.00	2.845.388.439.00
19.	LAZ Dompet Dhuafa Riau	4.247.589.902.00	3.731.964.389.00
20.	LAZ Dewan Da'wah Islamiyah Indonesia	1.221.499.445.00	902.756.316.00
21.	LAZ Rumah Yatim Ar Rohman Indonesia	2.434.399.985.39	2.435.932.409.00
22.	LAZ Global Zakat	5.656.197.041.00	5.656.197.041.00
23.	LAZ Muhammadiyah Riau	2.672.730.978.00	2.553.670.750.00
The Total		**121.677.865.062.89**	**108.942.106.306.00**

Data source: National Zakat Agency (BAZNAS) of Riau Province

Of course the question is where exactly the local regulation on zakat is regulated, while the local government is not authorized to regulate it even though the State Civil Apparatus (ASN) in the area is obliged to pay zakat profession, can it be regulated through the regulation of the Head of the region (Perkada)?. According to the author, zakat cannot be regulated through Perkada, in accordance with Hans Nawiasky's theory that the legislation is hierarchical whereby the lower legislation should not be contrary to the higher legislation, in the sense that the lower regulation is the implementer of higher regulations so that it cannot be regulated by perkada because Perkada is the implementing regulation of the local regulation (Perda) while the local government is not authorized to regulate zakat through Perda because it is not a concrene of absolute affairs. Thus, because ASN has an obligation to pay zakat of the profession then it can be regulated through the Governor's Instruction, because the instruction is binding inwards instead of binding out to the public. This is as done by the Riau Provincial Government after the draft of regional regulation on zakat stipulated not to obtain register number from the Minister of Home Affairs, Governor of Riau through The Governor's Instruction No. 1 of 2019 governing the Collection of Zakat Income (Profession) of State Civil Apparatus (ASN) and Employees of Regional Owned Enterprises (BUMD) in Riau Provincial Government Environment.

4. CONCLUSION

Zakat is included in one of the absolute governmental affairs in the field of religion which is the absolute authority of the Central Government, so that the local government is not authorized to regulate about zakat through local regulations. Material content of local regulations in order to maintain regional autonomy and auxiliary duties and contains the meaning that the establishment of local regulations must be based on the division of affairs between provincial governments, regencies/cities in the sense of concruciary affairs. So legally it is appropriate if the Central Government through the Minister of Home Affairs does not issue a Register Number for Provincial Zakat Regional Regulation 2018. Nevertheless, the Central Government must be consistent in conducting *executive previews*, because for West Nusa Tenggara Province it turns out that the Central Government issued Register Number against Perda No. 9 of 2015 on Zakat, Infaq and Shadaqah as well as Bengkalis Regency also obtained register number from the Governor as a Representative of the Central Government towards Local Regulations No. 3 of 2018 on Zakat, Infaq and Shadaqah, this caused confusion for the Local Government. On the other hand, the management of zakat regulated by local regulations has a good impact. In Bengkalis regency, the receipt of zakat has increased significantly compared to before the existence of regional regulation on zakat.

5. SUGGESTION

The government must be consistent and thorough in conducting *executive previews* of regional regulations on zakat. In addition, all regional regulations on zakat at both the Provincial and Regency/City levels that conduct *executive previews* are one institution, that is the Minister of Home Affairs representing the government. This needs to be done so that there is no difference or disparity towards the regional regulation of zakat in Indonesia. Before establishing local regulations, the Government of Riau Province should carefully examine Law No. 23 of 2014, to know what affairs can be regulated by local regulations and consult with the Minister of Home Affairs so that the regional regulations that have been made are not in vain.

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THE GRANTING OF RIGHT TO BUILD OVER WAQF LAND: AN ALTERNATIVE EMPOWERING WAQF LAND PRODUCTIVELY

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Abstract

Waqf is one of the Islamic teachings with a social dimension and is very strategic for the people's welfare if used productively. It is unfortunate if a lot of the waqf land is not used productively. This research proposes the concept of the granting of right to build (HGB) over waqf land as well as the right to build, which are granted on land with right of management (HPL). The research approach used in this paper is a normative juridical approach with qualitative analysis methods. The results obtained from this study are that concept of granting HGB over Waqf Land is expected to be implemented in Indonesia because it benefits both the developer and the nazhir of waqf land. Developers can get additional capital because they can guarantee the right to build over waqf land and free from land acquisition costs. Meanwhile, nazhir benefits from the developer's utilization costs and recommendation fees, which will then be distributed for the public interest according to the waqf pledge.

Keywords: Waqf, Waqf Land, Right to Build, Right of Management.

1. INTRODUCTION

1.1 Issue Background

Islam is a religion that regulates human life as a whole or comprehensively. Apart from the vertical relationship between humans and God, Islam also regulates the horizontal relationship between humans and humans. In the relationship between humans, Islam pays close attention to the social dimension; some of the things Islam regulates concerning the social dimension are zakat, infaq, alms, and waqf. Waqf in Muslims' history has played a significant role in bringing Muslims to a golden era in various lifelines, be it social, economic, political, and scientific.

Waqf comes from Arabic, namely from the word *waqofa-yaqifu-waqfan*, which means to hesitate, stop, understand, prevent, hold, say, show, put, pay attention, serve, and standstill [1]. Quoted from the book Ahkam al-Waqf, Abdul Wahhab Khallaf defined waqf as holding something that is both *hissi* and *ma'nawi*. According to him, the word waqf is also used for the object, namely, in the sense of something being held back. Then from the book Subul as-Salam, Muhammad Ibn Ismail as-San'any mentions that waqf means keeping property that might be used without consuming or destroying the object and being used for good thing [2].

Waqf is an institution recommended by Islamic teachings, which can be used by a person to channel the sustenance that Allah has given to him. The development of waqf in Indonesia is in line with the development of the spread of Islam. In the early days of Islam's spread, waqf, in this case, is waqf for immovable objects (land and buildings) used for the construction of mosques, Islamic boarding schools, madrasas, and hospitals. It was beneficial for preachers at that time to proclaim Islamic teachings.

As a country with the largest Muslim population in the world, Indonesia supports the existence of waqf institutions. The presence of waqf institutions in Indonesia can be said to be very strategic. Apart from being an aspect of Islamic teachings with a spiritual dimension, waqf is also an institution that emphasizes the importance of upholding economic welfare and the welfare of the people. One of the concrete forms of government support is Law Number 41 of 2004 concerning Waqf (Waqf Law) and its implementing regulations. The definition of waqf in the Waqf Law is the legal act of wakif (a person who donates) to

separate and/or hand over part of his property to be used forever or for a certain period following his interests for worship and/or public welfare according to sharia [3] [4].

The definition of waqf in the Waqf Law allows a person to donate his assets for a certain period. With the enactment of the Waqf Law, several new waqf objects were developed. In the past, the assets most identical to waqf were land and buildings. Still, now waqf assets can be in the form of money, precious metals, securities, vehicles, intellectual property rights, lease rights, and other movable objects following statutory regulations. The development of several new waqf objects does not mean that the old waqf objects are not the main focus in Indonesia. Land and buildings as objects of old waqf become something that needs to be empowered because many Indonesian people currently think that waqf is land. In other words, people do not know other waqf objects other than land.

In practice, there are still many waqf lands that are abandoned or not utilized productively. Based on data from the Indonesian Waqf Board (BWI), the potential for waqf assets per year reaches Rp. 2,000 trillion with a waqf land area of 420,000 ha [5]. It is unfortunate if the waqf land's potential, which is vast and occupies several strategic locations, is not used and managed productively. Vast and strategic waqf lands in various places are possible to be managed and developed productively. For example, waqf land can be leased to developers to build office areas, apartments, flats, etc. The rental proceeds can be used to maintain the waqf building or empowerment of communities with weak economic conditions around them [6].

Fatwa Tarjih has issued the issue of abandoned waqf land on Abandoned Waqf Land on the question of the Wakaf Council and the ZIS PP Muhammadiyah, that two main problems cause the waqf land to become neglected, namely: [7]

(1) Waqf land is abandoned because there are no funds to build it according to the waqf's intention. In this matter, it seems that the purpose of waqf, which was intended or pledged by wakif, actually has a beneficial value for the community. It's just that funds are not yet available to make it happen causes the waqf land to be abandoned.
(2) Waqf land that has been neglected due to the purpose of the waqf intended or promised by the wakif is less beneficial because the same facilities as planned or promised by the wakif are already available. In this case, if the purpose of waqf that is intended for wakif is still carried out, it can be ascertained that the waqf property, both land and buildings, will not bring optimal benefits and goodness.

The problem regarding the unavailability of funds occurs because the developer is not interested in constructing buildings based on leased waqf land. After all, the developer will not be able to guarantee the land. The story will be different if the waqf land can be granted the right to build (HGB) as well as in the land with right of management (HPL). On the land with HPL, holders of the land with HPL are given the authority to grant rights to land over HPL, such as right of ownership (HM), right to build (HGB), and right to use (HP).

The concept of waqf land, which is almost the same as HPL, is both a breakdown of state land status. Boedi Harsono, in his book, states that from control authority, there is a tendency to specify further the status of land which was initially included in the definition of state lands to become (1) waqf lands; (2) HPL; (3) customary land rights; (4) tribal lands; (5) forest zone lands; (6) remaining lands (state land in the narrow sense) [8]. If from the control authority between HPL and waqf land the same, namely the details of the state land, why is it that only the HPL can be granted other land rights.

It is the potential to develop the concept of the granting HGB over waqf land, which increases the author's curiosity to explore and discover the idea of granting HGB over waqf land that may be applied later in Indonesia to optimize the potential of land waqf productively. For this reason, the author is interested in writing an article entitled "The

Granting of Right to Build over Waqf Land: Alternative Empowering Waqf Land Productively."

1.2 Research Method

The research method used in producing this paper is normative juridical research. Legal research is a scientific activity based on methods, systematics, and individual thoughts that aim to study one or more specific legal phenomena by analyzing them. In normative juridical research, researchers only use library materials or secondary data consisting of primary legal materials, secondary legal materials, and tertiary legal materials that regulate or discuss the waqf land, HGB, and HPL [9]. The data analysis technique used in this research is the qualitative data analysis technique. Efforts are made by working with data, organizing data, sorting it into manageable units, synthesizing, looking for and finding patterns, finding something meaningful to study, and deciding what to write for others to read [10].

1.3 Benefit

This study aims to initiate and discover new concepts that did not exist before, namely the granting HGB over waqf land. As the owner of the capital, the developer will be interested in utilizing the waqf land because it can guarantee HGB over waqf land and free of land acquisition costs. On the other side, nazhir will get cash income in the form of utilization fees and recommendation fees for granting HGB over waqf land, which will later be managed and allocated for public interest according to the waqf pledge. The author hopes that the concept initiated can be implemented in the future.

2. DISCUSSION

2.1 Waqf, Waqf Land, and Productive Waqf

Waqf comes from Arabic, namely from the word *waqofa-yaqifu-waqfan*, which means to hesitate, stop, understand, prevent, hold, say, show, put, pay attention, serve, and standstill [1]. Quoted from the book Ahkam al-Waqf, Abdul Wahhab Khallaf defined waqf as holding something that is both *hissi* and *ma'nawi*. According to him, the word waqf is also used for the object, namely, in the sense of something being held back. Then from the book Subul as-Salam, Muhammad Ibn Ismail as-San'any mentions that waqf means keeping property that might be used without consuming or destroying the object and being used for good thing [2]. In the Compilation of Islamic Law (KHI), Article 215 paragraph (1) states, "*a waqf is a legal act of a person or group of people or a legal entity that separates part of their property and institutionalizes it forever for worship or other public purposes following Islamic teachings*."

As a country with the largest Muslim population in the world, Indonesia supports the existence of waqf institutions. The presence of waqf institutions in Indonesia can be said to be a strategic institution. Apart from being one of the many aspects of Islamic teachings that have a spiritual dimension, waqf has also become an institution that focuses on the urgency of upholding economic welfare and the welfare of the people (welfare state). One concrete form of government support is the formation of the Waqf Law and its implementing regulations. In contrast to the definition in the KHI, the definition of waqf in the Waqf Law is "*the legal act of wakif (the person who donates) to separate and/or surrender part of his property to be used forever or for a certain period according to his interests for religious purposes and/or public welfare according to sharia*."

Waqf property can only be waqf if it is legally owned and controlled by wakif. The land is one of the waqf objects that fall into the immovable object category. What includes immovable objects in the Waqf Law includes: (a) land rights following the provisions of the

prevailing laws and regulations, either already registered or not; (b) buildings or parts of buildings standing on the land as referred to in letter a; (c) plants and other objects related to soil; (d) righ of ownership to apartment units (HMSRS) following the provisions of the prevailing laws and regulations; (d) other immovable objects following sharia provisions and applicable laws and regulations.

The Waqf Law states that "*land rights are following the provisions of the applicable laws and regulations, both those that have been registered and those that have not been registered*" it has not been stated in detail what land rights can become the object of waqf. Then in the implementing regulations for the Waqf Law, namely Government Regulation No. 42 of 2006 concerning the Implementation of the Waqf Law states that land rights that can be donated include: (a) rights of ownership (HM), either already registered or not; (b) rights to build (HGB), right to cultivate (HGU), or rights to use (HP) over state land; (c) rights to build (HGB) or rights to use (HP) over right to management (HPL) or rights of ownership (HM) must obtain a written permit from the holder of HPL or HM; (d) rights of ownership to apartment units (HMSRS).

The Waqf Law has expanded the object of waqf in the form of waqf land. In the past, someone can only apply waqf on land to HM, and now someone can also apply to HGB, HGU, HMSRS, HP over state land, and land rights over HPL or HM with the permission of the holder of HPL or HM.

Regarding waqf land, Prof. Boedi Harsono said that land waqf is a holy, noble, and praiseworthy legal actions carried out by a person or legal entity by separating part of his assets in the form of land rights and institutionalizing it forever into "social waqf," namely waqf which intended for religious purposes or other public needs, following the teachings of the Islamic religion [8].

Since the enactment of Government Regulation Number 24 of 1997 concerning Land Registration, Waqf land is one of the land rights that must be registered. Waqf land needs to record and register to provide legal certainty for the waqf land concerned and avoid various disputes that may arise later.

Waqf land that has been registered will be issued a certificate of land for waqf in the name of Nazhir, which is issued by the Head of Land Office. Based on the provisions of Article 32 paragraph (1) of the Government Regulation concerning Land Registration, a certificate is a proof of right, which is valid as a powerful means of evidence. Based on the Supreme Court's decision dated November 3, 1971, Number 383/K/Sip/1971, it states that the court is not authorized to cancel the certificate because it is under administrative authority [11].

Waqf land is often identified as a non-productive object of waqf. This assumption is entirely wrong. Waqf land can also become productive waqf if the management who take care of it understand the essence of productive waqf. The birth of the Waqf Law wants to bring the spirit of productive waqf in Indonesia [12]. Indeed, the definition of productive waqf in the Waqf Law is not explicitly explained.

According to language, Productive means having the character producing, bringing results, benefits, and profits. Munzir Qahaf divides the use of waqf into two, namely waqf, which is used directly and indirectly [13]. The first type of waqf is waqf, whose main items are used to achieve goals such as a mosque for prayer, a school for studying, a hospital for medicine. This type of waqf is called consumptive waqf. Meanwhile, in the second type of waqf, the waqf's object is not used directly but is managed to produce something, then the results obtained are donated. This type of waqf is called productive waqf. Another expert, Jaih Mubarak, stated that productive waqf is a transformation from traditional waqf management to professional management of waqf to increase or increase waqf benefits [14].

This meaning does not identify productive waqf as an increase in quantity, but it can also be quality, such as waqf management.

Waqf management in Indonesia has a long history. Quoted from the Directorate of Waqf Empowerment, at least the management of waqf in Indonesia is divided into three significant historical periods as follows [15]:

(1) *Traditional Period*. At this time, waqf was still considered pure teaching, which was included in *mahdhah* worship. During this period, almost all waqf objects were physical objects such as prayer rooms, mosques, tombs, and Islamic boarding schools. Therefore, waqf institutions' existence has not contributed widely because the nature of the existing waqf object was consumptive.

(2) *Semi-Professional Period.* The management of waqf is almost similar to the traditional period; however, there has been a development of patterns or forms of productive waqf empowerment even though the implementation is not optimal. An example is the construction of a waqf mosque in a strategic place and adding a building for the meeting hall to be rented for weddings and other events.

(3) *Professional Period.* During this period, Waqf's potential began to be looked at and considered attractive to be empowered professionally-productive. Professional is meant to cover aspects of management, business partnership patterns, human resources, waqf object, and has received full support (political will) from the government. One of the government's support in this regard is the issuance of the Waqf Law and Fatwa of the Indonesian Ulema Council (Fatwa MUI).

The concept of productive waqf can still be applied in waqf land. One of the author's ideas in this paper is the granting of right to build on waqf land. This is the concept of productive empowerment of the waqf land. It is considering that currently waqf lands are still managed consumptively or even worse in the form of abandoned waqf lands.

2.2 Regulation of Right to Build (HGB) in Indonesia

Right to Build (HGB) is mentioned in Article 16 paragraph (1) letter c of Law No. 5 of 1960 (UUPA). In particular, HGB is regulated in Article 35 to Article 40 of the UUPA. Further arrangements regarding HGB are regulated in Government Regulation No. 40 of 1996, particularly Articles 19 to 38 of the regulation. HGB is the right to build and own buildings on land that is not his own, with a maximum of 30 years. This definition contains elements from the HGB, including: (a) HGB is the right to build and own a building; (b) HGB land comes from land that is not his own; (3) has a period [16].

In HGB, there is a separation between ownership of the building and the land above it. The building belongs to the HGB holder while the land belongs to another party. Objects that can be categorized as buildings include: residential or residential houses, shop houses, office houses, hospitals/community health centers, restaurants, flats (apartments), offices, shops, hotels, factories, warehouses, and so on [17].

Based on Article 21 of Government Regulation no. 40 of 1996, the land can grant HGB is state land, HPL, and HM. Subjects who can control HGB include Indonesian citizens and legal entities established under Indonesian law and domiciled in Indonesia (BHI). Foreigners who are resided in Indonesia or foreign legal entities that have representatives cannot become HGB holders in Indonesia. HGB occurs or is created due to two things, namely: (a) Regarding land which is directly controlled by the state because of the Government's stipulation; (b) Regarding owned land because the agreement is authentic between the owner of the land concerned and the party that will acquire the HGB which intends to give rise to that right [18].

HGB can be given for a maximum period of 30 (thirty) years. At the right holder's request and considering the buildings' needs and conditions, the HGB period can be

extended for a maximum period of 20 (twenty) years. And the rights can be renewed for a maximum period of 30 (thirty) years. For HGB above HM and HPL, it may be extended based on an agreement between the HGB holder and the HM or HPL holder.

The following are the obligations of HGB holders: (a) Paying incoming money to the country, the amount and method of payment thereof shall be determined in the decision to grant the right; (b) Use the land according to its designation and requirements as stipulated in the decisions and agreements of the right holder; (c) Taking good care of the land and buildings on it and preserving life; (d) Submit the land given with HGB to the state, holders of HPL or holders of HM after the HGB is abolished; (e) Submit the deleted HGB certificate to the Head of Land Office.

Selain kewajiban, pemegang HGB juga memiliki hak antara lain: (a) HGB holders are entitled to receive an HGB certificate if the HGB is registered for the first time at the Land Office; (b) The HGB holder has the right to transfer the HGB to another party; (c) Holders of HGB have the right to make HGBs as collateral for debts and are burdened with Mortgage Rights (Hak Tanggungan); (d) HGB holders have the right to release the HGB for the benefit of other parties.

2.3 The Concept of the Granting of Right to Build (HGB) over Waqf Land

The UUPA is based on the stance that to achieve what has been stipulated in Article 33 paragraph (3) of the 1945 Constitution; it is not necessary for the Indonesian nation as a state to act as the owner of the land. It would be more appropriate to place and give the country the position as an organization of power of all the people (nation) to act as the ruling body over land. From this point of view, it must be seen the meaning of the provisions in Article 2 paragraph (1) of the UUPA, which states that "*earth, water, and space, including the natural powers contained therein, are at the highest level controlled by the state*." Following the basis of this stance, the word "*controlled*" in this article does not mean "*owned*." Still, it gives the state authority as an organization of the Indonesian nation's power to control land at the highest level.

The State's right to control all land within the Republic of Indonesia's territory, both lands that are not or have not been taken over or which have been entitled with individual rights. Lands that have not been clogged with individual rights by the UUPA are called lands directly controlled by the State. To abbreviate the use of words in administrative practice, the term State Land is often used.

Boedi Harsono, in his book, states that from control authority, there is a tendency to specify further the status of land which was initially included in the definition of State lands to become (1) waqf lands; (2) HPL; (3) customary land rights; (4) tribal lands; (5) forest zone lands; (6) remaining lands (state land in the narrow sense)[8].

In terms of the power of control above, it can be seen that either the HPL or the Waqf Land details of state land, according to the author, is it only on land with HPL that other land rights can be granted. Besides, there is also an allusion or legal touch, which indicates that the management of waqf land can also be carried out, such as HPL, including: (a) Waqf land and HPL land are lands directly controlled by the State; (b) Waqf land certificates can be issued, and HPL certificates can also be issued; (c) Waqf lands and HPL lands cannot be transferred; (d) Nazhir carries out the maintenance, management, and development of waqf land. Meanwhile, HPL lands are carried out by government agencies, BUMN, BUMD, PT Persero, regulatory agencies, and other legal entities appointed by the government are carried out by government agencies.

Table 1.
The Similarity of Waqf Land and HP

No.	Indicators	Waqf Land	HPL
1.	Land Control	The right to control of the state whose implementing authority is partly delegated to the holder.	The right to control of the state whose implementing authority is partly delegated to the holder.
2.	Proof of Land Rights	Certificate of Endowment Land	Certificate of HPL
3.	Transfer of Land Rights	Not transferable	Not transferable
4.	Land Manager	Nazhir	Government Agencies, BUMN, BUMD, PT Persero, regulatory agencies, and other legal entities appointed by the government

HPL basically has two aspects, namely [19]: (a) Public Aspect, that HPL is the embodiment of the right to control the state whose authority is partially delegated to the holder, where the main objective of HPL is that HPL land is made available for the use of other parties who need it. (b) Civil Aspect, that HPL changes its function from "management" by the state to "rights" that can be used for the business needs of the holder itself and because of a practical necessity, namely to grant land rights over HPL to third parties through an agreement between the HPL holder and the third parties that require.

HPL is not included in the category of land rights. HPL holders have the authority to use the land for their business needs. The primary purpose of granting HPL is that HPL holders are given the authority to carry out activities that are part of the state's authority as regulated in Article 2 of the UUPA. In this connection, HPL, in essence, is not a right to land but rather the right to control the state given to the holder. HPL is the right of control of the state whose implementing authority is partially delegated to the holder, including regulating the designation, use, supply, and regulating legal relations.

The purpose of granting HPL, according to Prof. Boedi Harsono, stated that the land parcels controlled by HPL were not allocated for the rights holders' own needs but were provided for the fulfillment of the needs of other parties. For example, an industrial estate entrepreneur offers parts of the land under his control for industrial companies operating in his area [19].

To obtain land rights such as HGB, the HPL holder agrees with the party requesting the land rights by making a Land Use and Utilization Agreement (SPPT). In the agreement, apart from mentioning the identity of the parties, the location, area, and boundaries of the land parcels, and the type of use, there is also an agreement regarding: (a) Land rights which are requested to be granted to the party concerned and information regarding the validity period and the possibility of extending it; (b) Types of buildings to be established on it and the provisions regarding ownership of the buildings at the end of the land rights granted; (c) Amount of income and terms of payment; (d) As well as other requirements that are deemed necessary.

HGB over HPL is the right to utilize land and building assets of institutions/state-owned enterprises (BUMN), so it includes the assignment of rights, not the granting of rights (such rights can be categorized as land leases with a long term) [20] [21]. The granting of HGB over HPL is not the same as selling land because in granting HGB over HPL, there is no transfer of land rights from HPL holders to HGB holders, whereas, in land sales, there is a transfer of land rights from the seller to the buyer [19].

Overall, the laws and regulations governing HGB on state land also apply to HGB over HPL. However, there is a difference in the need for HPL holder approval if the HGB over HPL is extended or renewed, used as collateral for a debt, or transferred to a third party. If the land concerned is not used/abandoned by the owner of the HGB or with the expiration of the period of use of the HGB. Then the HPL holder can cancel the HGB in question before the period ends or not extend the land rights so that the HGB is removed and the land concerned will return to the HPL holder.

Because the waqf land position and the HPL have legal equivalence, overall, the laws and regulations governing HPL lands can be applied to waqf lands. The concept of granting HGB on waqf land is a strategic concept if it can be implemented. Therefore, intensive efforts are needed so that the idea initiated by this author can be a reference or input for policymakers such as the Government, DPR, Law Enforcement Officials, academics, MUI, and BWI as institutions that overshadow the waqf institutions in Indonesia.

In addition, to support the concept of granting HGB over waqf land, a competent manager (nazhir) is required. The waqf land manager's position can be carried out by BWI or BUMN/BUMD, which will be formed specifically for this concept. BUMN/BUMD that will later be formed to become Nazhir must at least meet the following requirements: (1) state-owned or regional-owned legal entities; (2) all of its capital is owned by the Government or Local Government and constitutes inseparable state assets; (3) oriented to public services.

2.4 Benefits of the Granting of Right to Build (HGB) over Waqf Land

The concept that the author has initiated is the granting of HGB on the waqf land. This concept has several advantages or benefits if it can be applied in Indonesia. It is known that Indonesia is a country with the largest Muslim population in the world, so that the use of waqf is very potential for the welfare of the community.

Talking about benefits or advantages, apart from waqf institutions, Islam has known other institutions such as sedekah, infak, zakat. The position of waqf also exists as a form of Islamic concern for the ummah. If the infaq and sedekah funds are used up for operational financing, the zakat funds are used for emergency solution funds for the people (eight zakat recipients). So waqf exists as a jariyah charity institution to build the people's economic welfare in general.

In general, the benefits of waqf can be seen and depend on the management system. Traditional and modern management provides different benefits. Both do provide benefits, but the impact of these benefits is believed to have a striking difference. Traditional management that puts immutability in the top position often overrides management innovation. Modern management prioritizes the usefulness through productive management while maintaining the objects' existence, namely that they remain and do not decrease. So the substance of the waqf teaching is not solely in the maintenance of the object (waqf assets), but far more important is the value of the objects' benefits in helping solve the people's economic problems.

In particular, the concept of regulating HGB over waqf land is an innovation in the use of waqf lands in the context of developing productive waqf investments. Article 39 of the UUPA states that the HGB can be used as collateral for a debt of security rights burden

(*Hak Tanggungan*). So that by being given the legality of the HGB institution on the waqf land, the developer will be interested in developing the waqf land because in addition to the capital they have, the developer can also get additional money from the bank with HGB collateral on the waqf land concerned. Also, developers are free from land acquisition costs, which are quite large in nominal terms. On the other side, this concept will specifically provide benefits for nazhir to get cash income in the form of utilization fees and recommendation fees for granting HGB over waqf land, which will later be managed and allocated for public interest waqf pledge.

3. CONCLUSION

The productive waqf concept can be applied to the waqf land, which is often identified as consumptive waqf. Through this paper, the author would like to introduce the idea of the granting of right to build (HGB) over waqf land, which may be an alternative option for waqf land productively later. This concept can apply the regulations for granting land rights over land with HPL in its application. This can be used because waqf land and HPL land have several similarities in practice and concept. The benefits that can be obtained from applying the concept of providing the HGB on Waqf Land can be seen from the developer side as the holder of the HGB and the nazhir side as the manager of the Waqf Land. Developers who have HGB over waqf land can guarantee their land to obtain additional capital in managing the HGB concerned and get freedom from land acquisition costs. Nazhir, as the manager, also received costs for the use of the waqf land on which the HGB was given from the developer and recommendation fees paid by the developer for HGB certification. Then the cash income can be used for the public interest following the waqf pledge.

The author hopes that this concept will contribute to expanding legal scientific studies regarding the regulation of HGB on Waqf land as the delegation of state authority. And a legal basis can be provided so that the implementation of this concept can be applied so that the waqf land utilization, which is still largely abandoned, will be optimal.

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ISLAM AND THE ANTICIPATION OF HOAX INFORMATION WITH NUANCES IN A MULTI-CULTURALIST AND MULTI-ETHNIC SOCIETY

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Abstract
The dissemination of news through online media is not only carried out by communication media but now everyone can also play a role as the perpetrator in disseminating information as well as being victims of hoax recipients The dissemination of hoax information will have an impact on division and anarchism, so a solution is needed to prevent and anticipate the spread of hoaxes through an approach to Islamic teaching values that provide a realistic and humanist approach to the concept.
Keywords: Hoax, Victim, Realistic, Humanist.

I. INTRODUCTION

In the current era of democratization which is characterized by the freedom of opinion for every citizen, both verbally or in writing, the phenomenon of spreading information, both real and false (hoax) is one thing that must be of mutual concern because it will spark acts of anarchism and divisions among the community. Based on data from BPS (Central Statistics Agency), the total population of Indonesia is 252.4 million people. In 2013 the penetration of internet users reached 28.6% of Indonesia's 252.4 million people. In 2015 there was an increase, to 34.9%. It turns out that 85% of the total internet users in Indonesia use mobile devices when surfing the internet.(1) And the number of internet users in Indonesia until the second quarter of 2020 reached 196.7 million or 73.7 percent of the population. This number increased by about 25.5 million users compared to last year. … The second largest internet user comes from Sumatra Island with 22.1 percent(2)

As a great nation with values of pluralism that exist and grow in Indonesian society, including ethnicity, religion, race, and inter-group, since the beginning, the Indonesian government has acknowledged the multi-culturalist and multi-ethnic thoughts as outlined in the concept of Bhineka Tunggal Ika. In this multi-ethnic society, of course, there are different ways of thinking so that the interpretation of an event will be different.(3). Today the Indonesian nation is faced with a transition period, where life has shifted from traditional to modern with indications of increasingly sophisticated technology. Still, it has not been supported by mental readiness in dealing with the impact of information dissemination, especially in dealing with hoax information dissemination. The spread of hoaxes on the issue of SARA (ethnicity, religion, race and intergroup) is a tremendous threat to the Indonesian people who adhere to the Only because the consequences of the Almighty God require every citizen to have the right to embrace and carry out worship following the religion he believes. Human nature and nature as God's creatures so that they reject atheism and secularism, there is no place for conflicts between religions, religious groups, between and between religions and between religions. Recognition of the existence of the State which is "... thanks to the grace of Allah Almighty.(4)

SARA (ethnicity, religion, race and intergroup) is an acronym for Tribe, Religion, Race, and Inter-Group, which grows and develops in society. In the concept

of SARA (ethnicity, religion, race and intergroup) there is a definition of horizontal conflict between ethnic groups, religions and races as well as vertical disputes that originate from "economic-political" differences between groups.(5) In this regard, efforts are needed to overcome and anticipate hoax information with the nuances of SARA to increase the value of national unity and integrity.

II. DISCUSSIONS

A. Hoax Nuanced SARA (ethnicity, religion, race and intergroup)

Hoaxes are very much circulating in the community through online media. The results of research conducted by Mastel stated that the channels that were widely used in the spread of hoaxes were websites, amounting to 34.90%, chat applications (Whatsapp, Line, Telegram) by 62.80%, and through social media (Facebook, Twitter, Instagram, and Path) which is the most used media, reaching 92.40%. Meanwhile, the data presented by the Ministry of Communication and Informatics states that there are as many as 800 thousand sites in Indonesia that are indicated as spreading hoaxes and hate speech.(6)

Hoax is a word used to denote false news or an attempt to deceive or trick readers into believing something. Information that is not based on reality or truth (nonfactual) for a specific purpose. The purpose of hoaxes is just a joke, for fun, to form public opinion. In essence, deceptions are misleading and misleading, especially if internet users are not critical and immediately share the news they read with other internet users.(7)

SARA's (ethnicity, religion, race and intergroup) posts that spread on social media cannot be denied that it is in great demand by account owners or social media users. Some immediately believe the information they get, but some seek the truth about the story. Not all social media users can process the information they get wisely. This is what sometimes triggers social friction between communities due to the unclear SARA information they obtain from social media. The dissemination of hoax information can be in the form, false ideas, opposing principles, media manipulation, balancing, objectivity, against moral neutrality.(8)

SARA posts are posts of information or dissemination of information, the contents of which allude to matters relating to ethnicity, religion, race and between groups. The purpose of disseminating this information is very diverse, ranging from just posting, creating barriers between communities, provoking friction to arise or occur, to building hostile relationships. Dissemination of information related to SARA is something that needs to be watched out for because it can trigger tensions between communities, especially for people who are unable to filter the information they receive.(9)

Regarding the issue of SARA, arguing that problems are various developments in the public arena that then continue and have a broader impact on society. Concerns are also the starting point for conflict if they are not adequately managed and are not following public expectations such as policies, operations, products or organizational commitment.(10)

Because SARA is a social reality, its existence cannot be eliminated. Even every attempt to stop under any pretext, including towards unification through the "monolithic cation" of society, tends to cause unrest, social upheaval, mass unrest, and inevitably ends in social disintegration. In contrast, the plurality of society cannot be

eliminated for the sake of the jargon of unity because unity must be achieved. through the existence of a plurality.(11)

B. Hoax as a crime and its legal sanctions

The dissemination of hoax information carried out by the community will have an impact on society which can affect the behaviour and psychology of the spread of hoaxes and hate speech that is out of control and have consequences for the law. Legal events, both criminal and violations, are subject to criminal sanctions. There are principal differences between crimes and offences, namely:

1. Crime is rechtsdelict, which means actions that are contrary to justice. This conflict, regardless of whether the act is punishable by law or not. So, the public felt that act as contrary to justice;
2. Violation is a wetsdelict, meaning that actions based on society are a criminal act because the law states that they are offences.(12)

Republic of Indonesia Law No. 11 of 2008 which was renewed by Law of the Republic of Indonesia No. 19 of 2016 concerning Electronic Information and Transactions is legal literacy related to the rules for disseminating information through the media, and it is hoped that with this law the public can act more carefully in their attitude and actions.

The presence of the rule of law is one of the obligations of the state to guarantee freedom for everyone without exception the liberty to worship following their religion and belief as a form of protection of human rights that must be obtained and felt by the presence of faith in everyone without discrimination.(13) Besides, the law is also expected to be able to anticipate the impact of spreading SARA content which is a current trend by using social media which intends to propagate certain groups to create various forms of discrimination.(14)

The prohibition on the use of social media as regulated by the Law on Information and Electronic Transactions, legally prohibited actions can be carried out, among others by:

1. Communicating, sending, transmitting or deliberately trying to make these things happen to anyone who is not entitled to receive them;
2. Intentionally preventing the information being received or failing to be accepted by the authorities to receive it within the government and local government.

The provisions of Article 28 paragraph 1 of the Law on Information and Electronic Transactions which contain any person who deliberately and or without right spreads false and misleading news, the threat can be subject to a maximum of six years and a maximum fine of IDR 1 billion.

C. Islam and the Phenomenon of Falsification of Information

The teachings of the Islamic religion which are terms with values have brought human historical civilization to glory, including in observing and responding to the spread of fake news which is currently rife that threatens the disintegration of the nation. Islam, through its teachings, has established "tools" in the form of attitudes in warding off fake and fake news.

The HOAX phenomenon is not new to Islam; Islamic history cannot be separated from continuous efforts to fight hoaxes. A noble wife of the Prophet, 'Aisyah ra, was once accused of lying, namely, when she was left behind from a large group of

Muslims after at night, she looked for the fallen necklace. She was finally found by a friend and escorted to the group that had to leave it. However, the Muslim community at that time was in chaos because of the accusation that 'Aisyah ra had an affair.

The issue ended after Allah SWT sent down eleven verses from QS An-nuur, a form of defence and freed 'Aisyah from accusations to protect the honour of the Prophet.(15) One of the verses is:

"Indeed the people who bring fake news are from your group too. Don't think that fake news is bad for you, even if it is right for you. Each one of them got a reward for the sins they committed. And who among them took the largest share in broadcasting this fake news for him a great punishment (also)." (QS. An-Nur: 11)

Several other verses also warn about the obligation of a Muslim in responding to news: *"O you who believe, if a wicked person comes to you with information, then check it carefully so that you do not impose a disaster on a people without knowing the circumstances that cause it tohappen. you are sorry for your actions"*(QS Al Hujurat 6).

The verse very emphatically states the amount of torment for spreading false news (hadith ifk), or in today's language or terms it is called a hoax.

The incident of spreading false or fake news also occurred several decades after the death of the Prophet, began to circulate incorrect information that attributed it to the Prophet's words, with political motives, thus moving the heart of Caliph Umar bin Abdul Aziz to ask scholars to combat the spread of false hadith by codifying hadith. The later scholars massively codified the hadith. For example, Imam Syafi'i said "*In fact, lies that are also prohibited are invisible, namely telling news from people whose honesty is not straightforward" (Ar Risalah).*

D. Realistic and Humanist Approach

The values contained in Islamic teachings have taught and educated humans to become qualified ones. And if you pay close attention, Islam has led its ummah to think realistically following human potential (humanists). Based on behavioristic theory in which every human being is born without bringing the "potential" (innate) intelligence, potential talents, potential feelings and other traits. All abilities, intellect and emotions, only arise after humans make contact with the surrounding environment, especially the environment. Another principle belief is the role of "reflexes", namely physical reactions that are thought not to require mental awareness.(16)

"Reflex" behaviour is a natural thing for humans, as well as the spread of issues through the mass media which quickly spread to society, carried out by humans on a reflex without considering the correctness of the information and this is done without awareness of the impact. However, Islam teaches humans always to be aware of what they are doing, because every action will have risks, both positive and negative.

Islamic teachings guide the human being, the human heart and mind are trained to always be aware, including in delivering news, information and Islam has stipulated the following provisions: First, *Qaulan Sadidan* (right, straight, honest words) as the Word of Allah QS. An-Nisa, verse 9, which means:

*"And fear (of Allah) those who if they leave the weak offspring behind them, they are worried about (their welfare). Therefore, let them have devotion to Allah and let them speak with the correct speech (qaulan sadidan)".*The meaning of qaulan sadidan is to say truthfully and honestly.

Second, *Qaulan Balighan*(words that make an impression on the soul, are right on target, communicative, and easy to understand). The Word of Allah in QS An-Nisa verse 63 which means: *"They are people who Allah knows what is in their hearts. therefore turn away from them, and teach them a lesson, and tell them Qaulan Baligha (a word that leaves an impression on their souls)".*

Qaulan Sadidan (words that are real, straight, honest) and Qaulan Balighan (comments that make an impression on the soul, are right on target, communicative, and easy to understand) mean that Islamic teachings have provided a method of thinking that influences very logical and realistic words. Because thoughts are always expressed in comments, and logic is also related to "words as expressions of thought". By thinking logically, humans will be able to distinguish and criticize the events that occur, including incoming information by considering circumstances on a "reasonable and the following science or not". Not only that, humans are required to be able to think critically so that their ability to process the phenomena accepted by the sensory system is tested.(17)

The attitude of *tabayyun*means that you must be careful to be the keyword in dealing with the onslaught of news and false and false information that comes. Imam ath-Tabari interprets the word tabayyun as put it first until you know the truth, don't rush to accept it. (think calmly by using your heart and mind). Shaykh al-Jazâʻiri said, that is to say, research again before you say, act or sentence. Tabayyun becomes an attitude for someone in facing the massive flow of information with various opportunities for the emergence of fake / false news and information.

Furthermore, Third, *Qaulan Layyina* (gentle words). The command to use soft words is found in the Qur'an: It means: *"So speak to him both in gentle words, I hope he remembers or is afraid."* gentle, with a pleasant voice, and full of hospitality, so that it can touch the heart Fourth, *Qaulan Karima* (noble words). Islam teaches to use noble words in speaking to anyone. These noble words are as contained in verse Al - Qur'an(QS. Al-Isra verse 23)

"And your Lord has commanded you not to worship other than Him and to do good to mother and father. If one of the two or both of them are old in your care, then you may not say to both of them the words "ah" and do not shout at both and say to both of them a good gesture. "

Fifth, Qaulan Ma'rufa (right words). The name Qaulan Ma'rufa mentioned by Allah in the verse of the Qur'an (QS. Al-Ahzab verse 32) is "O wives of the Prophet, you are not like other women if you are cautious. So don't be submissive in speaking so that people who have a disease in their heart desire and say Qaulan Ma'rufa - a kind word."

Qaulan Ma'rufa means talk that is useful and causes goodness (maslahat). As a believing Muslim, words must always be protected from vain words, whatever is said must still contain advice, soothing the heart of those who hear it. Do not let society look for other people's horror, and can only criticize or find fault with others, slander and incite (hate speech).

Qaulan Layyina (gentle words), Qaulan Karima (noble words). Qaulan Ma'rufa (sound words) are things that will touch the other side of humans and show the nobility of human morals/behaviour, and this is very relevant to humanistic elements as in its development it has become part of the development of psychology.

The humanistic approach in the Koran sees humans as a single element that contains: a) physically and biologically; b) mentally and psychologically; c) human education socially and d) spiritually. The concept of man in the perspective of the Koran is the basis for a humanist approach, including the nature of human form, human potential, and the purpose of human creation.(18)With these things, it is hoped that humans will be aware of the dangers of disseminating information that is not yet clear and also considering the harmful effects and sanctions of the hoax news it spreads.

III. CONCLUSIONS

Based on the discussion and study of Islamic Solutions in Anticipating Hoax Nuanced contaited Information in Multiculturalist and Multiethnic Societies (A Realistic and Humanist Approach), it can be concluded that the issue of spreading fake news can be anticipated with a realistic and humanist approach. Islamic teachings have paved the way for overcoming slander and the problem of spreading fake news with a comprehensive system for multiculturalist and multiethnic societies such as Indonesians.

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GOLD STATUS FOR FINANCING GOLD INVESTMENT UNDER MURABAHAH AQD: AN ANALYSIS BASED ON THE FATWAS OF INDONESIAN *ULAMA'* AND INTERNATIONAL SHARIAH STANDARD

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Abstract

Since the fatwa of MUI and Shariah Standard of AAOIFI arrange distinguished rule on *aqd murabahah* for gold investment financing, it arises the issue on the legal status of gold whether it remains as medium of exchange (currency) or as a general liquid asset. Therefore, this paper purposes to clarify the strongest underlying consideration on Fatwa of gold bearing status in the gold investment financing facility under *murabahah* (set profit sale contract). The issue is explored through doctrinal research and comparative approach. The result concludes that Shariah Standard AAOIFI regards to the majority *ulama'* (Islamic scholars) argumentation. They suppose that the legal status of gold remains following the standard of currency and fungible asset in shariah. Consequently, sale and purchase transaction of fungible asset gold and money must be on the spot transaction to avoid riba (*usuary*). Meanwhile, Fatwa MUI allows deferred payment sale of *aqd murabahah* for gold ownership financing due to the consideration of minority *ulama'* that gold has no longer applied as medium of exchange transaction. As the result, the legal status changes into a general liquid asset. The comparative rules are expected to bring up a discourse to reconstruct the more appropriate aqd for gold ownership financing.

Keywords: murabahah, gold, fatwa, fungible asset, medium transaction.

1. INTRODUCTION

Gold and silver have been used as medium of exchange for a long time. Their use both as medium of exchange or as asset has been mentioned in the Al-Qur'an and As-sunnah. It is said in the Qur'an, Surah Yusuf Verse 20 which means "And they sold him (Yusuf) for a reduce price - a few dirhams".[1] Gold as medium of exchange is a *ribawi* item (fungsible asset). It has certain provisions that must be considered so that neither *fadl* nor *nasi'ah* usury occurs. The principle of *ba'i* usury states that exchanging *ribawi* assets that are not of the same type but one *'illat* (legal cause), such as exchanging 2 (two) grams of gold for 40 (forty) grams of silver is allowed as long as it is done in cash, which means handing over on the spot.

If not, then usury *nasi'ah* will occur in the transaction. This has been conveyed by the Prophet Muhammad in the hadith which means "The Transaction of gold and silver is usury unless it is done in cash."[2] The use of gold as medium of exchange has stopped since World War I. This is due to several factors such as military, political, and economic factors.[3] Even though gold is no longer used as the official medium of exchange, people still use gold as and asset and collateral for deferred payments.[4] Gold is still a profitable asset to this day.

For example, during the COVID-19 pandemic, the price of bullion (ANTAM) in March 2020 was around IDR 810,000.00 (eight hundred and ten thousand rupiahs) but since August 2020, the price of gold has reached IDR 1,028,000.00 (one million twenty eight thousand rupiahs) and above.[5] The high price of bullion (antam gold) resulted in many people making non-cash investments through deferred payment sale of *murabahah* (set profit sale) financing agreements, especially during the pandemic. The gold financing under deffered payment sale of *murabahah* contract, which was often carried out with the payment of *taqsith* (installments) or *ta'jil* (tough), led to differences in views among the jurists, some of whom allowed it although most others forbade it. Therefore, Bank Mega Syariah submitted an application for a gold *murabahah* fatwa to the National Sharia Council of the Indonesian Ulama Council Resolution (abbreviated as DSN MUI) with Number 001 / BMS

/ DPS / 1/10 on January 5, 2010.

Responding to the request, DSN MUI issued a fatwa allowing a deferred payment sale of gold under *murabahah* contract. The fatwa was enforced on 3 June 2010.[6] This fatwa is binding as a legal basis in the implementation of gold *murabahah* for LKS based on Article 1 Number 12 of the Islamic Banking Law regarding the regulation of Islamic principles, i.e. principles in Islamic law issued by the competent institution.The institution authorized to issue fatwas in Indonesia is the National Sharia Council of the Indonesian Council (DSN MUI). In contrast with the DSN MUI Fatwa, the arrangement of gold *murabahah* financing contracts in Middle Eastern countries generally uses Sharia Standards from the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI). The AAOIFI Sharia Standards serve as the legal basis for Islamic Financial Institutions (Islamic Financial Institutions) in countries such as Bahrain, Oman, Syria, Pakistan. Following the arrangement within AAOIFI, gold *murabahah* must be cashed in. AAIOFI's Sharia Standards stipulate that gold *murabahah* must be made in cash. Then, the DSN-MUI Fatwa Number: 77 / DSN-MUI / V / 2010 regarding the law stipulated that non-cash gold transactions were allowed either in installments or by tough. This regulation is in line with the opinion of the majority of scholars from *Hanafiyah, Malikiyah, Syafi'iyah,* and *Hanabilah*. One of the factors that is the basis for differences in the standard setting of gold *murabahah* is the distinctive views on the legal status of gold material in the financing, whether as *ribawi* (fungible) goods or not.

The difference in these arrangements has generated interest in studying both. The problem statement raised in this research is regarding the regulation of the position of gold material in *murabahah* financing which is more appropriate between the DSN MUI Fatwa and AAOIFI Standard Sharia according to Islamic Law. The aim is to gain clarity on stronger legal considerations regarding the gold status under *murabahah* financing according to Islamic law. The study on the position of gold objects, especially in *murabahah* financing, is important as input for positive law in Indonesia. This is related to the Drafting on Sharia Contract Bill and Sharia guarantees that are being initiated to become part of the Omnibus Law.

1.2. Research Method and Benefit

This type of research is legal research. Legal research is a type of research that examines the rules of law, legal principles, expert opinion as a system of norms related to certain legal issues. This legal research examines the principles of fiqh, the principles of Islamic law such as the principle of the benefit of life, the principle of prohibition of doing wrong, the principle of freedom and volunteerism, the opinions of the jurists from the four schools, and regulations related to the golden murabahah in Fatwa DSN-MUI Number: 77 / DSN. -MUI / V / 2010, AAOIFI Shari'ah Standard Number 8 about Murabahah, and The AAOIFI Shari'ah Number 57 On Gold And Its Trading Controls. When the research was carried out from April 22, 2020 to September 25, 2020. These fatwas, both the MUI and AAOIFI DSN fatwas were used as the initial basis for analyzing the legal issues of gold material in the financing of gold murabaha.

Thus, the research uses statutory approach. The statute or statutory approach is an approach to legal research methods that use statutory regulations as a starting point when analyzing them. In addition to the statutory approach, this study also uses a comparative approach because this study compares the gold material legal status in the financing under murabahah contract in the DSN MUI FATWA and AAOIFI Sharia Standard. The comparative approach is an approach that makes comparisons between certain legal institutions from certain legal systems with others.[7] According to Max Rheinstein in Jhonny Ibrahim dividing the comparison of law into two, namely the comparison i.e. macro

and micro law. The macro law comparison approach is to compare a particular legal system with another. Meanwhile, the comparative micro law approach is to compare the substance of the rules in a legal institution from a legal system. This legal research only compares the legal substance of the two fatwa institutions with the aim of providing an assessment of stronger legal considerations regarding the gold *murabahah* contract. Analysis of the legal provisions of gold items in the financing of gold *murabahah* in the DSN MUI Fatwa and AAOIFI is carried out by collecting literature studies and legal documents such as scientific books, scientific journals, articles from the internet as well as the DSN MUI and AAOIFI fatwas on gold murabaha.

The analysis in this study also uses deductive thinking logic because this legal research is carried out from a general nature, in the form of regulations regarding gold murabaha in DSN MUI and AAOIFI, so that a specific conclusion will be obtained regarding stronger legal considerations between the MUI DSN fatwa and AAOIFI. Deductive logic of thinking is a way of thinking that begins with an understanding that things are accepted and applied to all events or groups, so this also applies to any material or part of the events of all groups. Deductive thinking logic is used in order to obtain conclusions from something that is general in nature on something that is special.[8] In addition, this study also uses prescriptive analysis methods to provide conclusions and a prescription. The method of prescriptive analysis is to analyze a legal issue using a method based on a point of view to provide arguments for the results of research that has been done and to be able to find answers to legal issues.[9] This study provides arguments or conclusions regarding stronger legal considerations on the gold murabahah arrangement between DSN MUI and AAOIFI according to Islamic law so that this can provide a prescription regarding which legal considerations are strongest among all the gold murabahah arrangements according to Islamic law.

2. ITERATURE REVIEW

2.1. Regulation Of Gold Murabahah In Fatwa DSN MUI Number 77 / DSN-MUI / V / 2010, The AAOIFI Sharia Standard Number 8 About Murabahah, And The AAOIFI Sharia Standard Number 57 On Gold And Its Trading Controls

Provisions regarding gold murabahah in the DSN MUI fatwa Number. 77 / DSN-MUI / V / 2010 stipulates that gold may be handed over after the contract and contains khyar conditions. On the other hand, the provisions in The AAOIFI Sharia Standard Number 8 about Murabahah, and The AAOIFI Sharia Number 57 about Gold and Its Trading Controls stipulate that the object is received at the time of the contract / in place and does not contain khyar (optional) conditions. In addition, related to tsaman in the MUI DSN Fatwa, there is an advance payment in the transaction and it can be done in non-cash, either postponed or in installments. Meanwhile, the provisions in the AAOIFI Sharia standard stipulate that there is no down payment in the transaction and the payment must be made in cash at the same time as the delivery of gold on the spot.

2.2. The Position of the Gold Material in Islamic Law

Gold and silver have a certain position in the view of Islam. Gold and silver were the medium of exchange used during the Islamic civilization from the time of the Prophet's leadership to the Ottoman Caliphate. Besides being used as a medium of exchange, gold is also used as a standard unit of syar'i laws, such as the level of zakat and standards in uqubat (punishment) for fines against jinayat (crimes). According to Imam Al-Ghazali, gold and silver both in the form of money and another are ribawi goods.[10] The scholars have different opinions regarding illat (legal reason) gold and silver which are ribawi goods. The first opinion is the opinion of the Hanafi and Hanbali schools. According to them, usury illat

in gold and silver is a unit of weight and type. The second opinion is the Syafi'i and Maliki schools. According to them both the usury illat (reason) for gold and silver is the tsamaniyah ghalabat (the domination of the medium of exchange). The third opinion is the opinion of As Syirazi (The Syafi'i scholar) and some of the scholars of the Maliki scholar. They say that usury illat (reason) for gold and silver is muthlaq tasamaniyah (absolute as a medium of exchange) or qiyamul asy yaa '(a measure of price value).The third opinion is considered the most diligent (strong) by the majority of contemporary scholars and is supported by all international fatwa institutions, including the Fatwa Majma 'Fiqih al-Islami, Fatwa al-Lajnah ad-Daimah, and Fatwa al-Majelis Al-Urubi li al. -Ifta 'wa al-Buhuts.

The difference of opinion regarding 'illat' (legal reasoning) causes different views regarding the status of gold as ribawi good. In the third opinion regarding usury illat, it states that gold and silver were previously used and accepted as legal instruments of exchange, even though they are no longer functioning as before, the two precious metals still have the same status as the current currency. The status of gold which is still considered a ribawi treasure is a stipulation of the decision of the scholars around the world who were gathered in the Rabithah Alam Islami (Muslim World League) at the 5th congress in Mecca in 1982. Likewise, the 3rd congress which was attended by the Ulama throughout the world under the auspices of the Organization of Islamic Conference (OIC) which was held in Amman, Jordan in 1986. Decree No.21 (9/13) which reads "The Islamic Fiqh Institution Council stipulates that currency has tsamaniyah criteria (price / value). Decree Number 21 (9/13) which reads; The Islamic Fiqh Institution Council has determined that the law for currency is the same as the law that has been explained by the Sharia regarding gold and silver. Usury can occur in currency."[11]

This is according to the hadith narrated by Ubadah bin Shamit" (selling) gold for gold, silver for silver, wheat with wheat, barley with barley, dates with dates, salt and salt, with conditions such as, equal (quantity) and cash, if different ashnaf above (types and characteristics,) then sell as you like but yadan bi yadin (must be in cash)."[12] In contrast to the opinion regarding the view of the status of gold, some scholars have the view that the status of gold is no longer a ribawi item because it is no longer a currency based on the stipulation of the authorized institution. Some of those who think so are Ibn Qoyyim and Shaykh 'Ali Jumu'ah. This results in differences in views regarding the permissibility of non-cash murabahah gold transactions.

3. LEGAL CONSIDERATIONS CONCERNING GOLD OBJECTIVES LAW IN DSN MUI AND THE AAOIFI SHARIA STANDARD

The gold material provisions in different murabahah gold contracts in the MUI DSN Fatwa and the AAOIFI Standard Sharia have legal considerations based on syar'i arguments. The MUI DSN in determining the fatwa provisions had been through a process and used certain methods. DSN MUI has a guidance method when determining fatwas, which has been regulated based on the Decree of the Indonesian Scholar Council Resolution Board Number: U-596 / MUI / X / 1997 concerning Guidelines for Determining Fatwas of the Indonesian Scholar Council Resolution (referred to SK DP MUI Number: U -596 / MUI / X / 1997 concerning Guidelines for Determining the MUI Fatwa). These guidelines state that every fatwa is obliged to be in the form of a legal opinion which has the strongest basis and provides benefits to the people. Al-Quran, Hadith, Ijma' (consensus), Qiyas (analogy), and other legal arguments are the bases used as guidelines in making legal products, namely fatwas.[13]

MUI also does not reject legal arguments outside the agreement of the scholars, such as: istihsan, istishab, sad al-dzari'ah and other arguments that are still being debated. When MUI discusses a problem, this Fatwa institution notices and uses the opinion of the previous

sect priest jurists in considering the law, and also, looking for arguments, and considering the most beneficial for the people.[14] The legal basis that becomes the consideration of the DSN MUI Fatwa regarding the allowance of the deferred payment sale for gold financing under murabahah contract includes Al-Quran, Hadith, the rules of ushul fiqh (The Fundamental principles of Islamic Jurisprudence) and fiqh (Islamic Jurisprudence), and the opinions of Islamic scholars who allow and do not allow non-cash murabahah gold financing, some of which are described as follows :

1. Al-Qur'an Surah Al-Baqarah Verse 275 which means, "And Allah has justified buying and selling and forbidden usury."[15]
2. Hadith about buying and selling about the willingness of all and the Hadith of the Prophet about the prohibition of non-cash murabahah gold narrated by Imam Muslim from Bara 'bin' Azib and Zaid bin Arqam which reads, "Rasulullah SAW prohibits selling silver with gold non-cash"[16]
3. The principles in Islamic jurisprudence rules include :
    a. *Ushul fiqh* rule "The law applies whether 'illat or not."
    b. Jurisprudence rules "Any law based on an 'urf (tradition) or community habit becomes invalid when that tradition is lost. Therefore, if the traditions of society change, then the law changes."[17]

The opinions of the scholars whether permitting or prohibiting. There are other opinions regarding the deferred payment sale of gold. Under murabahah contract. Therefore, DSN MUI conducts an opinion election through tarjih (collaborating opinions). MUI in their fatwa strengthens and takes an opinion that allows non-cash payments, a minority opinion. DSN MUI refers to the opinion expressed by Sheikh al-Islam Ibn Taymiyah and Ibnul Qayyim regarding the ability to buy and sell jewelry (made of gold) for gold, with deferred payments. Gold or silver exchanged for tsaman (money) does not apply to usury because gold and silver in trading transactions, either murabahah or ordinary trade, do not function as money or legal tender issued by the competent financial institution. Non-cash trading of gold is allowed because gold is no longer a currency. As mentioned above, the DSN-MUI refers to the opinion of Sheikh al-Islam Ibn Taymiyyah and Sheikh Ibn Qayyim who are Hanbali scholars. In contrast to Sheikh al-Islam Ibn Taymiyyah and Sheikh Ibn Qayyim, the majority of jurists with the Hanbali mazhab of thought prohibited non-cash transactions of gold. DSN-MUI, in their fatwa which does not prohibit non-cash murabaha gold, uses the Al-Taysir al-Manhaji method. It is a method that chooses a light opinion but does not conflict with the rules. Although using a lighter opinion, DSN-MUI remains in the corridor of manhaj. The basic principle of applying the rules of Al-Taysir al-Manhaji in the DSN-MUI Fatwa is to take a more diligent and more beneficial opinion if it is possible, if it is not possible, then what is more prioritized is which opinion is more beneficial while Aqwa dalilan (the power of argument) be the next consideration.[18] DSN-MUI takes a minority opinion which is considered a very weak opinion by both jurisprudence experts in Indonesia such as Erwandi Tarmizi (contemporary muamalah fiqh expert) and international level experts such as Syeikh Wahbah Al-Zuhaily (contemporary fiqh expert). The DSN-MUI stipulates a fatwa that it is permissible for gold murabahah transactions to be non-cash by considering the view of *mashalih mursalah. Mashalih mursalah* is the benefit that is not mentioned in the texts, both in the Qur'an and hadith but is considered good according to reason with the consideration that it can manifest goodness and avoid badness.[19]

The consideration of *mashalih mursalah* can be seen from the existence of a fatwa that allows non-cash payments in gold transactions. People really need to do ba'i, murabahah gold transactions on a non-cash basis because otherwise goodness will be lost, and people will experience difficulties and the closure of the doors of debt. Unlike the MUI DSN, AAOIFI regulates the prohibition of non-cash transactions with a very careful method of

legal ijtihad. This can be seen from the standard-setting process which requires a long process, as can be seen in the Appendix for Sharia Standards. Each AAOIFI sharia standard described the standard setting history. This standard was established by involving many parties such as international jurisprudence experts and the central bank by holding meetings to discuss this sharia standard.

In Appendix B AAOIFI Sharia Standard No. 57 Regarding Gold and Sharia Standard No. 8 regarding *murabahah* in Appendix D, lists the arguments used in each decision in the standard. Thus, it can be seen the basis of syar'i in each paragraph of the standard. In Appendix B or D of the AAOIFI Sharia Standards, it is mentioned about considering syar'i arguments and the opinion of the majority of the 4 mazhab fuqaha. The Statement of The Standard section contains provisions for prohibiting non-cash *murabahah* gold and prohibiting containing khyar requirements. Meanwhile, Appendix B or D includes syar'i arguments from the Al-Qur'an, Hadith, and other legal sources. Similar to the MUI DSN method, AAOIFI prioritizes Al-Qur'an and As-Sunnah over other legal sources and uses the opinions of previous Ulama on the same or similar issues. AAOIFI in determining its Sharia Standard pays attention to and takes the opinions of previous scholars, classical Ulama (four Imams of mazhab) and contemporary scholars. In addition, AAOIFI also uses fiqh principles and the opinion of international fatwa institutions.[20] The Appendix D section of the Sharia Basis for the Standard (AAOIFI Sharia Standard No.8 concerning *Murabahah*) mentions the argument of the Al-Qur'an, Surah Al-Baqarah Verse 275 which means, "Allah has permitted trade (Allah has justified buying and selling).”[21] In addition, it also includes the Al-Qur'an Surat Al-Baqarah Verse 198 which means, "It's no crime for you to seek the bounty of your Lord.”[22] Appendix B The Sharia Basis for the Standard (AAOIFI Sharia Standard No. 57 Regarding Gold) states the argument of the Hadith riwayah Ubadah bin Shamit " (sell) gold with gold, silver for silver, wheat with wheat, barley with barley, dates with dates, salt with salt, with conditions such as, equal (quantity) and cash, if different ashnaf above (types and characteristics,) then sell whatever you like but yadan bi yadin (must be in cash)."[23] Furthermore, in Appedix (B) The AAOIFI Sharia Standard mentioned decision No. 52 (3/6) 1990 Majma 'Al Fiqh Al Islami (fiqh division of the Organization of Islamic Cooperation / OIC) that fiqh experts agree that gold is a *ribawi* item that is required to make transactions in cash. This provision is also based on the fiqh rule that "In fact' illah is obtained by means of istinbath, if then back to the text and contrary to it, it is obligatory to negate the law or its effect.”[24] As described in detail in the DSN-MUI and AAOIFI arguments which regulate the permissibility or prohibition of non-cash gold *murabahah*, both have legal considerations based on syar'i arguments, including the differences of opinion of the ulama who were taken into consideration in the fatwa. The difference between Ulama or Fatwa Institutions is something natural. This difference is not the cause of following lust or worldly interests, but because of several factors such as different in understanding and interpreting the text that in many authentic hadiths about gold as a *ribawi* treasure that requires cash to have 'illat namely tsamaniyah (medium of exchange) according to the DSN- MUI, meanwhile according to AAOIFI, 'illat gold is mutlaq tsamaniyah (absolute as a medium of exchange), so that even though gold is no longer used as a medium of exchange, it is still a *ribawi* asset that must be made in cash. Minority opinion by most jurisprudents is referred to as an opinion that is weak, while the majority opinion which is strengthened by strong arguments is a strong opinion. Choosing the strongest opinion is called tarjih. According to most scholars, doing practice with the strongest argument is obligatory.

On the other hand, some scholars do not allow practice with weak argument or legal basis. Among the basic considerations is the Ijma 'of the Sahabahs of the Prophet. This opinion determines that the sahabah of the Prophet SAW agreed to do practice with the strongest arguments, as when there are several conflicting reports. For example, the case of

the junub bath where there are two contradictory reports on this issue. Friends of the history of Aisyah RA are considered to know more about Rasullullah SAW's household. If tarjih and practice with the strongest arguments are not needed, surely the sahabah will not tarjih on these reports.[25]

Thus, the provisions of the gold material law in AAOIFI, which stipulate that gold transactions must be carried out in cash, have stronger legal considerations than the legal considerations in MUI's DSN. AAOIFI uses valid arguments contained in the Al-Qur'an Surah Al Baqarah verses 198 and 275, Hadith concerning *ribawi* assets or the prohibition of exchanging gold for gold or for silver for non-cash. The *fiqh* rule regarding *'illat* which is obtained by means of *istinbath* must not contradict the authentic texts. Besides, the legal considerations are based on the opinion of the majority of jurists from four scholars, as well as the decisions of various international fatwa institutions such as Majma 'Al Fiqh Al Islami (the Islamic Cooperation Organization / OIC's fiqh division).

4. CONCLUSION

A stronger legal consideration between FATWA DSN MUI and AAOIFI regarding gold items in deffered payment sale of *murabahah* financing is the AAOIFI Sharia Standard. Since the AAOIFI Sharia Standards use the strongest (strongest) arguments regarding gold transactions in the Al-Qur'an, Hadith about *ribawi* assets or the prohibition of exchanging gold for gold or for silver in non-cash transactions, Islamic jurisprudence principles. about 'illat which is obtained by means of istinbath must not contradict the authentic text. In addition, these legal considerations use the majority opinion of jurists from 4 (four) *mazhab*s, as well as decisions of various international fatwa institutions such as Majma 'Al Fiqh Al Islami (the Islamic Cooperation Organization / OIC's fiqh division).The AAOIFI Sharia Standard which regulates the prohibition of gold *murabahah* is carried out on a non-cash basis to avoid the occurrence of nasi'ah usury which is prohibited by sharia. On the other hand, the MUI DSN Fatwa uses different and weaker legal considerations, including using an opinion that is marjuh (weakest) and even jurisprudence experts consider this opinion too weak. Based on the view of the strongest opinion, the DSN-MUI regulates the suspension of payments and delivery of the gold *murabahah* contract. This provision can lead to the inclusion of the nasi'ah usury in the contract. DSN MUI considers mashalih mursalah rather than the power of argument.

5. SUGGESTIONS

It is better if the Drafting Law on Sharia contracts and sharia guarantees regulates the gold financing undrt *murabahah* contract use strong legal considerations or a valid legal basis, including adopting the opinions of the majority of jurists from the four scholars that are considered valid as the rule in *as-sharf* (money exchange transaction) that the transactions must be made in cash or handover on the spot.

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IS ISLAMIC BANK REALLY ISLAMIC? THE ROLE OF SHARIA GOVERNANCE IN PRODUCT DEVELOPMENT IN ISLAMIC BANKING

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Abstract
The vast development of Islamic Banking does not always align with the Islamic spirit that it carries. There are some practices where Islamic Bank creates a pseudo-Islamic product that dilutes the shariah principles. Therefore, this phenomenon raises the question: is Islamic Bank genuinely Islamic? This paper using descriptive approach and using literature studies research methods to address the problem in Islamic Banking, in light of Shariah Governance theories. The result shows that Shariah Governance on product development in Islamic Banking influenced by internal factors in Islamic Banking operational and external factors on government regulation on operation countries. Therefore, proper Shariah Governance is crucial to create an Islamic Banking product that is aligned with the Maqashid al-Shariah spirit.
Keywords: Shariah Governance, Islamic Banking, Product Development

1. INTRODUCTION

Over the past several decades, Islamic economy has grown rapidly, and the total Islamic finance asset reached two trillion dollars in 2015. [1] However, in the recent development in Islamic Banking and Finance, there are critics for the practice of Islamic Financial Institution. Some people argue that current Islamic Banking and Finance's practice that driven by market demand does not fulfill the ethical and social objectives of *Shari'ah*. Islamic banking products accused of only mimicking conventional products without the spirit and substance of Islam. [2] There are several products in Islamic Bank which breach the *shari'ah*-compliant characters by selling "Islamic" product that contradicts to the *shari'ah* value. This phenomenon raises the question: is Islamic Bank genuinely Islamic?

This paper aims to explore the *shari'ah* compliance from a product development perspective in Islamic banking. Firstly, this paper will define the product in Islamic Banking. Then, this article will describe the product development in Islamic Banking and the task of Shariah Supervisory Board as an Islamic scholar, which has a role as gatekeeper of the *shari'ah* principle in the firm. Last, this paper will analyze the challenge in product development from internal and external perspectives, including the role of *Shari'ah* Governance in such process. The concluding section will clarify that the existence of *shari'ah* non-compliance products comes from the internal and external constraints in the product development process, which influence modes of financing. Therefore, a whole *shari'ah* governance system at institutional and organizational levels is essentials to ensure the real Islamic characteristic in Islamic Bank.

2. MATERIALS AND METHODS

This article using descriptive approach and using literature studies to explain the theoritical concept of maqashid shariah and product development process in Islamic banking. In addition, this paper using Shariah Governance theory as a solution to mitigate problem in Islamic Banking.

3. *MAQASHID* AL-SHARI'AH APPLICATION IN ISLAMIC BANKING: BETWEEN EXPECTATION AND REALITY

Islamic Banking has grown rapidly in the past several decades, and its assets reach USD 1.76 Trillion in 2019. [3] Nowadays, there are more than three hundred Islamic banks established in more than 75 countries, with regulatory institutions, such as the International Islamic Market and Islamic Finance Services Board (IFBS). [4] The current development of Islamic Banking and Finance is caused by market-driven demand, such as:[5]

1) The strong demand from a large number of Muslims for Sharia-compliant financial services;
2) emerging wealth in the Muslim world from Gulf countries, with demand for suitable investments; and
3) the competitiveness of Islamic banking attracting both Muslim and non-Muslim investors, which causes several multinational banks operating either Islamic windows or Islamic subsidiaries. [6]

Historically, Islamic Banking and Finance emerges as an alternative economic system from the existing capitalist and communist system [7] for Muslim consumer who only wants to conduct business according to their religious faith. [8] Besides to avoid riba (interest), Islamic Banking and Finance aims to promote Islamic economic behaviour based on the objectives of *Shari'ah*. For example, the usage of profit-loss sharing contracts will enhance socio-economic objectives, thus fulfil *Maqashid* objective. [9] According to Ghazali, the objective of *Shari'ah* (*Maqashid al-Shari'ah*) is safeguarding the faith, self, intellect, posterity, and wealth. [10] *Maqashid al-Shari'ah* suggests that economic and financial activity must lead to human well-being [11] and protecting society from potential harms. [12]

Kamali (2006) suggests that the overall goal of Islamic law should fulfil the legal maxim that promotes substance over form. [13] Thus, to fulfilling *maqshid al-Shari'ah*, Islamic Banking and Finance not only must ensure the transactions is *Shari'ah*-compliant but also cater the ethical and social goal. [14] As stated by Grais and Pellegrini (2006), the Islamic financial system based on *Maqashid al-Shari'ah* should promote social benevolence by conduct activities that foster social objectives. [15] Hence, Islamic Banking and Finance expected to both fully comply with the Shari'ah principle and fulfil the ethical and social objective.

However, the market-driven development of Islamic Banking and Finance forced it to develop beyond the framework of Islamic economics, caused the lack of *Maqashid* application in practice. [16]

There are two negative impacts of such development. Firstly, Islamic Banking and Finance changes into a profit-oriented institution which causes its social and ethical function neglected. Secondly, there is existing Islamic Banking and Finance's product which violates Shari'ah principle.

4. TYPES OF PRODUCT IN ISLAMIC BANKING

A fundamental characteristic that distinguishes Islamic Banking from its conventional counterpart is the *shari'ah*-compliance characteristic. [17] Thus, Islamic Banking should protect and enhance *Maqashid al- Shari'ah* or the objective of *Shari'ah* in its activities. [18] As explained by Grais and Pellegrini (2006), there are three aspects of *Shari'ah* requirements for the Islamic financial industry. First, conduct transactions according to Islamic law. Second, the activities should promote social benevolence. Finally, develop Islamic financial system based on the principles and goals of *Shari'ah*. [19] Therefore, the products in Islamic financial institutions supposed to be created to achieve *Shari'ah* goals.

However, in practice, there are three types of existing Islamic Banking products as identify by Ahmed (2011): [20]

1) Pseudo-Islamic Product, a product which its form is suitable for legal requirement according to Islamic Law but its substance does not fulfil the objective of the *shari'ah* or social orientation.
2) *Shari'ah*-compliant Products, the products that satisfy both the form and substance of Islamic law, but not considering the social goals.

3) *Shari'ah*-based Products, a product that achieves not only the form and substance of Islamic law but also fulfils the legitimate needs of all market segments.

Product Types	Legal	Social		
	Form	Substance	Market Segment	Needs
Pseudo Shari'ah Compliant	V	?	?	?
Shari'ah compliant	V	V	?	?
Shari'ah based	V	V	V	V

Tabel 1.
Characteristics of Islamic Banking Product. Source: Ahmed, 2011a

As stated by Kamali (2006) and Ahmed (2014), the overall goal of Islamic law is fulfilling the legal maxim that promotes substance over form, which is relevant in the creation of Islamic products. [21] Beside avoid the pseudo-Islamic products, the product of Islamic banks be Shari'ah-compliance product, which means it fulfills both the form and substance of Islamic law, for instance, avoids riba. However, the sharia-compliants product is not satisfying the maqashid goals yet. For instance, Murabaha contract as a most favourable contract in Islamic banking is fulfilling the legal requirement according to Islamic Law (sharia), yet it does not have a real contribution to the promotion of economic development and justice in society as the objective of Islam (*Maqashid Al-Sharia*). Therefore, the ideal Islamic banking products according to *maqashid al-shariah* supposed to be *shari'ah*-based products.

However, in the development, several Islamic banks using more flexible and a liberal approach when structuring Islamic Banking products and services in order to compete in the market. They argue that otherwise, Islamic banks would face failure, thus affecting the perception of society to whole Islamic finance. [22] This approach is resulting in controversial contracts, for example, the creation of tawarruq usage of legal stratagems (*hiyal*), which only fulfil the form of Shari'ah but against the Shari'ah in substance. [23]

Moreover, in the market-driven economy, there may be circumstances in which the Islamic contract has not accommodated under the existing regulations, [24] thus the gap between *Shari'ah* and national law causes the incompatibility of Islamic bank products in the market. Hence, the Islamic bank product should be modified to suit the regulation. [25] In this case, the creation of pseudo-Islamic the contract is most likely to be occurred. [26]

Furthermore, a pseudo-Islamic product which breaches the *Shari'ah* principle may harm Islamic banks. Pseudo-Islamic product creates the perception that Islamic Banking and Finance is only mimicking conventional product by using Islamic terminology in product without spirit and substance of Islam. [27] Additionally, pseudo-Islamic product that abuse the *shari'ah*-compliance can negatively affect Islamic banking. According to Ahmed (2014), the harm may occur in short-run and long-run. In short run, *shari'ah* non-compliance product can affect the income and profit of Bank. In long run, dilution of *shari'ah* principles can harm the reputation and credibility of Islamic financial institution, hence damage its sustainability. [28] Therefore, there are the needs to ensure *shari'ah* compliant principles in Islamic banking products.

5. PRODUCT DEVELOPMENT PROCESS IN ISLAMIC BANKING

The product development process has significant role to determine the output of products in Islamic Banking. Product development in a firm involves stages of activities of

several departments in firm on the development of new products, [29] including the role of Sharia Supervisory Body. [30]

The principle of freedom of contract in Islamic law is allowed the Islamic financial institution to conduct product development, as long as it not against the Shari'ah requirements. [31] Hence, financial engineering can be applied to Islamic banking. According to Iqbal (1999), there are two modes of financial engineering approach in Islamic finance: by replicating existing systems in conventional system and substitute the prohibited aspect (reverse engineering) or by apply Shari'ah principles to design new products (innovation). [32]

Reverse engineering is a more feasible and favourable system than innovation in product development, yet this approach can create a misunderstanding about Islamic products. [33] Lack of human resources causes a lot of human resources in Islamic banking comes from conventional background. Sometimes they are only perceived Islamic Banking as "interest-free banking" without real understanding about the Islamic spirit. [34] No wonder, Khan (2010) criticise that Islamic Bank in practice only creates distinguish Islamic characters by using Islamic terminology for the conventional transaction. [35]

6. CHALLENGE IN PRODUCT DEVELOPMENT: HOW SHARIAH GOVERNANCE CAN OVERCOME IT

Every institution needs proper corporate governance. As explained by Turnbull (1997 in Muhamed et al., 2014), corporate governance is all of the aspects that affect the institutional process, including authorities and regulation, involved in organising the production and sale of goods and services. [36] Noor & Noordin (2016) suggest that good governance requires support from external factors such as regulations and competition in the market as well as internal factors such as business strategy, goals, and corporate culture. [37]

For institutions that adhere to *Shari'ah* principle, *Shari'ah* governance is the corporate governance mechanism that ensures the fulfilment of all *Shari'ah* requirements. [38] It ensures Shariah compliance in organization through management style and independent supervision for Shariah compliance. [39] In order to ensure Shari'ah characteristic in Islamic Bank, *Shari'ah* Supervisory Board which comprise of Islamic scholars have essential role in safeguarding the Shari'ah aspects in product and the operation of Islamic Bank. [40] Particularly in Islamic products, *Shari'ah* Supervisory Board is responsible as a gatekeeper to assuring the compliance of Islamic Banking contract with the Shari'ah principles and objective before its releases to the consumer. [41] However, although *Shari'ah* Supervisory Board has essential role in shaping sharia-compliance of product, *Shari'ah* Supervisory Board does not have supremacy authority to determine the modes of contract in Islamic Banking. The role of Board of Director also critical is to determine whether Islamic products are sharia-based or sharia-compliant. [42] Thus, both *Shari'ah* Supervisory Board and management should have integrated vision to promote the *Maqashid* of Shari'ah in Islamic Banking's activities.

Another factor from the institutional and organisational constraints where Islamic Banking operates conduce the choice of product types in Islamic Banking. [43] Thus, there are internal and external factors in product development process which determine modes of products in Islamic financial institution.

From an internal factor in organization, there is the friction between Shari'ah compliance and economic incentive. [44] As a firm, Bank aims to develop products which is efficient and can produce high return. However, sometimes the product which economically efficient is contradicted with the principles of Shari'ah. In this circumstance, there is the trade-off between Shari'ah-compliance and economic benefit of the product. [45]

For example, the mudharabah and musharakah contract is deemed as sharia-compliance products, yet it perceived to have high risk. [46] This product may not be favourable by risk management department, rather than debt-based product such as tawwaruq, which have lower risk and lower cost. [47] Thus, the decision to choose the modes of product depends on the sharia-compliance understanding from the top management based on vision and mission of the Bank. [48]

From external factor, there is a legal and regulatory requirement which affect the execution of Islamic product. [49] As a part of corporate governance system, Shariah governance affected by the existing regulation in operation country. [50] Thus, before issue the Islamic product, the firm needs to understand the implications of the laws and regulations of the country on the Islamic mode used in a product.

According to Ahmed (2014), there is three types of governance/rule that influences the operation of Islamic banking. First, the country that has Islamic banking laws which accommodate the Islamic banking industry. Second, the country which has a western legal system, but its regulation accommodate Islamic banking practice. Last, the country which has no specific laws that support Islamic banking practice. [51]

In the last circumstance, if the national regulation is not supporting Islamic banking, the product that potentially does not conform to the regulatory definitions of products in national laws cannot be offered by Islamic Bank. This condition where the country has regulatory oversight may cause the dilution of sharia compliance principles of the product. [52] As stated by El-Gamal (2006), "Islamic product has to be functionally identical to the conventional financial product since otherwise it would not be approved by banking regulators in both Islamic and non-Islamic countries". [53] Hence, Islamic Bank has no choice to overcome such external constraints but modifying the products to adjust the existing rules and regulations. [54]

Therefore, shariah governance as regulatory framework in both organizational and institutional level is essential for product development in Islamic banking. The suitable regulatory framework for Islamic banking will ease the creation of Shari'ah compliant products and minimize the risks arising from *Shari'ah* principles in banking operations. [55]

7. SHARIAH GOVERNANCE ON ISLAMIC BANKING IN INDONESIA'S REGULATION

From Ahmed (2014) theory about types of governance/rule that influences the operation of Islamic banking as mentioned above, Indonesia can be categorized as the first type, which is the country that its law has accommodated the Islamic banking industry.

Indonesia has quite long history on development of Islamic Banking regulation. Firstly, Law No. 14 Year 1967 of Banking does not allow the bank without interest since the Section 1 letter a of this Law specifically define Bank as Financial institutions which the main business is to provide loans and services in payment traffic and circulation of money. Then, section 1 letter a stricly define credit as provision of money or bills based on the borrowing and lending agreement between banks and other parties, where the borrower is obliged to repay their debts after a certain period of time with the amount of interest (rents) that has been set. Thus, there is no bank without interest. The Deregulation on June 1st 1983 change that condition by allowing the Bank with zero percentage interest. Furthermore, Pakto October 27th 1988 allow the establishment of new bank, which make the establishment of Islamic Bank is possible. Then, the Law No. 7 Year 1992 on Banking is accomodated the Bank without interest by using profit-sharing system. Moreover, its amandment on Law No. 10 Year 1998 of Banking changes term "Bank based on the Profit-Sharing Principle" into "Bank based on Sharia Principle". Finally, Indonesia has particular

law which specifically regulates the operational of Islamic banking, on Law No. 21 of 2008 on Islamic Banking. [56]

In addition, the Shariah Governance system in Indonesia also has strong legal basis. There are several provision on Shariah Supervisory Board in Indonesia, which is regulated in several law and policy, such as:

a. Law No. 21 of 2008 on Islamic Banking

This law regulates about the Shariah Supervisory Board on Islamic Banking and Sharia Business Unit, as mentioned on Article 32. This regulation mandated establishment of Sharia Supervisory Board in Sharia Banks and Conventional Commercial Banks which having Sharia Business Units (Unit Usaha Syariah). [57] In addition, the Sharia Supervisory Board shall be appointed by the General Meeting of Shareholders (RUPS) upon the recommendation from the Indonesian Ulama Council. [58] The Sharia Supervisory Board has duty to providing advice and suggestions to the board of directors as well as supervising bank activities in order to comply with Sharia principles. [59]

b. Law No. 40 of 2007 on Limited Liabilities

Shariah Supervisory Board in a business unit in the form of a Sharia Limited Liability Company is regulated in article 109 of Law No. 40 Year 2007 of Limited Liability Companies. This article state that: [60]

(1) A company that runs a business based on sharia principles, besides having a Board of Commissioners, should has a Sharia Supervisory Board;
(2) The Sharia Supervisory Board consists of one or more sharia experts appointed by the GMS on the recommendation of the Indonesian Ulema Council (MUI);
(3) The Sharia Supervisory Board's duty is to give directions and advice to the Board of Directors and supervises the Company's activities to comply with Islamic principles.

Thus, it can be concluded that provision on this law regulates SBB on every shariah business in limited liabilities form.

Beside aforementioned regulations, the Sharia Supervisory Board is also regulated on Bank Indonesia Regulation (PBI) number 11/33/PBI/2009 concerning Implementation of Good Corporate Governance for Sharia Commercial Banks and Sharia Business Units. Where on Article 47 paragraph 4, it is stated that the Sharia Supervisory Board is required to submit a semesterly SSB Supervision Report to Bank Indonesia no later than 2 (two) months after the end of the semester.

How about the role of the National Sharia Board? Based on the Basic Guidelines for DSN MUI Chapter IV paragraph (2), DSN MUI issued a fatwa that binds SSB in every Islamic financial institution and becomes the basis for parties to take related legal actions, based on fatwas issued by DSN MUI referred to by DPS. [61]

It can be conclude that the Shariah Governance system in Indonesia is developed well. Thus, Indonesia have good environment which can support the implementation of Maqashid al-Shariah spirit on Islamic Banking product.

8. CONCLUSION

Islamic Banking is expected to both fully comply with the Shari'ah and fulfil the ethical and social objective as required by the *Maqashid* al-Shari'ah. However, market-driven development of Islamic Banking makes it become-profit oriented, thus neglecting its role in socio-economic development. As an impact, there are several pseudo-Islamic products that violate *Shari'ah* principle.

As a conclusion, by reflecting on the dynamics in the product development, it can be inferred that the existence of *shari'ah* non-compliant products in Islamic Banking affected by the product development process. In addition, both constraints from internal and external factors on Islamic Banking may cause the creation of unideal Islamic Banking products.

Hence, in order to make the products totally sharia-compliant, there are the needs to ensure the implementation of proper *shari'ah* governance at corporate level and national level.

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INHERITANCE SYSTEM BASED ON CUSTOMARY LAW IN MUARA LEMBU VILLAGE, SINGINGI DISTRICT KUANTAN SINGINGI REGENCY

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Abstract

Indonesian society consist of various ethnic groups who have various customs and customary laws which between one and another is different and has its own characteristics that make customary law including customary inheritance law very pluralistic. The customary inheritance law of a community group is strongly influenced by the form of the kinship of the community itself, each kinship has its own inheritance law system. Likewise, the customary inheritance law in Muara Lembu Village still uses the matrilineal system which is a system of drawing the descent according to the mother's lineage. The position of women is more prominent than men. This can be seen from the phenomenon that occurs in the community of Muara Lembu Village regarding the implementation of the distribution of inheritance, that girls get more inheritance than boys. The method that used in this research is empirical legal research regarding the process of the occurrence and the process of how the law working in the community based on customary law related to the implementation of the distribution of inheritance from the perspective of customary law in Muara Lembu Village, Singingi District, Kuantan Singingi Regency. The philosophical value of why the distribution of inheritance in Muara Lembu for women gets a greater part than boys because primarily women or girls take care of their parents during their lifetime. This is in line with the principle of gender justice that women get what they want and what they are charged and become their responsibility in the family which suitable with Pancasila Justice, namely Humanity Justice within the limits of humanity in the sense of equity or justice as fairness.
Keywords: Customary Law, Property, Inheritance

I. INTRODUCTION

Humans live in societies that they need each other. Humans interact with other humans to achieve what they want, that is a form of human nature as a social being. From this interaction, it forms the agreements between one party and another. These agreements are based on the law to avoid default, in which one of the parties does not do what is his obligation. Therefore, the law exists as a binder between the parties to do what has become their obligation [1].

Law is not separated from human life so discussion about law is inseparable from discussion on human life. Human life grow continuously from familial unit, small group society, ethnic, nation and state including international society that people should obey its rules. State presence strengthens law diversity because state has authority in shaping citizenship living by creating law. The law is called as state law. In same time, there is also other law system, namely customary law that is built through tradition, in unwritten form including religious law and state law. It is collectively effective as different law system known legal pluralism [2].

Customary law is cultural product and also social product. As cultural product, customary law contains cultural values as product of human creation, desire and feel. As a cultural product, customary law is created from human desire to live in fair and civilized manner, following humanitarian instinct that have negative and positive sides. As cultural product, customary law is human civilization actualization in its era [3].

As a social product, customary law is the result of collective work, mutual consensus, for the common interest. Customary law is an instrument of social cohesion, maintaining and strengthening social cohesion that lives in a state of serenity, peace, and coexistence. As a social product, customary law is the result of joint social work belonging to a social community called the customary law community or legal partnership. Therefore, the

customary law of a community is different from one another, even though the law is shaped from the same values, the same needs, but its actualization needs to be adjusted to the context of time, place, and person, so the validity of the laws of one society is different from that of other society [4].

Customary law that is a cultural product and also social product include marital law, inheritance law and so on. One of important elements in customary law is inheritance law. Therefore, material about customary inheritance law should be presented by doing library study and field study to identify whether there is same points among various customary inheritance law in Nusantara and national law [5].

Adat inheritance is customary law containing rule on inheritance law system and principle, inherited property, the dead person and heir and method to transfer inherited property from the death to heir. Customary inheritance law is law on property from a generation to its descent [6].

Customary inheritance law in Indonesia is inseparable from various kinship systems. According to Ter Haar [7] as customary law expert kinship system is also called relatives law (*verwantschhps recht*), Soerojo Wignjodipoero [8] stated it as familial law. In other side, Hilman Hadikusuma [9] stated it as kinship customary law. Hazairin [10] states that customary inheritance law has their own characteristic coming from traditional society mind with patrilineal, matrilineal and parenatal or bilateral kinship system. Same kinship systems do not always have same inheritance system [11].

Indonesia consists of various ethnics having their own customary law . They are different from each other and have certain characteristic that make customary inheritance law is very pluralistic. Customary inheritance law of a society is influenced by kinship system of the society; each kinship system has their of inheritance law system.

It occurs at customary inheritance law in Riau province, especially in Kuantan Singingi regency at Muara Lembu village of Singingi district. Muara Lembu is a village among twelve villages in Singingi district. It has 35.325 ha area that is 5 km far from district centre and 30 km from regency capital and 135 km from province capital.

The Muara Lembu community, part of the Riau community, takes a very strong position in adhering to religion and prevailing customs. Religion is used as a barometer of the values contained in culture and prevailing customs. All cultures in the Muara Lembu community show high social values between one another. Especially as a society with the Islamic religion, they make religion a central position in their life. So that the existing customs are expected to be able to provide positive values to society without contradicting existing values.

Therefore, people keep their attitude and behavior not to break the tradition. About adat inheritance, distribution of adat property in Singingi adat society at Muara Lembu village indicate that its distribution is base matrilineal kinship according to mother line with collective society system. Therefore, property of adat society in Muara Lembu village is transferred through mother line or female kinship, inherited from one generation to next generation with taking its benefit [12].

It is interesting to do research on implementation of distribution of inherited property from customary law perspective in Muara Lembu village considering that adat inheritance distribution from customary law perspective in Muara Lembu village is different from property distribution according to Islamic Law.

II. Problems

Based on the conditions described above, it is very important to conduct research on the implementation of the distribution of inheritance from the perspective of customary law in Muara Lembu Village, Singingi District, Kuantan Singingi Regency in order to know the

customary inheritance law system and the implementation of customary inheritance in Muara Lembu Village, Singingi District, Kuantan Singingi Regency. Therefore the problem in this paper is how is the implementation of the distribution of inheritance from the village of Muara Sapi, Singi District, Kuantan Singing District?

III. Results and Discussion

There is variety in inheritance law in Indonesia (law pluralism) consisting of west inheritance law contained in Civil Law, Islamic inheritance law and customary inheritance law. Islamic inheritance law is regulated in Quran and hadith. Quran determine inheritance kinship based on blood and marital kinship. Quran verses containing strategic law principle on inheritance law is in surah An-Nisa verse 7 "For men there is a share in what their parents and close relatives leave, and for women there is a share in what their parents and close relatives leave—whether it is little or much" ˹These are˺ obligatory shares" (Surah An-Nisaa, verse 7). In this paper, author only focused on customary inheritance law particularly customary inheritance law in Muara Lembu village Singingi district of Kuantan Singingi regency.

In customary inheritance law in fact is influenced by three kinship systems in our society (14): (1) patrilineal system that draw male or father line existing in Tanah Gayo, Alas, Batak, Bali, Irian Jaya, Timor; (2) matrilineal system, which draw line from female or mother line existing in Minangkabau society; (3) parental or bilateral system that draw father and mother descent line existing in Java, Madura, east Sumatera, Aceh, Riau, South Sumatera, Kalimantan, Ternate and Lombok.

In addition to kinship system that give significant influence on customary inheritance law particularly on determination of heir and part of property inherited, customary inheritance law also have three inheritance system [13], namely (1) individual inheritance system, which determine the heirs to inherit individually, such as in Java, Batak, Sulawesi and other; (2) Collective inheritance system, a system determine that heir inherits properties collectively because the inherited property cannot be divided to each heir, for example, heirloom in Minangkabau and *tanah dati* in Hitu peninsula, Ambon; and (3) Mayorat inheritance system in which property is inherited to one son/daughter. This mayorat system has two model: male mayorat, when the eldest son is single heir of the death and (b) female mayorat, when the eldest daughter is single heir, for example in Tanah Semendo society in South Sumatera.

In addition, according to Zainuddin Ali [14], there are five types of customary inheritance law: (1) godliness and self control principle, awareness for heir, that bless in form of controllable and owned human wealth that is God bless. Therefore, to make God willingness, when a person dead and left property, then heir is aware and used the law to divide their inheritance. Therefore, they do not make dispute or fight over the property, because the conflict among heirs will give burden to the death's soul in his/her way to God. Distributed or not distributed the inherited property is not goal, but it is harmony among heirs. (2) Right equality and togetherness, in which heir have same position as one have right over the property, equal between right and obligation for each heir to get their property. (3) Harmony and kinship principle, heirs keep harmonious relationship in enjoying and using inseparable property and in finishing distributable property. (4) Peaceful negotiation principle, heirs divided the properties through negotiation led by senior heir. And if there is agreement on inheritance distribution, the agreement is made sincerely with good saying from each inheritor. (5) Justice principle, in a family fairness principle is emphasis to create harmony in the family that reduces possibility of damaged relationship of relatives.

About inheritance, customary inheritance law existing in local community may be classified into four marital properties that is inherited property. The four inheritance properties are [15] :

1. *Harta pusaka Tinggi*
   Harta Pusaka Tinggi is all properties inherited from generation to generation from ancestor. It is called as *Harta Pusaka Tinggi* because it has been inherited for more than three generations. *Harta Pusaka Tinggi* may be dry land (farm land) or wet land (rice field) or other form.
2. *Harta Pusaka Rendah*
   Harta Pusaka Rendah (*harta suarang* or *joint property*) that is all property obtained during marital binding either both works or only husband work. *Harta Pusaka Rendah* may become *Harta Pusaka Tinggi* when it has been inherited to the third generation, for example from grandmother to grandchild.
3. Prenuptial property
   There are two types of prenuptial property
   a. *Harta tepatan* (wife's property)
      Harta tepatan is all wife property carried into the marriage obtained through inheritance or her business or other's gift before marriage.
   b. *Harta pembao* (husband's property)
      Harta pembao is all property of husband obtained before marriage in form of relative's gift or his work. *Harta pembao* may include jewelry, rice land, livestock, movable goods and unmovable goods.
4. Harta Pemberian
   Harta Pemberian is all properties gifted from family, relatives or other to husband/wife before marriage or after marriage. Gifted property before marriage will add prenuptial property of each party, while gifted property after marriage will be common property

About customary inheritance law in Muara Lembu village, Muara Lembu society as part of Riau society take strong position in keeping religion and existing tradition. Religion is barometer over values contained in a culture. All cultures in Muara Lembu society show high social value to each other. Even, people having faith in Islam make the religion as central position in their life. Therefore, its tradition is expected to give positive value to people without violating existing values.

Distribution of inherited property in Muara Lembu village still used matrilineal system according to mother line with collective society system. Position of female is stronger than male. It is indicated from phenomena occurring in Muara Lembu village society on implementation of inherited property in which daughter got more property than son.

Inherited property according to inheritance law in Muara Lembu society as presented by Bapak Datuk Basarudin and Datuk Saripindri include [16] :

Four properties as inheritance: (1) *Harto Pusako Tinggi*, consisting of rice field, dry field, and land received from ancestor from generation to generation; (2) *Harto Pusako Rendah* (harta suarang/joint property), parent's property obtained for their marriage; (3) prenuptial property, consisting of wife's prenuptial property called as *harta tepatan* and husband's prenuptial property called as *harta pembao*; (4) gifted property, all property gifted from family or other before and after marriage.

Based on the interview, it is clear that *Harta Pusaka Tinggi* is original property, which is received from ancestor from generation to generation. According to customary inheritance law of Muara Lembu society, there are also divisible and indivisible inheritances. Indivisible *Harta Pusaka Tinggi* is collective property. Indivisible *Harta Pusaka Tinggi* may be used by turn.

Meanwhile, *Harta Pusaka Rendah* can be distributed to the heirs. However, *Harta Pusaka Rendah* may include property that can not be distributed the heirs, similar to *Harta Pusaka Tinggi*.

Prenuptial property can be distributed to heir, but it is given back to origin of the property, when there is divorce or death. Gifted property when occurred before marriage will add prenuptial property of each party and when occurred after marriage it is joint property.

Implementation of customary inheritance law in Muara Lembu have occurred according local customary law, with negotiation among parties. Although there is obstacle in its implementation, it is solved with negotiation. Adat society in distributing inheritance and in solving inheritance conflict used always customary inheritance law. However, there is problem when they want to distribute inheritance property using Islamic inheritance law or Civil Inheritance Law (BW).

For Muslims the administration of inheritance law is more complex because the law they should take that is created through national legislation did not give clear law regulation to solve inheritance problem. Islamic inheritance law is not imperative law for Muslims. It is different from marriage law that is imperative for Moslem that will get married. Therefore, Islamic inheritance law for Moslem in Indonesia is choice of law, which in fact some people do not using it [17].

As is Law no 7/1989 on Religion Court, inheritance matter in KHI is not obligatory provision that Moslem should do in distributing inheritance property. KHI is just guidance for person or institution requiring it (that means it may be ignored). It is indicated in the Considering part at point b of Presidential Instruction no 1/1991, stipulating "Islamic Law Compilation in point a by Governmental Institution and by public requiring it may be used as guidance and to solve problems in the field". So use of Islam inheritance law is matter of choice for Moslem. It may be used when the adat society agree.

People are given freedom in selecting which inheritance law to use. When there is agreement among them, people can use BW inheritance law, Islamic inheritance law or customary inheritance law. It also occured in Muara Lembu village. Adat society used customary inheritance law, and non adat society used Islamic law and non Moslem used BW inheritance law [18].

Philosophy value of female getting more part than male is due to in principle daughter care their parent along their life [19]. It based on gender equality that female got what their burden and responsibility in family and Pancasila justice, namely Humanitarian Justice, within justice as fairness limit. Justice as fairness include respect to human right, proportional justice and distribution and giving benefit for all people.

There were some obstacles in implementation of inheritance property distribution in Muara Lembu village. According to Lawrence M Friedman, law system is collection of all subsystems [20]. Actual operation of a legal system is a complex organism in which structure, substance and culture interact. External social world give soul and reality on legal system. Legal system is not isolated; it depends absolutely on inputs from external. Legal system contains three interacting subsystems and should be viewed in a whole effective legal system. Law as a system has three subsystems: legal structure, legal substance and legal culture. (1) legal structure is a basic and real element of legal system. Legal structure relates to institutions having authority to make and do laws created by legal system such as court, legislative institution. HLA Hart stated that characteristic of legal system is multiple collections of rules. Legal system is unity of primary and secondary rules [21]. (2) Legal substance is matter or form of laws. Legal culture is attitude and social value element [22]. (3) Legal culture is one's attitude on law and legal system, relating to conviction on their value, mind, and or idea and hope. Legal culture consist of internal legal culture (legal

culture of legal expert) and external legal culture (legal culture of public). Legal culture refers to parts in general culture, tradition, opinion, way of act and though that direct social power toward or away from law and with certain ways.

Law will play role well when the three components (legal structure, legal substance and legal culture) interact to each other and play their role according to their function, so law will run effectively according to its function. When the three components of law system did not run well, there will be problems in making law function as innovation and development media for society [23].

Legal structure has no meaning if it is no related to legal substance. Legal substance is core or law that theoretically relates to justice. Therefore, understanding on legal enforcement is not only intended for enforcement to law to any one as legal state desire that require all citizen to obey law, but also relates to implementation of justice in society life. Law Implementation and enforcement in the meaning of legal substance manifestation in various human interactions, as individual or as social creature that always interact in saving their life can only be done when legal structure play role in its task and function. It is meaning of legal subsystems interacting in a unity system. It also occurs for legal culture subsystem. Law comes from norm, while norm is accumulation of agreed values. So, in this culture, the values grow and develop [24].

Based on the above matter, there are some obstacles related to implementation of inheritance distribution in Muara Lembu village. The first is legal structure side. Legal structure is basic and real element of legal system. Legal structure relates to institution having authority to make and enforce the customary inheritance law. The obstacle is that customary institution only function as facilitator in implementation of customary inheritance law. When there is dispute, adat institution in this case societal prominent figure can only give advice without sanction [25]. Conflict of interest from each party may occur. The problem is worsening when it relates to dispute of which inheritance law should use Islamic inheritance law, customary inheritance law or BW inheritance law. Complexity coming from the legal dispute should get solution. It is necessary optimization role of customary institution and adat leader in doing customary inheritance law in Muara Lembu village.

The second obstacle related to legal substance. Legal substance is matter or form of rules; in this case customary inheritance law in Muara Lembu village. Although it is not written as law, customary inheritance law is still used and obeyed. However, in its implementation there is obstacle. For Moslem, problem of using inheritance law is more complex because law they should take created through national legislation did not give clear law regulation to solve inheritance problem. Islamic inheritance law is not imperative law for Moslems. It is different from marriage law that is imperative for Moslem that will do marriage. Therefore, Islamic inheritance law for Moslem in Indonesia is choice of law, which sometime it is not followed. So, in its implementation there is problem of desire of heir to use different inheritance laws. To deal with the obstacles, there are some efforts that may be done: (1) still left inheritance law in variety and its dispute in implementation is delivered to court; or (2) do unification by making new national law in inheritance field [26].

The third problem relates to legal culture. Legal culture is attitude and social value element [27]. Legal culture is one's attitude on law and legal system, relating to conviction on their value, mind, and or idea and hope. Legal culture refers to parts in general culture, tradition, opinion, and way of act and though that direct social power toward or away from law and with certain ways. Obstacle in implementation of customary inheritance law in Muara Lembu village is that sometime there is people not doing what have been agreed in inheritance distribution based on local customary law. So it leads to dispute and problem in future. Therefore, it is necessary effort to build understanding and awareness of each party according to Godliness and Self control principle. It is awareness for heir that bless in form

of human wealth that is controllable and owned is God bless. Therefore, to make God willingness, when a person dead and left property, then heir is aware and used its law to divide their inheritance. Therefore, they do not make dispute or fight over the property, because the conflict among heirs will give burden to the death's soul in his/her way to God. Distributed or not distributed the inherited property is not goal, but it is harmony among their descents.

It accords to gender equality that female got what their burden and responsibility and family and Pancasila justice that is humanity justice in justice as fairness [28]. Justice as fairness include respect to human right, proportional justice and distribution and giving benefit for all people. It is intended to keep inheritance property and distribute it based on agreement by still keeping its brotherhood. It is also to encourage harmony of the family that will lessen possibility for damaging relationship in the family by still considering justice and benefit based on agreement in a peaceful negotiation.

IV. Closing

a. Conclusion

The implementation of the distribution of inheritance to the indigenous people of Muara Lembu Village still uses the matrilineal system, which is a hereditary drawn system according to the maternal lineage. The position of women is more prominent than men. This can be seen from the phenomenon that occurs in the community of Muara Lembu Village regarding the implementation of the distribution of inheritance, that girls get more inheritance than boys. The philosophical value of the distribution of customary inheritance in Muara Lembu, the women get a more share of the parties than boys, because primarily women or girls who look after their parents during their life are based on the principle of gender justice that women get what they are charged and responsible for in the family. This is in line with the principle of gender justice that women get, what they are charged and responsible for which it is suitable with Pancasila Justice, namely Humanity Justice within the limits of humanity in the sense of equity or justice as fairness. The scope of justice as fairness includes respect for human rights, justice, and proportional distribution and brings benefits to all people.

b. Suggestions

It is necessary to optimize the role of customary institutions and traditional elders in implementing customary inheritance law in Muara Lembu Village in resolving conflicts that arise in the distribution of inheritance based on customary law. The parties should continue to carry out what has been agreed in the distribution of inheritance based on local customary law based on the principles of deliberation, consensus, and the principles of justice and benefit.

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AN ANALYSIS: THE SYNERGY OF MODUTU VALUES AS GORONTALO TRADITIONAL MARRIAGE PROCESSION IN ISLAMIC LAW PERSPECTIVE

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Abstract

Customs developed among Gorontalo people are strongly affected by Islamic teachings, upholding their cultural motto "*Adati hula hulasareati-Sareati hula-hula to Kitabullah*" that means "Culture refers to sharia, sharia refers to the Holy Koran". Therefore, for their cultural marriage procession, Gorontalo people always refer to Islamic teachings, as the majority of the people are Moslems. I applied statue approach method or legislative approach and historical approach with juridical-empirical research method. This was descriptive research analyzing several types of data i.e. (1) Primary Data, namely data obtained from rules and norms in Islamic Law and principles and principles believed in Gorontalo Customary Law, and (2) Secondary data, namely data obtained from interviews with respondents (indigenous leaders / religious leaders, Gorontalo culture) as well as literacy data reviewed from several books, articles, and narratives (literature studies). All data is collected and synchronized with processed methods of legal analysis.The findings argued that *modutu*(goods delivery) procession in the Gorontalo custom marriage was sacred and meaningful. However, by the era development, the sacredness began to disappear, or the marriage implementation gradually became less meaningful, and even violated the traditional values, as most Gorontalo people could not understand it well. The cultural element with its local wisdom property had been transformed in accordance with the more modernized era. Unfortunately, values contained by *modutu*procession began to disappear. Actually, when the values are well understood, both bride and bridegroom can lead to happier ending.
Keywords: *Modutu*Value; Marriage; Customary Law; Islamic Law

1. INTRODUCTION

Gorontalo is included in the 19th customary law territories that cannot be separated from Indonesia. Therefore, legal bases of Gorontalo custom marriage are the Holy Koran, hadiths, the Law Number 3 Year 2006, and a compilation of Islamic laws with its philosophical fundamental "Custom refers to sharia, sharia refers to the Holy Koran". It clarifies that Gorontalo culture, especially that regarding marriage, means appreciating and obliges their cultural events to be implemented in accordance with the culture and Islam.

Marriage is an obligation for Moslems that have met the requirements and concern of sins. Islam teaches that when someone has been capable to marry, s/he has to marry immediately. Islam regards marriage as a sacred and highly-valued event confirmed by Prophet Muhammad in a hadith, "Marriage is my command, and those not complying with it are not my fellows."

Based on the hadith, marriage is not only a suggestion, but also an obligation. In Gorontalo, the marriage shall not violate any Islamic teachings. Gorontalo marriage is distinguished in the term of its implementation, due to the majority of Moslems living there. Obviously, Gorontalo culture tightly embraces Islamic teachings.

Custom is one of the valuable national cultures belonging to all countries in Indonesia. Gorontalo has referent norms and values that are always be looked up to consisting of: a) *Wu'udu*(social rules) that enacts sanctions but is excluded in the law. For example, *wulea lo lipu*(sub-district head) that does not wear *kopiah* shall not be respected in *tubo*(cultural honor) by *tauda'a* (the head of village); b) *Aadati*(*wu'udu*that enacts sanctions) that is called customary law by Gorontalo people; c) *Tinepo*(politeness rules) that is guidance to behave in respect of others. For instance, cultural welcoming ceremony for the state officials that are not registered in *pulanga*(a cultural position); d) *Tombula'o* (social rules) that is guidance to recognize and identify the good and the bad. It prevents any dictatorship that may be conducted by the ruling government and apathetic deeds of the ruled people; and e) *Butoqo*(law) that is the regulation stipulated by *olongia*(the king), *baate*(public figure) and guidance to cast off a conflict that may exist among the people (1)

One of the cultural philosophies upheld by Gorontalo people is "*aadati ma dilidilitobolompo 'aito, aadatimahunti-huntingobolomopodembingo, aadati ma dutu-dutubolomopohutu*' that means the patterned culture shall be connected, the cut culture shall be attached, and the prepared culture shall be implemented (2)

Based on the cultural motto and philosophy, each procession in Gorontalo custom marriage shall strictly refers to Islamic teachings, because customary law and Islamic law walk side by side. Moslems believe in "*al-AadatuMuhkamatu*", or "Culture and customs can be regarded as law" (3)

However, considering the current phenomenon in Gorontalo regarding its custom marriage, the culture that has been upheld for decades are seemingly faded due to era development. Therefore, synergy among the government, public figures, and people shall be established to preserve cultures and customs that have guided Gorontalo people.

1.2. Research Methods and Benefit

The research applied statue approach method or legislative approach and historical approach with juridical-empirical research type. It was descriptive research examining several types of data i.e. (1) Primary Data, namely data obtained from rules and norms in Islamic Law and principles and principles believed in Gorontalo Customary Law, and (2) Secondary data, namely data obtained from interviews with respondents (indigenous leaders / religious leaders, Gorontalo culture) as well as literacy data reviewed from several books, articles, and narratives (literature studies). All data is collected and synchronized with processed methods of legal analysis.

1.3. Paper Structure

This research focus is to discuss how the issue of the application of modutu values in gorontalo traditional marriage. The problem that occurs during the gorontalo traditional marriage procession is the change of cultural elements that are local wisdom that is currently starting to fade and the stages in the traditional procession of marriage have begun to change. This is due to differences in the mindset of people who are already somewhat modern, lifestyle, technological advances are increasingly sophisticated, the needs of the community are increasing and influenced by cultures from outside the Gorontalo region. Therefore, how to maintain modutu values in gorontalo wedding traditional procession?

2. DISCUSSION

2.1.1 The Nature of Marriage Procession in Gorontalo Customary Law

As a legal action, marriage brings a legal consequence that is giving both rights and responsibilities to each party, either the husband or the wife. Additionally, it also gives administrative duties and authorities to the state to infiltrate a private territory of individuals; such as to determine each party's validity and legal status, including the legal relation with the third parties i.e. son/daughter-in-law and father/mother-in-law (4)

Besides, marriage is considered as one of the religious, social, and cultural acts, implying that sociologically, it ties all elements existing in social life. Gorontalo people have been obliged that their marriage shall be entirely ruled by the Gorontalo law and contains items related to the marriage meaning, escorting process, and cultural requirements in the forms of cultural properties or attributes. The traditional custom shall be preserved and maintained, as instructed in "*Malo kakali, lontobutuasali, tohuliyawali-wali*" that means "What has been determined since the very beginning has to be continuously implemented" (5)

Formerly, the marriage process was strictly performed based on the cultural values. Currently, the process still sticks to the values, but gradually violates them. The main cause

is that people wants to save their time and money due to socio-economic change, advanced technology, and more improved social knowledge.

In the terms of its hierarchy and meaning, the implementation of Gorontalo custom marriage has not been completely altered. People apparently only modify the procession order, some equipment, and escorting art. For example, regarding the implementation, we shall conduct 21 stages when referring to the traditional method. However, by the modern method, we have to only perform five stages that are informal encounter (*modulohupa*), proposal (*motolobalango*), goods delivery (*modutu*), food material delivery (*modepitadilonggata*), and marriage (*moponika*).

2.1.2 *Modutu* Values among Gorontalo People

In Gorontalo marriage, people have always implemented their custom in each of their marriage processions. One of the processions is *modutu*. However, there are people that hold the procession expensively, but do not alter any value contained by the procession.

Regarding the issue, we can sum up that there are some social levels here, as defined by several local public figures of Gorontalo. Alim Niode (local public figure) describes that a) There is a group of individuals that understand and implement custom marriage in accordance with their understanding; b) There is a group of individuals that are ignorant, but they implement the procession, since they regard it as a part of marriage processions. They believe that the procession may bring goodness in the term of customary, religious, or social aspects; c) There is a group of individuals that are ignorant and do not implement the procession, as they do not understand the values; and d) There is a group of individuals that understand the procession, but do not implement it, because they consider that *modutu*is not required in the marriage procession (interview, April 5th, 2019).

Furthermore, Abdul Rasyid Kamaru (religious figure) explains that the levels of social understanding according to Islam are: a) People with general understanding in *ubudiyah*business. For example, man that says "I am God" will be perceived as violating Islamic rules by these people; b) People with special understanding. For example, there is a man that says, "I am God". Instead of perceived that the man is saying that he is the God they worship, they will assume that he may be trying to say something; and c) People with extraordinary understanding. For example, a man that says "I am God" will be perceived that he only keeps his faith for God.

Hierarchically, *modutu*is a goods delivery in Gorontalo marriage. In addition to that, *modutu*is regarded as the encounter and confirmation that both families from the bride and bridegroom have been united. It is witnessed by the local government, sharia officials, relatives, and neighbors. Moreover, the participants are *utoliyaluntudulunggalai'oatau*(representative from the bridegroom's family), *utoliyaluntudulungowalato*(representative from the groom's family), the bridegroom's family, and the bride's family.

Picture 1: Adat trial "Momu'oNgango" (confirm) attended by the head of the sub-district and syara officials. He was confirmed with the "Modepita Maharu" stage (submission of dowry / tonelo).

Picture 2: Carry the treasure in the house of the bride

Differences between traditional *modutu*and modern *modutu*implemented in Gorontalo marriage are:

a. In the term of implementation, there is no difference.
b. In the term of goods delivered, the traditional package containing fruit is altered to be a package containing a larger amount of money. However, it is not implemented in all areas of Gorontalo, because some people still prefer the traditional one.
c. In the term of agreement, the difference is significant. Traditional *modutu*determines the amount of goods based on the bride's parents; while modern *modutu*determines it based on the bride's parents and her academic or social status. The higher her achievement, the higher the amount (8)

My observation and analysis revealed that the *modutu*procession was still traditionally and modestly implemented in Gorontalo. However, there had been more modern and expensive version implemented by some Gorontalo people because of different mindset, lifestyle, more sophisticated technology advance, more social needs, and influences from other cultures. It indicated that the era development and transformation had become more complex, so had Gorontalo custom and tradition.

Values contained by the *modutu*procession might be different from other values contained by the same procession in other countries in Indonesia, since each country had their own methods to hold their traditional ceremonies. For instance, in Gorontalo, there were several stages (*lenggota lo nika*) that were implemented before and after the main

procession (marriage). Additionally, there were 21 stages that should be held before the marriage i.e.: 1) observing (*mongilalo*), 2) requesting the news (*mohabari*), 3) requesting confirmation (*momatata'upilo'otaawa*), 4) connecting/proposing (*motolobalango*), 5) making and easing the way (*monga 'atodalalo*), 6) mediating the bride and bridegroom's families (*molenilo*), 7) requesting blessing from the families, witnessed by the local government and religious officials (*momu'ongango/modutu*), 8) delivering the goods (*modepitomaharu/tonelo*), 9) delivering the side dish (*modepitadilonggato*), 10) engaging (*mopotilantahu*), 11) finishing reading the Holy Qur'an (*mohatamuqurani*), 12) dancing (*motidi*), 13) resting (*mopotuluhu*), 14) pre-*akad nikah* (*moponika*), 15) *akad nikah* (*mongakaji*), 16) breaking the *wudhu* water (*molomelataluhu tabiya*), 17) *menyandingkan*(*mopopipidu*), 18) advising (*palebohu*), 19) taking the bride and bridegroom (*modelo*), 20) night event (*mopoturunani*), and 21) serving the food (*mopotamelo*).(9) Related to the stages above, shows that overall the traditional procession of marriage in Gorontalo has items related to meaning, accompaniment process, customary equipment in the form of cultural objects or customary attributes. Thus, Gorontalo is known as an area that has a long marriage procession and everything must be carried out.*Modutu* is one of the series in the traditional marriage procession that has noble values.The modernized *modutu*procession was presumably affected by Gorontalo people's mindset contaminated by sophisticated technology and era development. Therefore, to anticipate it, we need to improve the *modutu*implementation, especially in its values.The values are:

1) Moral value

The value is considered as the main value, due to its correlation to behaviors and speech. By maintaining a good behavior, all properties related to the *modutu*procession will be easier and simpler. There is no restriction for those that desire an expensive *modutu*, but it shall not violate the sharia and law applicable in Gorontalo.

2) Islamic educational value

Because of more modern mindset that has created such cultural transformation and alteration, people shall be given more religious understanding and knowledge. Dove mentions that in traditional culture, mindset is referred as inner-construction that is necessary to face changes. It is a mistake that developers perceive traditional cultures as threats (Rato, 2015:49). Regarding Islamic education, Maslan Paweni proposes that traditional education is different from the modern one in the terms of quality, quantity, and style. The later one has been greatly influenced by the era development. Therefore, all characteristics related to the traditional value of *modutu*are not understood by the young generation (interview, April 15th, 2019). Therefore, we need to develop character building and teach local content to them. Despite their high education, they still do not have adequate knowledge about *modutu*.

3) Economic value

The *modutu*procession closely relates to individual financial capability and social status due to its implementation that cannot be separated from both aspects. However, the current situation proved that Gorontalo people tended to hold the ceremony in an either modest way or luxurious way. My analysis showed that most Gorontalo people could not afford a perfect and complete *modutu*procession. Therefore, in order not to disturb the sacredness of *modutu*procession, poor people were suggested to implement the procession modestly and in accordance with the agreement made by both families.

4) Social value

In general, people could not live without others. In other words, there were various characters, traits, and ideas that later caused changes to happen. It impacted on *modutu*, as people became sensitive to changes. Consequently, sacred and important *modutu*had gradually become to be ordinary. For example, *kola-kola*, the media to deliver goods in the

*modutu*procession had been substituted by cars or trucks. In addition to that, the goods delivered were determined based on the social status of bride and her parents.

2.1.3 The Implementation of *Modutu* Values in the Perspective of Islamic Law

Gorontalo is one of the countries in Indonesia that come with cultural and custom diversity, not to mention its custommarriage. Before the Dutch colonization, Gorontalo was proud of its kingdoms that were regulated by customary law. Besides, Gorontalo is also well-known for its *'lima pohala'a*' term meaning five territories in one family tie. The territories are *pohala'a*Gorontalo, *pohala'a*Limboto, *pohala'a*Suwawa, *pohala'a*Boalemo, and *pohala'a*Atinggola. Therefore, according to the customary law, Gorontalo is included in 19 customary law territories in Indonesia. In Gorontalo, religion and custom are conjoined under the principle "Custom refers to *sharia*, and *sharia* refers to the Holy Koran".

Map of *Pohala'a* Gorontalo

The *modutu*arises conflict when there are pros and contras expressed by those preferring customs and those that do not. The latter group perceives irrelevance in *modutu*and that it costs a lot of money; while the first group sees *modutu*differently, as it is actually voluntarily The current fashion of *modutu* shows that people compete to make it as luxurious as possible by delivering expensive items although it is unnecessary. It is the meaning of the procession that is considered as essential. Philosophically, the custom marriage constitutes an ideal, flawless marriage according to the legal, religious, social, and customary aspects. Nevertheless, such value is often neglected.

Meanwhile, in Islamic law, custom or habit is called *urf*, or sayings, acts, or leaving situation understood by many people and regarded as their tradition. Therefore, *urf* is also called custom. Moreover, sharia experts does not differ *urf*from custom and habit (6). Furthermore, Islamic law and common law relate to each other. Cristian SnouckHurgronje proves it in his theory confronting that the law applicable among Moslems is actually their own customary law. Islamic law may be stipulated when it has been approved in accordance to the common law. In other words, the latter law determines the feasibility of the first one (7).

Regarding the implementation of *modutu*values based on the perspective of Islamic law and customary law, Abdul Wahab Lihu (public figure in Gorontalo) conveys, "Customs refer to sharia, sharia refers to the Holy Koran." Therefore, the *modutu*procession contains both Islamic value and customary value. The goods delivered by the bridegroom have been regulated by Islamic law. In addition to that, the *modutu*procession as a part of custom marriage in Gorontalo has been long conducted before Islam entered the territory, and people shall preserve such procession" (interview, March 20th, 2019).

In accordance with the argument, Abdul Rasid Kamaru (*qadhi*of Gorontalo) declares that the Holy Koran and hadist regulate *modutu*, in the term of goods delivery to the bride. In conclusion, there are no *ijtihad* and *ijma* anymore, because Moslems believe that when an act is not mentioned in the Holy Koran, hadiths may mention it, so we have to refer to it. However, while the latter also does not mention it, we can refer to *ijtihad*. When we cannot rely on *ijtihad*, we are given the last alternative that is *ijma*. Religiously speaking, some people may not be able to afford the *modutu*procession. To solve it, they can select the most necessary requirement, easing them to do the procession (interview, March 28th, 2019).

According to the customary law and Islamic law, *modutu*shall be implemented, but shall be easy, simple, and affordable. Why? Most Gorontalo people are a lower middle class, so they can only afford a simple *modutu*to eliminate the burden. Meanwhile, there is no restriction for those that desire a luxurious *modutu*procession, but they shall highlight the meaning of *modutu*itself and do not violate both Islamic law and common law.

3. CONCLUSION

The implementation of *modutu*procession in Gorontalo custom marriage was still preserved until nowadays. Nevertheless, the traditional values had been gradually transformed due to the people's more modern mindset, lifestyle, technology advance, and increased social needs.

Gorontalo, a country with the motto "Customs refer to sharia, sharia refers to the Holy Koran" upheld their cultural principles and customs in all life aspects, not to mention in their marriage procession, especially in the *modutu*procession, preserving its values despite many external influences.Custom values are a new concept in *modutu*and shall be developed by Gorontalo people to preserve it. The concept has not been completely applied in the *modutu*procession, hence requiring optimization, since the procession closely relates to the young generation that certainly will experience it. In addition to that, the *modutu*values will be preserved and well maintained if there is a synergy between the government as the authority holder and Gorontalo people as the custom actor.

Modutu is not intrinsically included in the pillars and conditions of marriage but is one of a series of gorontalo wedding traditional processions that must be carried out. In the review of Islamic law, there is no command to fulfill it, and there is no prohibition for those who carry it out. Even *modutu* (dowry) is carried out simply, easily, and not burdensome. Therefore, the implementation of modutu must be based on the prevailing customs in Gorontalo and not oversleep the Islamic *shari'a*.

4. RECOMENDATION

This article discusses the *modutu*values in Gorontalo custom marriage and was made as a contribution for Gorontalo as one of the countries in Indonesia upholding their customary law. In spite of its modest or expensive implementation and influences of era development, the *modutu*procession shall be maintained and implemented in Gorontalo custom marriage.Considering the problems related to the application of modutu values in gorontalo traditional marriage procession is very important in the life of gorontalo people, it is necessary to have synergy between the government, indigenous stakeholders and the community to jointly maintain and preserve gorontalo culture in order to be well maintained and timeless and known by all levels of society both from outside Gorontalo and abroad**.**

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THE ROLE OF ZAKAT MANAGED BY BAZNAS TO OVERCOME THE IMPACT OF COVID-19 PANDEMIC IN INDONESIA

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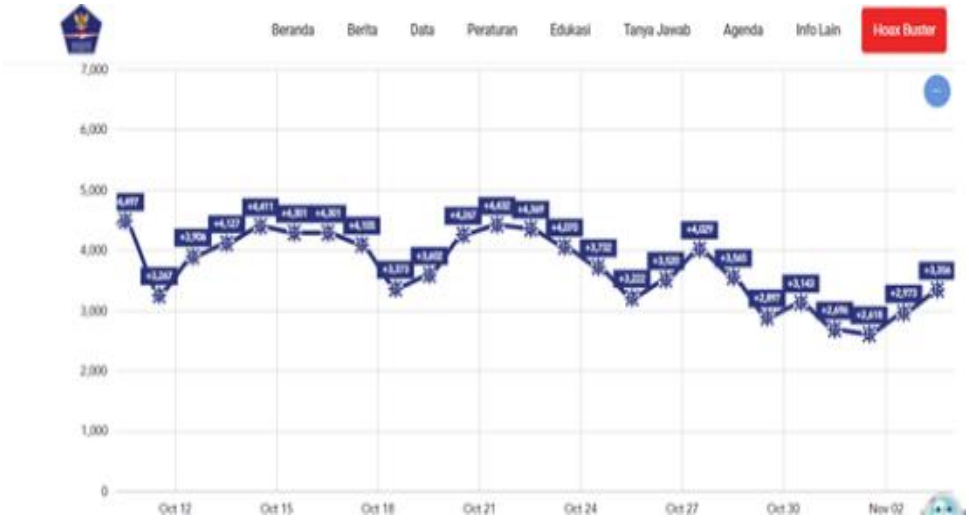
Abstract
The COVID-19 pandemic has been the main trigger for the increase in poverty rates in Indonesia. This is a challenge for Islamic law and institutions to participate in addressing this impact. This research aims to present the solutions offered by Islamic law and institutions, namely zakat and BAZNAS as government institutions of zakat management nationally. This research will discuss the potential of zakat and the role of BAZNAS as a zakat management institution in addressing the socio-economic impacts arising from the COVID-19 pandemic. This research also provides advice for managers and policy legislators to be able to optimize zakat as a solution in the midst of the current crisis.
Keywords: Zakat, The Role of Baznas, COVID-19.

1.1. INTRODUCTION

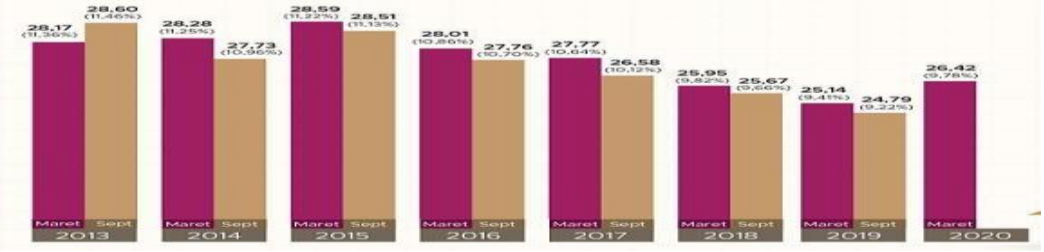
At the end of 2019, the world was surprised by the emergence of the COVID-19 virus in Wuhan, one of the biggest cities in The People's Republic of China. The spread of this virus is quite fast, so more than 180 countries have confirmed the first case of COVID-19.



Graphic 1.1 Daily development of COVID-19 confirmed cases
Source : Satuan Tugas COVID-19

In Indonesia, based on data of October 2020, there were 379.109 COVID-19 confirmed cases.[1] Most nations have attempted to control the spread of infections by reducing the rate of contacts between people.[2] The various methods to achieve such reductions in contacts are referred to generically as "physical distancing" measures—also known as "social distancing" or "spatial distancing".[3] The Indonesia Government has issued several regulations in order to reduce COVID-19 confirmed cases. One of them is Large-Scale Social Restrictions (LSSR) in all regions in Indonesia. But unfortunately, this movement has decreased overall economic activity.[4]

The implementation of LSSR has more or less affected the supply and the demand of the companies; therefore, it has decreased the production.[5] With this condition, the companies that are unable to survive will begin to cut their employee's salaries, lay off employees, and became bankrupt. This is one of the triggers for the emergence of new poverty in Indonesia because many people have lost income so they are unable to meet their daily needs. The ability of the community to meet basic needs is one of the parameters to determine whether the population is poor or not.[6]



Graphic 1.2 Number of Poor People in Indonesia Over the Last 8 Years
Source : Badan Pusat Statistika

Based on data was released by Badan Pusat Statistika, the poverty rate in Indonesia of March 2020 has increased to 26.42 million people. Compared to March 2019, the poverty rate was at 25.14 million people. Thus, it can be concluded that there has been an increasing number of poor people in Indonesia within the last one year. Besides, we could see at picture 1.2 the trend of decreasing the number of poor people happened from 2016 to 2019.

Therefore, an instrument is needed to overcome this COVID-19 effect. One of the potential instrument in Indonesia is zakat. in Islam, zakat is an additional economic instrument that can help the government to reduce poverty and inequality levels, and zakat also has a significant influence on national economic indicators. [7] Zakat as one of the concrete forms of social security implied by Islamic Law, in its following development functions as a moving tool for ummah economy through productive sectors managed by the recipient. [8] Giving zakat is an obligation for every Muslim who is able and has fulfilled the conditions under the provisions of Islamic law. This is supported by the fact that the number of Indonesia's Muslim population is the largest in the world. Therefore, Indonesia has a great potential for zakat. In Indonesia, zakat is also regulated in Undang-Undang No. 23 Year 2011 concerning Zakat Management.[9] Zakat will have the potential if it is supported by maximizing the distribution of zakat as a form of income distribution. This needs to be managed properly.

Indonesia has an institution focuses on collecting and distributing zakat, namely Baznas. BAZNAS is a non-structural government institution that has the authority to carry out zakat management tasks nationally which was formed by Presidential Decree No. 8 of 2001 on January 17, 2001. The role of BAZNAS as an institution that is authorized to manage zakat nationally is further strengthened by the birth of the Law Number 23 Year 2011 regarding Zakat Management. The function of BAZNAS is the function of planning, implementing, controlling, reporting, and being accountable for the collection, distribution and utilization of zakat. BAZNAS has duty to manage zakat, infaq and alms. BAZNAS has duty to manage zakat, infaq and alms. Looking at the majority of Indonesia's population is moslem, actually zakat is an economic sector that has the potential to improve or sustain the economy in Indonesia during the COVID-19 pandemic.

Therefore, with the potential for zakat, this study will discuss the potential of zakat and the role of BAZNAS as a government zakat management institution in overcoming the socio-economic impacts arising from COVID-19 in Indonesia. The purpose of this study is to explain the potential of zakat in helping to deal with the impact of COVID-19 in Indonesia and to review the role of BAZNAS as a government zakat management institution in helping to distribute zakat on a national scale in the midst of the COVID-19 pandemic in Indonesia.

1.2. RESEARCH METHOD AND BENEFIT

The research method used to produce this paper is a normative legal research method. Legal research is a scientific activity based on methods, systematics, and certain thoughts that has purpose to study one or more specific legal phenomena by analyzing them. In normative legal research, researchers only use library materials or secondary data consist primary legal materials, secondary legal materials, and tertiary legal materials that regulate or discuss zakat, including zakat management and national zakat management institutions and other statutory regulations set it up. [10] The data analysis technique used in this research is qualitative data analysis technique. Efforts are made by working with data, organizing data, sorting it into manageable units, synthesizing, looking for and finding patterns, finding something important to study, and deciding what to write for others to read. [11]

1.3. PAPER STRUCTURE

This research is based on juridical-normative research and also based on literature sources. This study aims to review the potential of zakat as an instrument of Islamic economic welfare in overcoming the socio-economic impact of COVID-19 in Indonesia. To limit the scope of discussion, this study will describe the concept of zakat in terms of legal aspects, both Islamic law and national law. Therefore, this paper will review the role of BAZNAS in assisting the distribution of zakat on a national scale during the COVID-19 pandemic in Indonesia.

2.1. BACKGROUND

2.1.1. The Concept of Zakat

Based on the Al-Qur'an Surah Al-Baqarah verses 275-281, there are three important sectors in the economy according to the Qur'an, namely the real sector (*al-bai)* or business and trade, the financial or monetary sector as indicated by the prohibition of usury, and zakat, donations and alms (ZIS). [12] The word zakat comes from an Arabic root for both purification and growth.[13] In the first sense, with paying zakat all kinds of possible impurities from the wealth that we earn will be released. In the second sense, with giving several wealth through zakat, those people who accepted it could fulfill their needs. According to the term, zakat is part of the property with certain conditions that that Allah obliges the owner to give for those who are entitled to receive it with certain conditions as well.[14] Zakat is a property that must be issued by a Muslim or a business entity to those entitled to receive it by Islamic law. [15] Zakat is regulated in several verses in Al-Qur'an and most of the words zakat are accompanied by shalat. This is interpreted that carry out zakat duty is crucial as well as carry out shalat. [16] In Al-Qur'an, zakat obligation is mentioned in At-Taubah verse 103. Based on historical studies, the mandatory zakat obligation is a sign that the importance of *hablumminallah* or a relationship to Allah, but also a *hablumminannas* or relationship to humans. [17] At-

Taubah verse 103 explains that zakat is taken from people who are required to give zakat give it to someone who is entitled to receive it through amil.

Yusuf Qardhawi revealed that the success of zakat management will depend on: [18]

a. The right and good amil zakat must be Muslim, honest, has good teamwork, and knowledgeable.
b. Ijtihad about the types of assets that develop
c. The domination of the fanaticism of the school and the spirit of imitation that applies to the scholars whom they choose their opinion to determine the laws of zakat
d. Weakness in the spirit of diversity and understanding of Islam in the person of ummah when the management of zakat is handled by the government.
e. There are many countries whose governments handle zakat affairs, but the zakat target is not achieved as expected

Characters in zakat consist of:

1. Muzaki, a Muslim or business entity that is obliged to pay zakat; [19]
2. Amil, a person who collects zakat;
3. Mustahik, people who are entitled to receive zakat. [20] Al-Qur'an Surat At-Taubah verse 60 explains that one of the groups entitled to receive zakat is only for the poor and for the needy, for those employed to collect zakat), for bringing hearts together for Islam, for freeing captives or slaves, for those in debt, for the cause of Allah, and for the stranded traveler – an obligation (imposed) by Allah.

The kinds of zakat that are regulated in statutory regulations are zakat mal and zakat fitrah which include gold, silver and other precious metals, money and other securities, commerce, agriculture, plantation and forestry, livestock and fisheries, mining, industry, income and services, and rikaz. [21] Therefore, zakat consist of :

a. Zakat fitrah is the zakat that must be issued by Muslims before Eid al-Fitr in the month of Ramadan;
b. Zakat mal (assets) is income/zakat profession from commerce, agriculture, mining, sea products, livestock products, inventions, gold and silver and zakat income/ profession.

Based on Al-Qur'an Surat Ar-Rum verse 39, zakat has crucial function in economic growth. This is supported by Surah Adz-Dzariyat verse 39 reflected two main concepts, namely equitable economic growth and sharing mechanisms in the economy. The main goal is to improve the welfare of the poor. For the short term, mustahiq can fulfill their needs. For the long time, their economic resilience will increase. [22] Because zakat is a compulsory service which encourages economic life to create certain influences. [23] If zakat is managed properly, it can be used to create economic growth and equal income distribution. [24]

From a micro perspective, zakat has economic implications for individual consumption and saving behavior as well as the production and investment behavior of companies without hurting work incentives. Meanwhile, from a macro perspective, zakat has economic implications for allocative efficiency, job creation, economic growth, macroeconomic stability, income distribution, poverty alleviation and social safety nets. [25] Therefore, Zakat as one of the concrete forms of social security implied by Islamic law, in its following development functions as a moving tool for ummah economy through productive sectors managed by the recipient. [26]

2.1.2. Zakat Management Institution in Indonesia

As a country with a great Muslim population, the receipt of zakat will be great as well. Therefore, it is necessary to have a zakat management institution. Zakat management is an activity of planning, implementing, and coordinating the collection, distribution and utilization of zakat. [27] Based in Article 3, the purpose of zakat management is to improve the effectiveness and efficiency of services in managing zakat, and to increase the benefits of zakat to realize public welfare and poverty reduction.[28] Provisions in the Act are in line with the provisions of the zakat law according to zakat law experts that the benefits of zakat are as follows: (Didin Hafidhudin, 2002, pp. 10-14) 1.The realization of faith in Allah SWT, giving thanks for His blessings, cultivating noble morality with a high sense of humanity, eliminating the miser, greedy and materialistic nature, 2. Zakat is a mustahik right, so the zakat functions to help and foster them, especially the poor to a better and more prosperous life, so that they can fulfill their needs properly, while eliminating the nature of envy that may arise from among them, when they see rich people who have enough wealth. Zakat is not merely fulfilling the needs of the mustahik, especially the poor who are consumptive in a short period of time, but it provides sufficiency and welfare to them by eliminating or minimizing the causes of their lives;

3. Zakat as a pillar of joint charity (jama'i) between rich people who have sufficient lives and mujahids whose entire life is used to strive in the way of Allah, because of his busyness he does not have the time and opportunity to try and endeavor for the sake of sustenance oneself, zakat is also a concrete form of social security prescribed by Islamic teachings;

4. Zakat as a source of funds for the construction of facilities and infrastructure that must be owned by Muslims such as religious facilities, education, health, social economy, as well as a means of developing the quality of Muslim human resources;

5. To promote the correct business ethics, because zakat is not dirty property, but it excludes part of the rights of others from our property that we strive properly and correctly in accordance with God's provisions;

6. In terms of the development of the welfare of the people, zakat is one of the instruments of income distribution, with well-managed zakat it is possible.[29]

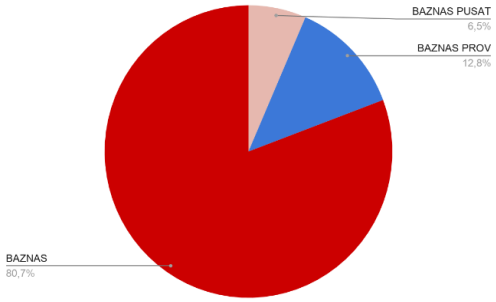
This zakat management institution will have several advantages if it has the following formal legal force:

a. To guarantee certainty and muzakki;
b. To keep the inferior feeling of mustahiq, particularly when he/she is facing muzakki;
c. To achieve efficiency and effectiveness, and right target of zakat distribution according to the existing priority scale at a point. To show the syiar of Islam in the spirit of Islamic governance. [30]

Zakat management in Indonesia is centralized. It can be seen from the centralized management of zakat on one institution. To manage zakat in national scale, Indonesia has an official institution formed by a non-structural government that has the role of managing zakat nationally known as the National Zakat Agency or BAZNAS. In managing zakat, BAZNAS is helped by the Amil Zakat Institute to collect, distribute and utilize zakat. After zakat is collected by the Amil Zakat Institute or LAZ, this zakat is collected by the Zakat Collecting Unit. Zakat Collecting Unit or UPZ is an organizational unit formed by BAZNAS to help collect zakat. [31] In the management of Zakat, it is carried out based on the principles of Islamic law, trustworthiness, benefit, justice, legal certainty, integration, and accountability.[32] BAZNAS as a zakat management institution is

located in capital country. To make it easier in managing zakat, especially in collecting and distributing zakat, BAZNAS forms representatives in provinces, districts, and cities. Apart from Baznas, there are amil zakat institutions in provinces, districts, and cities that are formed by the community, both licensed and traditional amil zakat institutions that have not been licensed (enough notification from the authorities) as mandated by the Constitutional Court Decision No. 86 / PUU-X / 2012.

BAZNAS carries out the planning functions of collecting, distributing, and utilizing zakat, implementing the collection, distribution and utilization of zakat, controlling the collection, distribution, and utilization of zakat, reporting and accountability for the implementation of zakat management. [33] Based on the data that the author got from the 2019 National Zakat Statistics published by Baznas, it was found that the amount of zakat collected by BAZNAS at all levels was Rp. 3,830,718285,568 with the largest collection at BAZNAS district and city levels. The data is described in the following graph.



Graphic 2.1 Amount of Zakat BAZNAS in 2019
Source: BAZNAS (processed by the author)

The amount of zakat during the last five years that has been collected by BAZNAS shows an increasing trend which can be observed in the following table:

Year	Amount of zakat collected
2015	Rp 3,650,369,012,964
2016	Rp 5,017,293,126,950
2017	Rp 6,224,371,269,471
2018	Rp.8,117,597,683,267
2019	Rp.10,227,943,806,555

Based on previously presented data, it is known that zakat has great potential in supporting and maintaining the economy in Indonesia, especially during the COVID-19 Pandemic.

2.1.3 Zakat Management in Indonesia

Zakat as an Islamic economic system can act as a distributor of capital for the community. This is reflected in the management and distribution of zakat from muzakki to mustahiq in accordance with Islamic sharia. In other words, zakat can be a distribution process for equalization of economic resources. The resources from muzakki to mustahiq will help people's lives so as to encourage economic growth and improvement. However, according to the International Working Group on Zakat Core Principle (IWGZCP), there

are 4 types of risks that have been identified and the world must have a clear concept in mitigating those risks. One of them is related to distribution and management.

Therefore, the distribution of zakat is done based on the scale of priority with regard to the principles of equalization, justice, and territoriality. The purpose of zakat management is to increase the effectiveness and efficiency of services in zakat management and increase zakat benefits to realize people's welfare and poverty reduction.[34]

In exercising its authority as a zakat management institution, BAZNAS focuses on five areas of zakat distribution, namely economics, health, da'wah, humanitarian social and education according to the chart as follows.

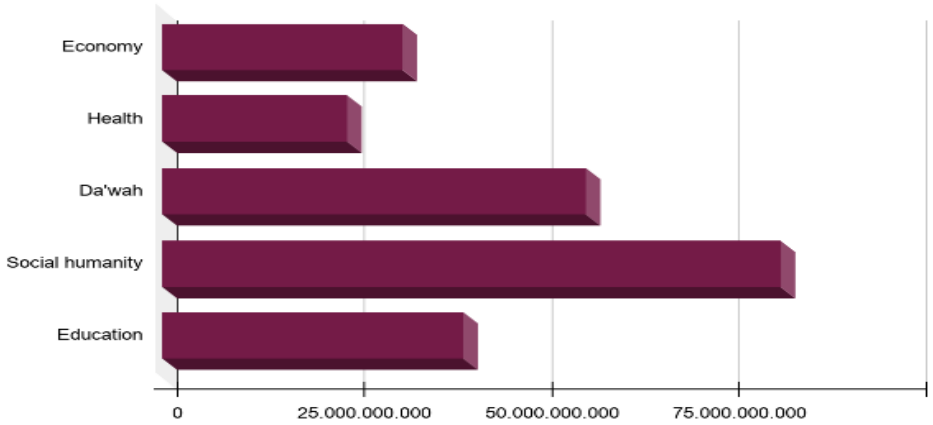


Figure 2.4 Amount of Zakat Distributed By Field
Source : BAZNAS (processed by the author)

Referring to the new poverty problem that arises from the COVID-19 pandemic, according to the authors BAZNAS has the potential to deal with this. It can be seen on the table that humanitarian economic and social issues include BAZNAS main focus in the distribution of zakat. BAZNAS can play a role in alleviating poverty in Indonesia by providing cash assistance in the form of consumptive zakat and productive zakat to mustahik zakat. By the acceptance of zakat by mustahik zakat, they can meet the needs of daily life and can improve their fate by opening a business.

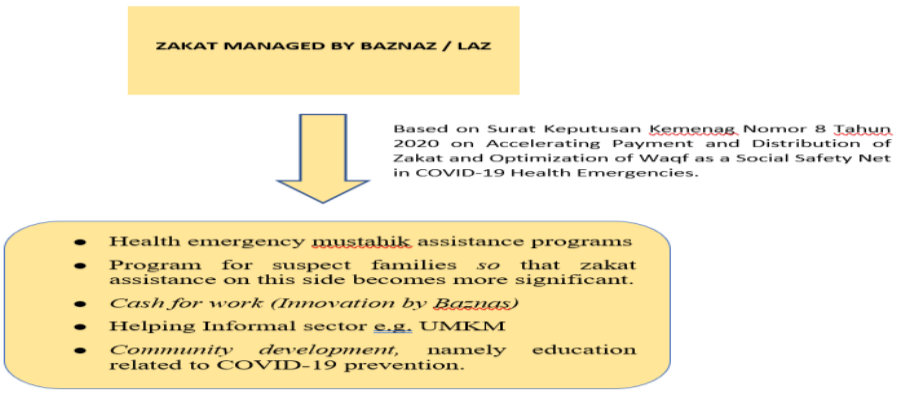
Based on data managed by Baznas, zakat management nationally is predicted to reach more than Rp 13.22 trillion in 2020 with optimistic scenario for zakat growth more than 30%.[35] This figure may be a reference for BAZNAS and LAZ to allocate socio-economic impact management and recovery programs due to COVID-19. In fact, since January-June 2020, baznas' total funds are Rp 240.39 billion. Meanwhile, in the same period in 2019, BAZNAS raised Rp 156.83 billion. This was a 46 percent increase compared to the same period last year for January to June 2019. [36] In 2014, the government in 2020 which is being hit by the COVID-19 Pandemic today, zakat can be one of the alternative instruments in poverty relief due to the COVID-19 Pandemic. In other words, zakat can be used for disaster management, such as this COVID-19 pandemic.

Then the focus measures of zakat to help reduce the impact of the COVID-19 Pandemic are also supported by the release letter No. 8 of 2020 on Accelerating Payment and Distribution of Zakat and Optimization of Waqf as a Social Safety Net in COVID-19 Health Emergencies. The circular contains that all Muslims who qualify to pay zakat *maal*

speed up the payment and distribution of zakat managed by BAZNAS or LAZ. This is so that the zakat that has been paid can be distributed to the *mustahiq* who need faster. The distribution must be carried out according to religious provisions, the service procedure is fast, easy and safe. The circular also mentioned that BAZNAS has to optimize zakat role in helping people to fulfill their needs in the midst of the Covid-19 crisis. In this circular details in detail the categories of recipients of zakat mall (zakat of wealth), infaq, alms namely poor households, daily workers in the informal sector, weak economies, and *other mustahiq.*

The role of zakat in the face of this pandemic is quite directed at the function of zakat itself as an instrument of public welfare redistribution. In the face of COVID-19 zakat is focused on helping to handle COVID-19 both health assistance and social and economic assistance. For example, health emergency mustahik assistance programs include spraying disinfectants, the provision of healthy sinks in various public facilities, the distribution of masks, the provision of PPE for medical personnel, the provision of ventilators, and the construction of isolation rooms in hospitals. [37] Zakat can be used as an operational assistance program for suspect families so that zakat assistance on this side becomes more significant. The second is disinfectant assistance for the poor and vulnerable in high-risk areas. Quick motion assistance from BAZNAS and LAZ with zakat resources, will greatly help inhibit the spread of the virus. Then in terms of socialization prevention of the spread of pandemic Pegiat zakat can play an active role by educating muzaki and mustahik about the potential and risk of COVID-19 pandemic. Considering, BAZNAS and LAZ have direct access to the community through a database of donors and beneficiaries. Furthermore, zakat is an alternative to food security in poor and vulnerable families. [38] In 2013, the government Rising prices and scarcity of goods supplies, especially food, are becoming a derivative problem of pandemics. Zakat can be distributed as a resilience aid and basic necessities.

Then, for now the National Zakat Agency (Baznas) creates innovations in zakat management to help people affected by COVID-19. An example is *cash for work.* The LSRR policy restricts people's movements so that it affects people's income. So *cash for work or* can empower mustahik by utilizing the potential they have. The *cash for work program* is divided into two forms, namely cash and non-cash assistance.[39] Currently the role of sharia social finance in the form of zakat will greatly help mustahik rise to the line above poverty. So we can see the zakat distribution scheme as follows.



Graphic 2.2 Zakat distribution during Pandemic COVID-19

In this case, for the people affected and very complaining about economic problems are entitled to receive zakat. Of course, this distribution is based on the scale of

priorities with regard to the principles of equalization, fairness, and territoriality. In addition, through productive zakat, zakat institutions began to focus on helping informal sectors, such as MSMEs, to revive the economy. With the allocation of zakat for the impact of COVID-19, it is expected to help ease the burden of life, ensure basic needs, and maintain the purchasing power of citizens affected by COVID-19. In terms of social, BAZNAS also held *community development,* namely education related to COVID-19 prevention.

3.1. CONCLUSION

Based on the Qur'an Surah Ar-Rum verse 39, as the third pillar in the economy, zakat has a very important function in economic growth. This is supported by Surah Adz-Dzariyat paragraph 39 reflected in two main concepts, namely fair economic growth and sharing mechanisms in the economy. In the face of the COVID-19 Pandemic as it is today, zakat can be one of the alternative instruments in poverty relief due to the COVID-19 Pandemic. Of course, this can be achieved by the practice of collecting, channeling, and managing zakat by BAZNAS (on a national scale) and LAZ (located in the Province and Regency / City). Zakat is focused on helping to handle COVID-19, both health assistance and social and economic assistance. This is supported by Circular Letter No. 8/2020 on Accelerating Zakat Payment and Distribution as well as The Optimization of Waqf as a Social Safety Net in The COVID-19 Health Emergency which details the categories of zakat mall recipients (zakat of wealth), infaq, alms namely poor households, daily workers in the informal sector, weak economies, and other *mustahiq.* In particular BAZNAS allocates zakat for *cash for work* programs, mobilizes MSMEs, and meets the basic needs affected by COVID-19, and develops *community development* such as education on COVID-19 prevention.

3.2. RECOMMENDATION

Related to the utilization of zakat funds related to the COVID-19 Pandemic is carried out in accordance with Article 26 of Law No. 23 of 2011 on Zakat Management, which is based on the scale of priorities with regard to the principles of equalization, justice, and territory and in accordance with Islamic sharia. In addition to ensuring that zakat to be distributed must be served quickly, easily, and safely, Amil zakat also focuses on zakat collection and distribution activities that avoid direct contact such as face-to-face because basically zakat collection and distribution activities due to their nature or circumstances must be done face-to-face. So to ensure this, there is also a Directive on Implementation and Technical Guidance of Law No. 23 of 2011 on The Management of Zakat as a Zakat Agency in the midst of a pandemic by prioritizing health protocols. In other words, there needs to be guidelines or standards regarding the collection and distribution of zakat that pay attention to COVID-19 health protocols, so it is mandatory to pay attention to COVID-19 health protocols, such as limiting physical distance and avoiding mass gathering or crowding both for collecting institutions and zakat managers and for amil.

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A LEGAL REVIEW OF THE WILL OF AN UNSHARED INHERITANCE AS WAQF FROM THE PERSPECTIVE OF POSITIVE LAW IN INDONESIA [1]

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Abstract
Waqf is an Islamic social institution that contains socio-economic values which are expected to be able to help generate social welfare whose benefits can be shared together. The emergence of covid-19 pandemic has encouraged people to donate by means of waqf. There is a specific difference in the process of waqf if the donated property is an inheritance that has not been divided. The aim of the present study is to conduct a legal review of the will of the unshared inheritance that will be donated during the Covid 19 pandemic from the positive law perspective in Indonesia. To achieve the objective, the descriptive analysis study utilized a normative juridical approach by examining the related literatures or the secondary data related to the donated land whose designation has been changed. The results showed that a written family agreement must be made if a person wishes to give waqf from the unshared inheritance. The agreement should contain the statements explaining that the waqif rights will be handed over for the social walfare and the benefit of many people. By this, the other heirs are responsible for handing over the portion of the waqif's assets according to the waqif's wishes written in the wills. Apart from being signed by the waqif, the will is also signed by the witnesses (other heirs). This procedure must be carried out in order to avoid any conflict related to the donated land.
Keywords: waqf, wills, and inheritance

1. INTRODUCTION

The inheritance law is a set of rules governing the procedure or process of transferring assets from the deceased family member to his/her heirs. [4] With the rules governing this matter, the heir or the person who inherits the property must comply with the applicable rules.

The final wish of the deceased person is called a will. The act of determining the will is permitted in the Islamic law and the Indonesian Civil Code. A will, according to the Islamic law, is an obligation. It is explained in the words of Allah in Q.S. Al-Baqarah / 2: 180, which says "it is prescribed for you when the signs of death approaches (any) one of you if he leaves wealth [is that he should make] a bequest for the parents and near relatives according to what is acceptable – a duty upon the righteous.

The verse indicates that a person is allowed to leave a will for those whom he/she chooses. In another verse, it is also explained the need to carry out the will of the person who dies. It is stated in Q.S. Al-Baqarah / 2: 181 which says "Then whoever alters the bequest after he has heard it – the sin is only upon those who have altered it. Indeed, Allah is All-Hearing, All-Knowing"

In addition to the Islamic Law, a will is also regulated in Article 874 of the Indonesian Civil Code which states "all inheritance of a person who dies is the property of his heirs according to law, as long as he has not made a valid provision regarding the matter". Moreover, it is also highlighted in the Article 875 of the Indonesian Civil Code which says "all the inheritance of the deceased heir belongs to the heirs, unless the heir has legally stipulated by means of a written will.

Waqf is an Islamic social institution that contains socio-economic values which are expected to be able to help create social welfare whose benefits can be shared with others. In Islam, waqf is included in the category of worship whose law is sunnah. The reward of doing waqf will continue to flow and be accepted even though he/she who gives the waqf has died.

Waqf institutions have been known since Islam entered the archipelago and have been well received by the community. Ter Haar even argues that waqf has been well accepted in the customary law system (gerecipeerd). [5] This is quite reasonable considering

that the majority of the population in Indonesia is Muslim. This is an example of a part of the customary law that comes from religion (goodienstig bestaandeel van het adat recht). [6] Waqf is one of the worships taught in the Islamic teachings that should be done by Muslims. As waqf is a form of worship, its main purpose is to show the devotion to Allah SWT, and seek the pleasure of Allah. [7] Even though waqf is a requirement of social worship, in practice it must be carried out following Islamic sharia and the prevailing laws, namely Law Number 41 of 2004 on Waqf (or Waqf Law).

Waqf is one of the things that is often carried out in society. In its practice, there are many problems surrounding waqf particularly related to the validity of the waqf status which requires a juridical study. In Indonesia, waqf is generally seen as a religious matter. However, the issue of waqf not only centers on a religious or customary issue, but it is also a part of a social and individual matters. In fact, it is included in the social, economic, administrative, and even political issues. This has consequences for waqf in Indonesia [8]

In donating their assets, people should remain follow the regulations contained in the Koran and the provisions of fiqh. The detailed regulations regarding waqf are just created by the Government of the Republic of Indonesia through the Waqf Law. To create a legal and administrative order that can protect waqf properties, the Government ratifies and enforces the Waqf Law. The birth of this Law was based on the concern on the management and development of waqf in Indonesia. [9]

Waqf land is a transfer of personal rights, right of ownership, or certain legal entities into waqf rights for the purpose of worship, social and other public needs. Along with the changes that occurs in the community, the donation of land is carried out in front of the authorized body. It is done in order to create the Wakaf Pledge Deed (hereinafter referred to as *Akta Ikrar Waqf* [AIW]). Every Religious Affairs Office (or KUA) along with the National Land Agency (BPN) has the authority to make AIW.

The appointment of waqf institution, which was originally a religious institution and now become an agrarian institution from the perspective of national land law, is enacted in the Law Number 5 of 1960 concerning Basic Agrarian Law Act, *Undang-Undang Pokok Agraria,* (UUPA). Waqf on land property is of particular concern to the government because the land is used for social and religious purpose. Thus, it is specifically regulated by the goverment as seen in Article 49 of the UUPA.

The result of the implementation of the Article 49 paragraph (3) on UUPA is the emergence of Government Regulation Number 28 of 1977 on the Endownment of Land properties. Waqf which is first a religious institution now has become an agrarian institution which is a concrete meeting point in Indonesian positive law. This is done in order to realize the same legal framework and views regarding the waqf of the owned land.

Land waqf (waqf), according to the government regulation number 28 of 1977, is a legal act of an individual or a legal entity that separates part of his/her land properties and institutionalizes them forever for worship purposes or other public interests in accordance with the Islamic principles. Meanwhile, waqf property is either movable or immovable objects. In this case, land is a immovable object that must have a definite status. This means that the donated land must be legally controlled by the wakif.

A clear and detailed regulation on waqf has been regulated by the government regulation number 41 of 2004 regarding the Waqf Law and Number 42 of 2006 concerning the Implementation of Law Number 41 of 2004 on the Waqf Law.

The current issue is that waqf practice in Indonesia is often carried out conventionally which allows it to be prone to various problems and many of which end up in court. When waqf carries a potential dispute, the case will move through religious court as the official institution to approve, examine, judge, decide and resolve waqf cases, stated in article 49 act

number 3 2006 regarding Religious Court.[1]

Coventionally-managed waqf has a potential dispute due to several causes as following:

1. There is no any waqf pledge over the land as the waqf property;
2. The waqf process is based on personal trust among parties involved ;
3. The waqf property is taken back by the heirs;
4. Insufficient knowledge of the concept of waqf in the community ;
5. The use of waqf as consumptive properties instead of productive ones;
6. The heir violates the waqf pledge by refusing to notify PPAIW.

The dispute settlement doesn't always have to end up in the religious court. There are alternatives to solve the problem through non-litigation, that is, National Sharia Arbitration Board (Badan Arbitrase Syariah Nasional or BASYARNAS in Indonesian). This is in accordance with Article 62 Law Number 41 of 2004 concerning Waqf in which it states that resolving waqf disputes should ideally be done through deliberation, mediation or arbitration. Taking it to the court should only be done if the aforesaid method can't be pursued.[2]

In addition, it is deteriorated by misconducts towards waqf properties carried out by irresponsible parties, waqf properties trading, and waqf withdrawn by the waqif families because it has not been registered and certified.

The waqf of freehold land is a holy, noble and praiseworthy act by a Muslim or a legal entity, which institutionalizes parts of his freehold land as "social-waqf" land, namely waqf intended for religious purposes or other general purposes, in accordance with the Islamic law.

Some circumstances allow people to do waqf. The Covid19 outbreak awakens people to do charity through waqf practice. However, it will be complicated if the waqf property is part of unshared inheritance. Meanwhile, waqf property must be a truly legal one of his own without any dispute in the term of ownership. This issue, later, results in the necessity of sharing the waqf in the form of land or buildings to other heirs.

1.2. Research Method and Benefit

This research used normative legal approach, which utilizes law principles and library research along with the implementation. [11] Normative legal research studies literatures or secondary data by examining the theories, concepts, law principles and regulations related to the research.

The method used by the researcher is descriptive analytical method. The researcher describes the provisions of current regulation associated with law theories and its practice that are related to the issue of this research.[12]

2. Results and Discussion

The occurrence of waqf firstly begins from the will of the waqif to allow part of his assets in the form of land or buildings to be an waqf for public purposes in accordance with the Islamic law. The procedure of waqf in Islamic law is accepted only when the elements and the requirements of waqf are fulfilled. The elements and the requirements include waqif, the donated property, the recipient, and the statement of waqf submission.

Waqif must not be under pressure from any parties while stating the waqf. The party wishing to donate their land is required to appear in the presence of the *Pejabat Pembuat Akta Ikrar Wakaf* (PPAIW), the Officials of Waqf Pledge Deed, to carry out the waqf pledge.

[1] Siska Lis Sulistiani, *Pembaharuan Hukum Wakaf di Indonesia,* Cet.I, Bandung: PT. Refika Aditama, 2017, hal. 145.

[2] *Ibid hal. 149.*

In this case, PPAIW refers to the head of religious affair, KUA, in the sub-district. [13] In any sub-district where KUA is unavailable, the Head of the Regional Office of the Ministry of Religious Affair will appoint the Head of KUA from the nearest area as PPAIW in the sub-district.

Waqf pledge is carried out verbally, unless the waqif is unable to appear in the presence of PPAIW, he could make the pledge in the written form with the approval of the Office of the Ministry of Religious Affair that supervises the waqf land. The pledge is considered valid if it is attended by at least two witnesses. Things that need to be prepared in carrying out the waqf pledge, including:

1. The certificate or other proof of the land ownership;
2. A certificate from the head of the village supervised by the sub-district Head Officer stating the ownership and no dispute involved over the land;
3. The certificate of the land registration;
4. Authorization from the Regent/Mayor of the district cq Head of the local Sub Directorate of Agrarian Affairs.

The waqf pledge deed, *akta ikrar wakaf* (AIW), is to be made after the pledge has been undertaken. To create the pledge deed, these requirements must be fulfilled:

1. Waqif makes a statement letter of the waqf over the land including the information of the land size and location. The letter states that the land is not involved in any dispute and also mentions the purpose of waqif regarding the waqf.
2. A statement from the head of the village concerning the waqf of freehold land. The purpose of this statement is to further confirm the status of the waqf land.
3. The certificate or any proof of the ownership;
4. If the object being donated is an immovable property, a statement letter from the head of the village supervised by the sub-district head officer is required to confirm the ownership.
5. The certificate of land registration;
6. A license from the head of National Land Affairs Agency.

After the waqf pledge deed is made in accordance with the provisions, PPAIW on behalf of the concerned *nadzir* is required to submit an application to register the waqf owned by the person concerned. The registration aims to maintain the integrity and sustainability of the waqf property. [14]

Land is usually an object of waqf among other properties. Waqf land is a right over land obtained from a person or legal entity (waqif) which is designated/used for religious or public interest (the public), not for personal interests, according to the purpose of waqf.

In Islamic law, the land that is allowed to be donated as waqf is land with the right of ownership as it is the strongest evidence to confirm the faithful owner of the land. Representing land as waqf is a legal act to remove any trading activities over the land, provided that the use or product of the land is to be used for certain people or for certain predetermined purposes. The removal of trading activities has changed the status of the land from “legal object” into “legal subject”.

Legal certainty and certainty of rights over the land is obtained through land registration. It is stated in Article 19 on Basic Agrarian Principles Law that the government must process the registration. Based on the law, the land registration needs to be conducted “to guarantee the legal certainty”.

Most of waqf objects are in form of land. The waqf land with legal certainty is the land that has fulfilled the administrative requirements under the prevailing laws and regulations, in particular having land certificates.

Certified waqf land can be utilized and developed according to the purposes of the

waqf. [15] Any waqf land that has not fulfilled the requirements of prevailing laws and regulations does not hold legal certainty and often cannot be used properly [16].

The registration of waqf land needs to be carefully regulated. This registration hold important roles, both from the perspective of legal order and from the administrative of the right and the use of land in accordance with agrarian laws and regulations [17].

Personal right over the waqf land is no longer valid once waqf pledge is conducted and the land has become a waqf object henceforth. The status of waqf over the land essentially begins when a person has made the intention. It is legally proven when he utters the intention to *nazhir* and later written and signed by the witnesses and PPAIW in the form of waqf pledge deed. The ownership of the waqf land is officially confirmed through the registration process to Land Affair Agency along with the certificate.

The government only guarantees the ownership of the waqf land provided that no ownership dispute proven or any dispute as the results of some factors, including incomplete administrative or civil requirements or any shortcomings in conducting and interpreting the prevailing laws and regulations by the officials.

Fiqh emphasizes that waqf is considered valid once it is uttered even without announcement from officials, and waqif has lost its right over waqf property. This interpretation comes from Asy-Syafi'i followed by Imam Malik and Imam Ahmad. Meanwhile, Imam Abu Hanifah stated waqf is not valid and it still belongs to waqif if the officials have not made the settlement and announcement regarding the waqf. It is valid only after the officials have done as stated. [18]

The waqf registration is not subject to any registration fee, except for the measurement and stamps. Those that occurred before law waqf is applied, the registration will be conducted by the *nazhir* in the sub-district KUA. If the *nazhir* is unavailable, the registration will be conducted by:

1. Waqif or the heirs;
2. The heir of the *nazhir*; or
3. Any member in the community who acknowledge the waqf.

It is an obligatory for the head of the village with the local KUA (religious Affairs office) to register *Waqf* land that does not have *Nazhir* and no one wants to register it; Such registration must be accompanied by:

1. A certificate regarding the land or a certificate from the head of the village regarding the *waqf* land;
2. Two witnesses of the *waqf* pledge or two witnesses of *istifadhah* (people who know or hear about the *waqf*).

After the registration is carried out, PPAIW determines a Deed in lieu of the *Waqf* Pledge Deed (APAIW) to prove that the registration of the donated land occurred has been carried out. The *waqf* land that has been registered and recorded at the Office of the National Land Agency written on the land title certificate, can make the *waqf* land strong to be proved legally.

A will or testament is a legal act performed before a person dies. The will is usually called the last testament of a person that can be carried out when the person passed away. A will can be considered as a letter containing decrees of the last wishes before a person passed away.

A will itself is divided into two kinds of wills, namely a will called erfsterlling which contains the appointment of a person or several people to be heirs, and a grant (legaat). Those two kinds of will made by a person must be shown with an accountably proof of deed. Therefore making a will should be proven by the presence of written evidence, even though we know that the Islamic Law Compilation regulates that wills can be carried out both orally and written.[19]

The current problem with *waqf* is *waqif* who wants to donate land from an undivided inheritance. Therefore, it is best that before applying for *waqf* registration, the land to be donated must be in accordance with the agreement of the family (the heirs). Agreement is needed to find out the rights of each heir and the agreement of other heirs regarding the inheritance that to be donated. The family agreement must be made in written form and set out in the *waqf* pledge deed in front of the witnesses and PPAIW, then the deed is signed. In formal terms, *waqf* land ownership is made with registration at the Land Office and the issuance of the certificate.

Other forms of *waqf*, other than through certificate registration, can also be through a family agreement which states that the proceeds from the sale of the inherited land in the form of money will be donated. The agreement between families is in the form of a written agreement which states that the *waqif* rights will be handed over for the social benefit and the benefit of the people. The other heirs are responsible for handing over the *waqif* portion of the *waqf* according to the wishes of the *waqif* written in the will. Apart from being signed by the *wakif*, the will is also signed by the witnesses (other heirs). This must be done so that there will be no case of donated land claims in the future because the land is inherited land that has not been divided.

KUA has a role as an organizational unit in achieving the success of the land certification program. The head of the local district KUA as the Official for Making the Waqf Pledge (PPAIW) must be careful, orderly, and principled to meet the validation in serving the process of *waqf* and the issuance of documents related to the certification process of the *waqf* land. To make it easier for the Head of KUA or PPAIW and the community to understand the procedure for application of *waqf* land certification, the Ministry of Religion, the Director General of Islamic Community Guidance, has issued technical guidelines for the procedure of requesting *waqf* land certification. An application for the *waqf* land certification can be made towards the *waqf* land which is from the inherited land that has not been divided and has not been certified that later to be proceed for the certificate issuance in the name of *Nazhir*.[20]

PPAIW on behalf of *Nazhir* submits AIW or APAIW and other documents required for the registration of *waqf* land in *Nazhir*'s name to the Land Office, within a maximum period of 30 (thirty) days from the signing of AIW or APAIW. The donated land can be:

1. the right of ownership or Customary Land that has not been registered;
2. cultivation right, building right title and the right to use over State land;
3. the right of ownership or the right to use on land with the right to manage or freehold title;
4. freehold title over apartment units;
5. State land.

These lands can be donated for good without any time limit, except for land that has status of building right title or the right of use on land with Management Rights or freehold title and the right of ownership over Flats. If a particular land to be donated as *waqf* land that is in the form of inherited land, which has not been divided, then only a portion of the total area that has been agreed upon by other heirs can be donated. Measurements for separation of certificates must be carried out first. AIW or APAIW is made for the separation of the certificate, and becomes the basis for the issuance of the *Waqf* Land Certificate in the name of *Nazhir*. *Waqf* land in the form of ownership rights is registered as *waqf* land in the name of *Nazhir*.

Application for registration of *waqf* inherited land that has not been divided needs to be accompanied by:

1. Application letter;
2. Measurement letter;

3. The right of ownership certificate;
4. AIW or APAIW;
5. The *nazhir* ratification from the agency in charge of religious affairs at the district level: and
6. A statement from *nazhir* that the land is not in dispute, confiscation, and is in accordance with the agreement of other heirs.

The Head of the Land Office issues a *Waqf* Land Certificate in the name of *Nazhir*, and records in the land title deeds and land title certificate in the column provided, with the sentence: "This land title must be based on the Waqf Pledge Deed / Deed in lieu of the Wakaf Pledge Deed dated …… Number..... And the Land Waqf Certificate Number ……/ …… according to the Measurement Letter dated …… Number …… with the area of ….. m²".

Nazhir can be individual, groups of people or organizations, or legal entities. *Nazhir* has the task of administering *waqf* assets, managing and developing *waqf* assets according to their purpose, function and designation, supervising and protecting *waqf* assets, and reporting the implementation of duties to the Indonesian *Waqf* Board.

In *Nazhir*, which consists of groups of people or organizations, if any of them resign or pass away, then the name / names of *Nazhir* who resigned or pass away must be scratched out from the list. The replacement on the list of name / names of the new *Nazhirs* on the land title deed and the certificate recorded after there is a letter of approval from the local District Office of Religious Affairs regarding the replacement of the *Nazhir*. Changing the name / names of *Nazirs* does not result in a transfer of rights from the land concerned.

The implementation of *waqf* during the Covid 19 pandemic has been carried out by some particular heirs in a will that had not been registered to the *waqf* Pledge Deed. *Waqf* land from an undivided and uncertified inheritance can become the object of dispute. Therefore, family agreement is absolutely necessary.

3. CONCLUSION

The inherited land to be donated must be in accordance with the agreement of the family (heirs). Agreement is needed to find out the rights of each heir and the agreement of other heirs regarding the inheritance to be donated. The family agreement must be made in written form and set out in the waqf pledge deed before the witnesses and the Officials of Waqf Pledge Deed (*Pejabat Pembuat Akta Ikrar Wakaf* [PPAIW]), then the deed is signed. In formal terms, waqf land ownership is made by registering it at the Land Office followed by the issuance of a certificate.

The Waqf Pledge Deed is proof that the donation has been done. If the pledge deed is already enough to proof the waqf status, then the waqf land certificate is certainly strong evidence as it is an authentic deed issued by national land agency (BPN) with legal certainty. Therefore, the heirs who demand to withdraw the donated land have no right to carry out the act. Waqf land which has met the harmonious conditions and the legal conditions of waqf land cannot be withdrawn or cannot be canceled which has been confirmed in Article 3 of constitution No. 41, 2004. Legal certainty guarantees for Nazhir can occur by registering donated land by PPAIW to the authorized institution (BPN). By being registered, a waqf certificate will be issued which is authentic evidence in the event of a dispute. With the existence of the waqf certificate, the position of the waqf whose name is listed on the waqf certificate has been guaranteed by law and protected as long as it is not proven otherwise or vice versa.[21]

Other forms of donation other than through certificate registration can also be done by family agreement stating that the proceeds from the sale of the inherited land in the form of money will be donated. The agreement between families is in the form of a written agreement which states that the waqif rights will be handed over for the social benefit and

the benefit of the people. The other heirs are responsible for handing over the waqif portion of the waqf according to the wishes of the waqif written in the will. Apart from being signed by the waqif, the will is also signed by the witnesses (other heirs). This must be done so that there will be no cases of donated land claims in the future because the land is inherited land that has not been divided.

4. SUGGESTION

Waqf is an attempt to improve people's economy during the Covid-19 pandemic. It would be better, if the will of unshared inheritance is extensively announced to those whose families are directly affected so that they can have better comprehension that the will of the inheritance can be made with a written statement from the heir to maintain legal certainty it must be written and registered. The importance of AIW (waqf pledge deed) will be a benchmark that the inheritance donated is safe and has legal certainty, thus it must be disseminated so that it does not have any potential to dispute waqf assets which may be claimed by heirs who disagree. Although the agreement may be made orally, waqf is registered for the sake of legal strength and legal certainty of the status of waqf.

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POST-DIVORCE CARE FOR CHILDREN IN AN ISLAMIC PERSPECTIVE

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Abstract
A child born in a legal marriage bond has the status of a biological child with civil rights attached to it and has the right to use his father's name after his name to indicate his descent and origin. Children's rights are part of human rights contained in the 1945 Constitution of the Republic of Indonesia and the United Nations Convention on the Rights of the Child. The rights of a child with a divorced parent condition, Islam has arranged in detail, related to the child's age and needs as well as the condition of both parents.
Keywords: Keywords: Childcare, post-divorce.

1. INTRODUCTION

Islamic teaching itself has established various rights relating to children. The most important thing in Islamic law is the right to breastfeed, the right to care, the right to a good name, the right to care, the right to earn a living, the right to education and protection.

The presence of children for husband and wife is the main binding force and strong glue in the fabric of love and harmony between husband and wife. Not all children are born from the result of a legal marriage. Some are born without the will and hope of the person who gave birth to them like adulterous children. In Islam a child is devoted to his father, and the minimum time a child can be served to his father as a legal child is 6 months.

The minimum time for pregnancy is a combination (adverb of time) of two verses in the Qur'an, namely: "and conceive and breastfeed her for 30 months and suckle her for 2 years". The first verse limits the time for pregnancy and breastfeeding to between 30 months and the second paragraph to breastfeed for 2 years, because breastfeeding is 2 years, the pregnancy period becomes 6 months. So it is in everyday statements and in medical science

1.1. Status of the Child

Children are both a mandate and a gift from God Almighty, even children are considered the most valuable assets compared to other assets. Therefore, children as God's mandate must always be guarded and protected because children are inherent in dignity and human rights that must be upheld.[1]

A child born from a woman's womb cannot choose to be born into a family that is intact, harmonious, happy, or legally recognized by both parents. Fortunately, a child born from a legal marriage is recognized and a birth certificate is made by both parents, but on the other hand, a child born by a woman is not recognized by her biological father as good due to several factors, for example, the child was born from an illegal marriage (for example, kawin sirri), adultery, a child victim of rape.[2]

A child born in a legal marriage bond has the status of a biological child with civil rights attached to it and has the right to use his father's name after his name to indicate his descent and origin.[3]

Legal marriage will give birth to a child who has a legal status and position before the law, while a child born from an illegal relationship without a valid marriage will bear the status of an out-of-wedlock child when he is born in the world. [4]

Marriage determines the status of the child, so the child depends on the marriage or the relationship between the mother and father. [5] If the marriage is carried out by following

under accordance with the applicable provisions without being violated, the child's status will be protected and guaranteed, while the marriage is carried out in violation of the applicable provisions, then the child's status is not protected and not guaranteed.

Ideally, a child born into the world will automatically have a man as his father and a woman as his mother, both biologically and legally (juridically), because naturally, it is impossible for a woman to become pregnant without a meeting between ovum and spermatozoa. through sexual relations or through other means based on technological developments that lead to conception. Therefore, it is not right and unfair when the law frees a man who has sexual relations which led to the pregnancy and birth of the child from his responsibility as a father, and at the same time, the law negates the rights of the child to the man as the father.[6]

Children's rights are part of human rights contained in the 1945 Constitution of the Republic of Indonesia and the United Nations Convention on the Rights of the Child.[7]The state protects children from treatment that can destroy their future. The law provides several views on the terminology of children based on their function and position, including the following:

Law Number 23 of 2002 concerning Child Protection in a General Explanation: Children are a mandate as well as a gift from God Almighty, which we must always protect because they are inherent in their dignity, dignity, and human rights that must be upheld. Children's rights are part of the human rights contained in the 1945 Constitution and the United Nations Convention on the Rights of the Child. In terms of national and state life, children are the future of the nation and the next generation of the ideals of the nation, so that every child has the right to survive, grow and develop, participate and have the right to protection from acts of violence and discrimination as well as civil rights and freedoms.

UU No. 4 of 1979 concerning Child Welfare in the Consideration of point (a): Children are the potential and successor to the ideals of the nation that the previous generations have put in place.

UU No. 3 of 1997 concerning Juvenile Court in consideration of point (a): Children are part of the younger generation as a human resource who is a potential and successor to the ideals of the nation's struggle, which has a strategic role and has special characteristics and characteristics, requires guidance and protection to ensure complete, harmonious, harmonious and balanced physical, mental and social growth and development.

Government Regulation Number 54 of 2007 concerning Adoption of Children in General Explanation: Children are part of the younger generation, the successor to the ideals of the nation's struggle and human resources for national development.

However, in reality, children born because of the mistakes of their parents who marry in an illegal marriage, do not get their rights such as the right to earn a living and the right to inherit. Parents do not care about the fate of the child in the future. So not all children will be respected for their existence or even recognized by their biological parents for their status.

1.2. Research Method and Benefit

The research method used is the descriptive-normative method, which means research by explaining, describing, analyzing a problem in a certain situation, the problem is about the care of children from their divorced parents.

a. Data collection technique

Data collected through library research, which is studying materials from books, magazines, newspapers, articles, laws, and regulations, and Supreme Court decisions. The data that has been collected is then sorted and selected for accuracy and validity, so that good research results can be found.

b. Data analysis

The data analysis used is qualitative. This qualitative analysis is intended is that analyze used without using numbers or statistical formulas and mathematics means that it is presented in the form of a description. Where are the results of the analysis will be presented descriptively, with the hope that it can describe divorce and childcare relationships and protection of children

1.3. Paper Structure

This study aims to provide an overview of child care arrangements in a condition where parents are divorced. In the provisions of the Marriage Law and Islamic Law Compilation, childcare arrangements are made in general. In the Islamic Law Compilation Article 105 it is stated that: in the event of a divorce a child who is not yet mumayyiz or not yet 12 years old is the right of the mother, while the care of a child who is mumayyiz is left to the child to choose between the father or mother as the holder of the right to care. Islamic Sharia regulates in more detail the care of the children

2. BACKGROUND

The wrong perception assumes that custody is the full right of the mother until the age of 12. Whereas the court is in another position, namely to protect children. So sometimes the obligation is borne by the father or sometimes the mother depends on the judgment of the panel of judges by seeing whether the child's interest can be fulfilled if the child is with the father or with the mother.

For children who in certain circumstances can be under the care of children, that is, in the care of a person or institution to provide guidance, care, care, education and health. This is possible if the parent or one of the parents is unable to guarantee the child's normal growth and development Related to Law Number 23 of 2002 concerning Child Protection, which one of the articles confirms that parents (father and mother) have equal and equal rights as parents to care for, maintain and care for and protect children's rights, the most important is the ability of parents to care for and care for children.

Children who are still under of age in a legal system and legal practice in Indonesia, when both parents have a case in court their opinion is never asked for by both parents. Juridically, the position of the child in marriage is regulated in Article 42 of Law Number 1 1974 of 1974 which contains definitive provisions that a legitimate child is a child born in or as a result of a legal marriage. Then, according to the limitative provisions in Article 43 paragraph (1) Law Number1of 1974, children born outside of marriage only have civil relations with their mother and their mother's family. This means that Law Number1 Year1974 Article45 paragraph (1) and paragraph (2) contains an imperative provision that both parents are obliged o care for and educate their children as well as possible. This obligation is valid until the child marries or can stand alone, which obligation continues even if the marriage between the two parents breaks

2.1.1. Post-Divorce Care for Children in an

Article 41 letter Law Number 1 of 1974 concerning Marriage ("Marriage Law"), divorce does not remove the obligation of the father and mother to care for and educate their children. The article also states that if there is a dispute over the control of children, the court will make the decision.

This means that regarding child custody if no agreement is found between husband and wife, it is resolved through court channels.

But as an illustration of the distribution of custody, if we look at it from Islamic law, we can refer to Compilation of Islamic Law ("KHI"). In Article 105 KHI, in the event of a

divorce, the care of children who are not yet mumayyiz or not yet 12 years old is the right of the mother, while the care of children who are mumayyiz is left to the child to choose between the father or mother as the holder of the right to care.

Regarding the provisions of Article 105 KHI, there are exceptions, namely if it is proven that the mother has apostatized and embraced a religion other than Islam, then the mother's right to care for the child will be annulled. This is in accordance with the jurisprudence of the Supreme Court of the Republic of Indonesia No .: 210 / K / AG / 1996, which contains a legal abstraction that religion is a requirement to determine whether a mother's right to care and care (hadhanah) for her child is not yet mumayyiz.

Law Number 17 of 2016 concerning Stipulation of Government Regulations in Lieu of Law Number 1 of 2016 concerning the Second Amendment to Law Number 23 of 2002 concerning Child Protection into Law ("Law 17/2016")which states that parental power is the power of parents to nurture, educate, nurture, nurture, protect, and develop children according to their religion and their abilities, talents, and interests.

This means that children must be cared for according to their religion so that their mental and spiritual development is good.

However, apart from seeing the religion of the parents who will get custody of the child, of course, the behavior of the parents must also be seen. The Similarity in religion is not the only factor in determining what is best for the child (in the care of the father or mother).

Regarding the costs for children, based on Article 41 letter b of the Marriage Law, the father is responsible for all maintenance and education costs that the child needs. If in fact, the father cannot fulfill this obligation, the Court may determine that the mother is responsible for the costs.

2.1.2. Legal Status of Unmarried Children in Islamic Law

In Islamic law categorized illegitimate children are children born in adultery.[8] The term illegitimate child is defined as a child born to his mother from an illegitimate relationship that is legally unrelated by lineage to his husband.[9]

In the statement of the Islamic Law Compilation, "children born outside of marriage", there is a confusion of meaning. Children born outside of marriage are different from children outside marriage. Children whose conception occurred after the marriage of their mother's father and born out of wedlock after their mother divorced or their husband died before the maximum age of pregnancy is considered a legal child and has rights like a legal child. Meanwhile, out of wedlock children (zina children) even though they are born in a marriage, they still do not have rights such as legal children. Thus, the main difference between the two lies in the presence or absence of a lineage connection. So, the status of an out-of-wedlock child as illegitimate in the view of Islamic law only has a nasab relationship with the mother. However, this lineage relationship will be according to other rights implications.[10]

The position of the child according to Islamic law as contained in the Compilation of Islamic Law in principle has the same view as the Marriage Law, because Article 100 of the Compilation of Islamic Law contains a formula that is not different from Article 43 paragraph (1) of the Marriage Law, where a Out-of-wedlock children only have a family relationship with their mother and their mother's family. A husband has the right to deny children born by his wife by confirming them through li'an institutions. Article 102 paragraph (1) of the Compilation of Islamic Law states that: A husband who will deny a child born from his wife,[11]

A husband who succeeds in proving the denial of a child born by his wife will have an impact on the status of the child who is born as an illegitimate child and will automatically

cut off civil relations with the father. Article 102 paragraph (1) The above compilation of Islamic Law provides a time limit for the husband to file a lawsuit for child denial, which is 180 days after the child's birth or 360 days after the break-up of the marriage or the husband knows that his wife gave birth to a child if the husband's residence is available. allows to file a lawsuit to the Religious Court.[12]

Children born outside of marriage in the Islamic Law Compilation, include:

a. Children born as a result of adultery muhson and adultery ghoiru muhson are called children out of wedlock. Zina Muhson is adultery committed by people who have or have never been married, while Zina Ghairu Muhson is adultery committed by people who have never been married, namely a virgin or a virgin. Islamic law does not consider zina ghoiru muhson as an ordinary act, but it is still considered an act of adultery that must be subject to punishment. It's just that the quantity of punishment is different, for adulterers, muhson is stoned to death while adulterers ghoiru muhson can be flogged 100 times. For example: 2 (two) months pregnant and then married.
b. Mula'anah children, namely children born to a woman whose husband is li'an. The position of the original child is the same as the child for adultery, he does not follow the lineage of the mother who gave birth to him, this provision also applies to the law of inheritance, marriage, and others. For example a mother is 4 months pregnant but the father denies that the child is not his son because the mother is accused of adultery with another man, then the father must be able to prove his words.
c. A child of syubhat, a child whose position has nothing to do with the lineage of a man who interferes with his mother, unless he acknowledges it. For example, A child born to a woman whose pregnancy was due to the wrong people (mistakenly), the husband is not.[13]

In Fiqh, there is no strict definition of an illegitimate child, but even so, the scholars define adultery as something that is contrary to a legitimate child, that is, an adulterous child is a child born to his mother from an illegal relationship.[14] Meanwhile, Wahbah Az-Zuhaili defines adultery as a child born to his mother through a path that is not syar'i, or it is the fruit of an unlawful relationship.[15]

Children outside of marriage arise due to:

a. A child is born to a woman but that woman is not married to the man who intercourse with her and is not married to another man.
b. A child born to a woman, the birth is known and desired by one of the mother and father, it's just that one or both parents are still bound by another marriage.
c. A child born to a woman during the iddah period of divorce but the child born is the result of a relationship with a man who is not her husband. There is a possibility that this illegitimate child can be accepted by the families of both parties naturally if the woman who gave birth is married to the man who intercourse with her.
d. A child born to a woman whose husband has left her husband for more than 300 days is not recognized by her husband as a legal child.
e. A child born to a woman even though the religion they adhere to determines differently, for example in Catholicism it does not recognize divorce but it is also done then remarries and gives birth to children. The child is considered an outside child.

Children born to a woman while for them the state prohibits marriage, for example, Indonesian citizens (WNI) and foreign citizens (WNA) do not get permission from the embassy to enter into a marriage because one of them already has a wife but they still mix and giving birth to the child, this child is also called an out-of-marriage child.

a. A child is born to a woman but the child does not know her parents at all.

b. Children born from marriages that are not recorded at the Civil Registry Office and / or the Office of Religious Affairs.
c. Children born from traditional marriages are not carried out according to religion and belief and are not registered at the Civil Registry Office and the Office of Religious Affairs.[16]

Legal Status of Children Outside of Marriage According to the decision of the Constitutional Court Number 46 / PUU-VIII / 2010

The issue of the legal status of children in legal studies in Indonesia has recently become interesting and important to note. Especially after the Constitutional Court issued a very controversial decision regarding the status of children out of wedlock. The Constitutional Court's decision was not only controversial but even provoked a prolonged polemic in society until finally, the Indonesian Ulema Council issued Fatwa No. 11 of 2012 concerning the Position of Children as Results of Adultery and Their Treatment. Because Islamic sharia distinguishes the rights of legitimate children and illegitimate children, real children, and adopted children. These provisions are the principles of the Islamic religion. Therefore, the emergence of an opinion that equates the position of children born from legal marriages and children born not from marriage, especially with the issuance of the Constitutional Court decision Number 46 / PUU-VIII / 2010 can shake the life of the Muslim community. This fatwa was based on the background of the decision of the Constitutional Court which granted the request for a judicial review of Article 43 paragraph (1) of Law Number 1 of 1974 concerning Marriage.

In the verdict, the judge stated that he had granted the Petitioner Hj. Aisyah Mochtar for some, namely:

Article 43 paragraph (1) of Law Number 1 of 1974 concerning Marriage (State Gazette of the Republic of Indonesia of 1974 Number 1, Supplement to the State Gazette of the Republic of Indonesia Number 3019) which states, "Children born outside of marriage only have a civil relationship with their mother and his mother's family ", contradicts the 1945 Constitution of the Republic of Indonesia as long as it is interpreted as eliminating civil relations with men which can be proven based on science and technology and / or other evidence according to the law that has blood relations as his father;Article 43 paragraph (1) of Law Number 1 the Year 1974 concerning Marriage (State Gazette of the Republic of Indonesia Year 1974 Number 1, Supplement to State Gazette of the Republic of Indonesia Number 3019) which states, "Children born outside of marriage only have a civil relationship with their mother and his mother's family ", does not have binding legal force as long as it is interpreted as eliminating civil relations with men which can be proven based on science and technology and / or other evidence according to the law has a blood relationship as his father, so the verse must be read,"Children born out of wedlock have a civil relationship with their mother and their mother's family as well as with a boy as their father which can be proven based on science and technology and/or other evidence by law to have blood relations, including civil relations with their father's family".

The Constitutional Court's decision was considered constructive regarding children born out of marriage, apparently born from a dilemma between the desire to enforce the law fairly and equitably on the one hand and an effort to maintain several values held by society, especially those originating from religious and cultural teachings. on the other.

Legal Status of Children of Divorced Parents

The magazine As-Sunnah Edition 04 / Tahun XII / 1429H / 2008[17]explained that the Islamic Shari'ah enforces this custody, to love, care for and give good to them. The reason is, if they are left without responsibility, they will undoubtedly be neglected, neglected, and

in danger. Whereas the dinul Islam teaches compassion, cooperation, and solidarity. So that it prohibits actions that are wasted on other people in general, especially those who are in a state of distress. This is the obligation of people who are still bound by kinship with the child. And their obligation is, to take care of the responsibilities of members of his extended family, as in other laws. Mother is the most entitled to hold custody of children compared to other parties. Al-Imam Muwaffaquddin Ibn Qudamah said,

From 'Abdullah bin' Amr, that a woman came to the Prophet to complain about her problem. The woman said:

يا رسول الله إن ابني هذا كان بطني له وعاء وثديي له سقاء وحجري له حواء وإن أباه طلقني وأراد أن ينتزعه مني

"O Messenger of Allah. My son was before, I was the one who was carrying it. I was the one breastfeeding and holding her. And actually, his father has divorced me and wants to take it from me.

Hearing the woman's complaint, the Prophet sallallaahu 'alaihi wa sallam answered:

أَنْتِ أَحَقُّ بِهِ مَا لَمْ تَنْكِحِي

"You have more right to take care of him as long as you are not married".[18]

Although child care is the right of a mother, sometimes she cannot get this right. Several factors that can hinder his rights. Including the following.

a. First. Ar-Riqqu.
   That is, the person concerned has the status of a slave, even though there is still "a little left". Because hadhonah (caring for) is a type of territory (responsibility). As for a slave, he had no territorial rights. Because he will be busy with service to his master and everything he does is limited by the rights of his master.
b. Second. Fasiq people.
   People like this, they do immorality so that they come out of obedience to Allah. That means, he cannot be trusted with parenting responsibilities. Thus, child custody is separated from him. The existence of a child with him "a little or a lot" will educate the child according to his bad habits. It is feared that it will harm children, which of course has an impact on children's education.
c. Third. Infidel.
   An infidel should not be granted the right to care for a Muslim child. His condition is worse than the wicked. The dangers arising from it were greater. Do not rule out, he deceived the child and expelled him from Islam by instilling his kufr religious beliefs.

Fourth. A Woman Who Has Remarried Another Man.

In the matter of childcare, it is the mother who has the most important rights. However, this right is automatically terminated if she remarries an ajnabi (another man). That is, a man who is not from among the 'asabah (heir) of the child he cares for. However, if the mother marries a man who is still related to the child, then the mother's custody is not lost.

Or for example, a woman whose husband has divorced, and then she marries another man (ajnabi), then in this situation, she does not get custody of the child from her first husband. Thus, his parental rights will be eliminated, based on the content of the hadith of the Prophet sallallaahu 'alaihi wa sallam:

أَنْتِ أَحَقُّ بِهِ مَا لَمْ تَنْكِحِي

"You have more right to take care of him as long as you are not married".

These are several factors that can prevent a person from obtaining custody of their child. When these hindering factors disappear, for example, a slave is completely free, the wicked person repents, the infidel has embraced Islam, and the mother has divorced again, then these people will regain their right to care for their child.

WHEN CHILDREN DETERMINE CHOICES?

At the age determined by the shari'ah, children have the right to make choices to live with their mother or father. In this case, two conditions must be met.

First: The father and mother must deserve the responsibility of taking care of their children (ahlil hadhonah). This means that one of the factors that prevent a person from being a babysitter of their child must not be attached to him.

Second: The child is already 'aqil (intelligent). If he has a disability, then he remains under the supervision of his mother. This is because women are more affectionate, more responsible, and more aware of children's needs.

THE DIFFERENCE OF CARING FOR BOYS AND GIRLS

A boy.

He was faced with the choice to decide. That is, he lives with his father or mother, when he is seven years old. When he is seven years old, sensible, he makes up his mind and then lives with the person of his choice, father, or mother. This is the decision made by the Caliphs 'Umar and' Ali.

Basically, there is a woman who came to the Prophet. She complained, "My husband wants to take my son away," then Rasulullah Sallallahu 'alaihi wa sallam asked the boy, his son: "O little child. This is your father, and that is your mother. Choose who you want! " The boy then took his mother's hand, and then they both left.[19]

If the child belongs to the father, then he is where the father lives day and night. So that his father is free to look after, teach, and educate him. However, it must not prevent the child's desire to visit his mother. Because to prevent him, means to cultivate an attitude of disobedience to his mother and cause the break of ties.

If he chooses the mother, then the child is with the mother at night. Meanwhile, during the day, he was with his father, to receive education and guidance.

However, if the child is silent, not making up his mind in this matter, then a lottery is taken. This means that both parents are not very special parties in the eyes of the child, so it is decided by qur‘ah (lottery).

The information above applies to boys. What if the child is a girl?

Girl

When she was seven years old, her custody passed to her father, until she married. The reason is, the father will be better at maintaining and guarding against him. In addition, a father is more entitled to receive the territory (responsibility) of a daughter. However, that doesn't mean that his mother shouldn't visit him. The father is even prohibited from preventing the mother of the child from visiting him unless it causes bad things or haram actions.

If it turns out that the father is unable to handle the care of his daughter, or does not care about the problem, because of his busyness or religious shallowness, then the mother has the right to take over, and the daughter lives with her mother.

Shaykhul Islam Ibn Taimiyyah rahimahullah said: Imam Ahmad and his students considered father prioritizing (to care for his seven-year-old daughter) if it did not cause

harm (trouble) to his daughter. If it is thought that the father is unable to look after and protect him, (and instead ignores him because of his busy life, then the mother is the one who (has the right) to handle the care and protection for him. In these conditions, the mother takes precedence. from her parents, then no doubt, the other party (who does not cause problems for her daughter), has more right to handle it.[20]

Shaykhul Islam Ibn Taimiyyah rahimahullah also added, if it is estimated that his father remarried and entrusted his daughter in the lap of his stepmother who was reluctant to deal with his problems, even (his stepmother) hurt and neglected the good for himself (daughter), while her mother (herself) could provide maslahat for him, did not hurt him, then in a situation like this, definitely hadhonah rights belong to the mother.[21][5]

3. CONCLUSION

As a conclusion, it is important to note that this research is

3.1. Child Care due to Marriage Breakdown (Law No.1 of 1974 concerning Marriage)

However, globally the Marriage Law has provided regulations for the care of these children which are linked together with the result of breaking up a marriage. In article 41 it states: If a marriage breaks up due to divorce, the following consequences are: 1. Either the mother or the father is still obliged to care for and educate her child, solely based on the child's interests, if there is a dispute regarding child care, the Court will give its decision. 2. The father is responsible for all the maintenance and education costs required by the child, if in fact, the father cannot fulfill these obligations, the Court may determine that the mother is responsible for the costs. The court can oblige the former husband to provide living expenses and / or determine an obligation on the part of the ex-wife. Regarding the obligations of parents to children, it is contained in Chapter X starting from articles 45-49. Article 45 states: (1) Both parents are obliged to care for and educate their children as well as possible. (2) The obligations of the parents as meant in paragraph (1) of this article shall be valid until the child is married or can stand alone, which obligation continues even if the marriage between the two parents breaks up. Article 49 (1) One or both parents can be deprived of power over a child or more for a certain time at the request of the other parent, the child's family in a straight line up and siblings who are adults or an authorized official by a court decision. in these matters: 1. He greatly neglected his son. 2. He behaved badly. (2) Even if parents are deprived of their power,

3.2. Article 26 of the Child Protection Law

That: (1) Parents are obliged and responsible for: a. Caring for, nurturing, educating, and protecting children; b. Developing children according to their abilities, talents, and interests; and c. Prevent child marriage. d. Providing character education and instilling character values in children. (2) If the parents are absent, or their whereabouts are not known, or for some reason, are unable to carry out their obligations and responsibilities, as referred to in paragraph (1), then this can be transferred to the family, which is carried out according to the provisions prevailing laws and regulations. Then if both parents have divorced, the care and maintenance of the child remain an obligation and responsibility for the parents, although one of the parents has custody of the child. However, in the care and maintenance of children, it is the children's rights that are prioritized for the benefit of the child in the future.

From the article above, this is in line with the Convention on the Rights of the Child (KHA) as explained in article 9 which states that basically, a child has the right to live with his parents, unless this is deemed not in his best interest. The right of the child to

maintain a relationship with his parents if separated from one or both, it is the obligation of the State in cases where such separation occurs as a result of the State's actions. However, in this case, the State also has the authority to separate the child from his parents a court decision. Therefore, from the legal provisions regarding child protection, the principle is that the best interests of the child should be the main consideration, as enshrined in the KHA (Convention on the Rights of the Child) Article 3 Paragraph 1

3.3. Child Care due to the Breakdown of Marriage (Presidential Instruction No. 1 of 1991 concerning Compilation of Islamic Law) Compilation of Islamic Law (KHI)

As for the Compilation of Islamic Law (KHI) the meaning of ḥaḍānah has also been formulated in article 1 letter (g) that what is meant by nurturing and educating children to adulthood or being able to stand alone.17 In Islamic Law Compilation (KHI) Here, ḥaḍānah (maintenance) of the child is held by the mother who has been divorced by her husband. However, if the wife has remarried another man, the mother's right to care for the child will be annulled. The Compilation of Islamic Law (KHI) in article 105 (a) which regulates custody of children reads as follows: Article 105: In the event of a divorce: a. It is the mother's right to care for a child who is ghairu mumayyiz or not yet 12 years old; b. Child care that is mumayyiz is left to the child to choose between father and mother as the right to care for the child; c. The cost of separating the children is borne by the father. “Everyone accused of a crime has the right to be presumed innocent until proven guilty according to law

3.4. Child Care due to the Breakdown of Marriage (sharia)

After the divorce, the mother is more entitled to child custody, both of them say that this right will be null and void when the mother remarries another person. Related to ha! First, it means that the obligation to bear the cost of caring for it is the consequence of the father. If the mother does not get married again, the process of exercising custody is in! continued until the child was seen as mumayyiz. Fiqh scholars generally determine that the child is mumayyiz if a boy is seven years old and if the girl is nine years old. If the child is already mumayyiz, the stipulation is that custody returns to the principle that the exercise of custody of this right is the interest or benefit of the child. In this case, to protect the interests of the child, children who are already mumayyiz are given the freedom to make choices regarding their custody of the mother or father. Meanwhile, if the requirements for receiving custody are not fulfilled by the mother. If before the child the mother was married again to someone else, the fiqh uiama agreed to transfer this right to the mother's family, for example, the mother's grandmother and above. The legal basis is an analogy (qiyas) with the above hadith, that the woman is closer to the child so that the right to hadlanah takes precedence on the mother. Likewise, the mother's relatives have more rights to this custody than the relatives of the father. That is why if the mother's eligibility for custody of the child is neglected, the custody of the child falls on the relatives of the mother's side. This opinion is also shared by ibn Qayim and Sayid Sabiq. "Under certain circumstances, according to fiqh, the above conditions can indeed change,

4. ADVICE

THE SOLUTION IF A POLEMIC HAPPENS BETWEEN THE WIFE AND FORMER HUSBAND RELATED TO CHILDREN CARE

It is undeniable that sometimes this parenting also creates problems due to problems that sometimes arise.

a. For example, if one of the husband or wife wants to travel far and stay temporarily in the destination, without any ill intent, the situation is safe, then in this situation, the right of hadhonah belongs to the father, whether the father is traveling or not. Fathers must take care of education and maintenance. Because, if the child is far from the father, which causes the father to be unable to carry out his duties, it will result in the child being neglected.
b. If the trip is not far away, is still within the qoshor prayer distance, and plans to stay there, then this custody of the child belongs to the mother of the child. Because the mother is more perfect in her love for the child. And again, in a situation like this, the father is still very likely to see the condition of his son.
c. Meanwhile, if traveling is for a purpose, then immediately returns, or the route or condition of the country to which the destination is concerned, then the right to hadhonah is transferred to the party who does not travel Because, traveling in such a state, will cause harm to him.
d. Ibnul Qayyim stated: "If you want chaotic problems or fabricate to abort mother's custody, then the father goes on a trip followed by his son, (then) this is hilah (fabrication) which is contrary to the intended purpose of the Shari'ah. In fact, the Shari'ah stipulates that mothers have more rights to child custody than fathers if the conditions of the residence are close together so that it is possible to visit at any time.[22]

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LEGAL PROTECTION FOR CONSUMERS DURING COVID-19 PANDEMIC FROM E-COMMERCE PERSPECTIVE OF FIQH MUAMALAH

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Abstract

Business development has produced various types of goods and services that can be consumed and protected with consumer protection, an inseparable part of healthy business activities or economy. During the Covid-19 pandemic, the utilization of Information Technology, communication media has changed society's behavior and human civilization. It is urgent to examine how consumer protection in the viewpoint of FiqhMuamalah is part of national economic development. Guided by the normative research method with a doctrinal approach,this research paper aims to examine and analyze how legal protection toward consumers in the COVID-19 pandemic era, from the e-commerce perspective of fiqhmuamalah. The Results OF this Article that if a legal buying and selling contract will have an impact on the transfer of ownership of goods from the seller ownership is transfered due to an agreement/contract between the two parties even though There has been no qabadh, this is in line with what Sheikh Wahbah Az-zuhaily explained that Qabadh in securities trading is sometimes haqiqi (legal ownership) and sometimes Al-qabdh al-hukmi (beneficial ownership). Al-qabadh al-hukmi is anything that states the transfer of ownership rights or asset management rights according to 'Urf, which applies without the involvement of traditional hand or acceptance elements. the consequence of qabadh is. The responsibility for the goods is transferred from the seller to the buyer. If the item disappears or is damaged after it occurs sale and purchase and before the qabadh occurs, the goods are borne by the seller because the goods are still under warranty, unless damaged or lost is caused by the buyer/consumer. This is in accordance with the rule of "goods purchased before being accepted by the buyer are still the seller's guarantee
Keywords: Consumer Protection, Covid 19, E-Commerce, FiqhMuamalah

1. INTRODUCTION

In today's business development, it is effortless for people to access and get goods and services. This convenience is inseparable from the development of information, technology, and social media. Business Actors or Producers are increasingly offering goods, products through social media with various details and promotions.

This inrmation and promotion is an effort to inform and introduce a product to the public. This condition makes it easy for consumers to find out the quality of an item or product. The massive amount of offers made by business actors must be balanced with complete and correct information on a product so that consumers feel safe to use the product.

In soaring offers made by business actors in the midst of the Covid 19 Pandemic through E-commerce, a very crucial thing that needs to be considered when conducting E-commerce transactions is when there is damage or defects in a product where the item has not yet arrived in the hands of consumers, wear and flaws of an item will certainly bring the risk of loss to consumers.

One of the studies that will be sharpened in this paper is the responsibility for any loss and as the terms are built-in trade transactions through E-Commerce in the case of handing over of goods later that when there is damage or defect in a product is the responsibility of the risk that must be accepted by consumers or business actors who must be responsible.

The right to obtain correct, transparent, and honest information regarding the condition of goods and services is one of the consumer rights which is regulated in the Consumer Protection Law Number 8 of 1999

1.1. Research Method

The research method used in this research is the Doctrinal approach. The doctrinal process contains normative characters because it has a research sense in the form of a set of

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norms (black letter law) at the application level or a certain level. This approach reaches the analysis of legal theory, law science, and legal philosophy. Research with a doctrinal approach is directed at a set of norms as research objectives by analyzing the relationship between norms, the relationship between vertical-horizontal legal provisions, the merging of norm theory, and legal principles.

1.2. Paper Structure

This research focuses on the study of how consumer rights can be met in e-commerce transactions. One of the consumers' rights is the right to choose goods and / services and obtain these goods and services according to exchange rates and conditions and guaranteed guarantees and the right to the formation—accurate, precise, and honest about the needs and warranties of goods and services.

2. BACKGROUND

Technological advances have resulted in all countries becoming as if without borders. Everything that happens in one place is immediately recognized by people living on the other side of the world. Technological progress has both positive and negative impacts. The connection between technological advances and the world of commerce, such as goods production from countries, has flooded the whole world. With the era of free trade, the positive impact that arises in the world of trade is the variety of goods and services offered, not only physically visible. Currently, the features displayed by on line market place through electronic systems such as Bukalapak, Lazada, Shopee provide information on a good / service through digital supply and demand or e-commerce/trade (ordinary people call it online buying and selling). Rapid business development has resulted in various types of goods and / services that can be consumed. It must be accompanied by consumer protection, which is an inseparable part of a healthy business or economic activity[2].

During the Covid 19 pandemic, the use of information technology, communication media has changed society's behavior and human civilization globally.The development of information and communication technology has also caused world relations to be borderless. The development of information and communication technology has led to social, economic changes and culturally significant "Transactions Through Social Media[3]." Several factors drive transactions through Social Media, including electronic commerce. It can reach more customers, and customers can access all information continuously and encourage the seller's creativity quickly and precisely. With the distribution of information conveyed, but in this condition, information must be provided with balanced/asymmetrical for consumers, to guarantee consumer rights in consuming goods and services.

Transaction in Islam is an act that is permissible both online and offline/conventional as long as the principles of transacting in Islam are not violated. One of the basic principles in Islamic transactions is not allowed to trade goods/services that are not apparent goods. This ambiguity can result in terms of quality of goods, quantity, acceptance of goods and product prices, and even the business actor's current condition as the subject of trade wherein electronic trading between business actors. Producers and consumers do not meet or are not in one domain when conducting a transaction.

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[2] Zulham, S.HI., M.Hum , Peranan Negara dalam perlaindungan Konsumen Muslim terhadap produk halal (Jakarta Timur: Kencana , 2018) 174-175

[3] Rudyanti Dorotea Tobing, Itikad Baik dalam Transaksi e-Commerce pada situasi Pandemi Covid-19 dikaitkan dengan Perlindungan Konsumen terhadap Produk Halal dan Hygiene Sanitasi, makalah di sampaikan pada webinar Nasional Perlindungan Hak Konsumen dalam Bisnis Online pada Covid-19 dikaitkan dengan produk Halal dan Hygiene Sanitasi di Fak.Hukum Universitas Syiah Kuala Banda Aceh tanggal 19 Mei 2020

During the Covid-19 Pandemic, there was an increase in E-Commerce transactions by around 30%, which can be assumed to be more problems with the information, quality, halalness, and echogenicity of traded goods[4]. In buying and selling online, people cannot see the items they purchase because all data about these items can only be seen through online shopping applications from the internet. Based on the above explanation, the writing will examine "Consumer Protection in E-commerce from the perspective of Fiqh Muamalah."

2.1. Coronavirus Disease-19 Muamalah and Social Changes

Coronavirus disease 2019 is a disease caused by a new type of Coronavirus, namely Sars-CoV-2, first reported in Wuhan, China, on December 31, 2019. This virus has become a global pandemic because it attacks various countries globally, including Indonesia; the World Health Organization (WHO) announced the Coronavirus as a pandemic, based on data from John Hopkins University as of Wednesday, March 11, 2020.The Coronavirus has infected 121,564 people in 118 countries.The virus originated from Wuhan, Hubei, and China. Based on data from the Covid-19 handling task force on Saturday, November 28, 2020, there were 5,418 new cases of Covid-19 in the last 24 hours. Thus the total Covid-19 cases in Indonesia now reached 527,999 patients since the first patient's announcement on March 2, 2020[5].

Covid-19 has had the impact of changes in economic development.In the economic field, many people's habits have changed, which usually consumers transact physically, start shopping with online transactions or e-commerce, and changes in the form of transactions due to the influence of conditions and situations. Relevant in Islamic teachings, because this is following the Law Rule "It is undeniable that the law changes with the changing times" and other rules are explained, "Changes in Fatwa along with changing times and circumstances." This rule shows that changing times, situations, conditions, and circumstances will affect the law's changes[6]. Covid -19 has created a large-scale Social Restriction (PSBB) policy, physical distancing, which results in people's behavior in transactions changing from physical/offline shopping to e-commerce or online transactions.

Changes in muamalah or transactions in e-commerce that must be considered are the substance of the meaning contained therein and the goals to be achieved, if muamalah that is done and developed is following what the syara '*(maqashiduSyariah*) wants to achieve consumer benefit and avoid harm then type muamalah this is acceptable. However, if e-commerce transactions bring harm to consumers, then this form is rejected.

2.2. E-Commerce in Indonesian Contract Law System

E-commerce transactions are an electronic transaction activity; e-commerce does not yet have a uniform term in Indonesian. There are several terms, including electronic trading contracts, electronic commerce transactions, and electronic trading transactions. The term used in Government Regulation No. 80 of 2019 is trading through an electronic system (PMSE), which is explained in article 1 number 2 trading via an electronic system, from now on abbreviated as PMSE, is trading where transactions are carried out through a series of electronic devices or procedures. An agreement in trading activities via electronic is

[4] Ahmadi Miru.,Perlindungan Hukum Bagi Konsumen di masa Covid-19 (Beberapa Pemikiran) the Article is presented on webinar Nasional Legal Protection For Consumer During Covid-19 Pandemi OnlinedFakultas Hukum Universitas Syiah Kuala Banda Aceh Tanggal 19 Mei 2020

[5]CNN Indonesia.com WHO Announcement Corona Virus Diases -19 as Pandemic , It's Accessed on Saturday 28 of Nopember in 2020

[6] Rozalinda, Fikih Ekonomi Syariah Prinsip dan Implementasinya Pada Sektor Keuangan (Jakarta: PT Rajagrafindo Persada, 2016), h.11

basically the same as an agreement made in conventional trading transactions. However, the arrangement used in electronic trading transactions is an agreement of the parties made through an electronic system called an Electronic Contract (Article 17 of the ITE Law).

An e-commerce agreement is the same as a sale and purchase agreement, which is a reciprocal agreement. Article 1457 of the Civil Code states that buying and selling is an agreement whereby one party binds himself to submit material, and the other party pays the promised price. E-commerce is located in the field of civil law, as a sub system of contract law. E-commerce has the same principles as agreement law in general. The validity of the legal principles of agreement in e-commerce[7], the provisions on the engagement remain in effect, so that Article 1320 of the Civil Code also applies regarding the legal terms of an agreement, namely the existence of an agreement, competent, certain things and causes that are halal.

2.3. Consumer protection in E-Commerce

In essence, the role of law for economic progress is to create a competitive economy and market. It is impossible for every business actor to be able to develop and compete without the help of consumers, but in practice, consumers are often disadvantaged by business actors. According to article 1, paragraph 1 of Law No. 8 of 1999, consumer protection is all efforts that ensure legal certainty to protect consumers. The coverage of consumer protection can be differentiated into two aspects:

1. Protection against the possibility of goods delivered to consumers not following what has been agreed.
2. Protection against the imposition of conditions that are not fair to consumers[8]
   In consumer protection, it is determined that there are consumer rights that must be fulfilled by every business actor in article 4 of UUPK letters b and c that consumers have the right to choose goods and / services and get these goods and / services in accordance with the exchange rate and conditions as well as the promised guarantee. Consumers have the right to correct, transparent and honest information regarding the conditions and warranties of goods and/or services. This right is fulfilled when an e-commerce transaction fulfills the elements in an electronic offer and acceptance where the electronic offer contains information such as:
   a. Specifications of goods and or services
   b. Prices of goods and or services offered
   c. Terms of the agreement
   d. Payment mechanism and system as well as payment timing responsibilities
   E. Mechanisms and systems for the delivery of goods or services
   f. Unexpected risks and conditions
   g. Limitation of Liability in the event of unexpected risks

If the requirements for the elements of e-commerce transaction offerings have been agreed upon between business actors and consumers, that if there is a risk or damage in the delivery process, it is not the responsibility of the business actor because in an E-commerce Transaction there has been an electronic receipt as regulated in Government Regulation No. 80 of 2019 concerning Trading Through Electronic Systems (PMSE)) it is explained that electronic acceptance is the act of accepting and consciously acknowledging the terms and conditions that are conveyed in the offer electronically, both online and offline. In the PMSE, electronic bids are declared to have been accepted:

[7] Rudyanti Dorotea Tobing ,Op.cit

[8]Aulia Muthiah, Hukum Perlindungan Konsumen Dimensi Hukum Positip dan Ekonomi Syariah (Yogyakarta: Pustaka Baru Press, 2018) h.39

a. If the recipient has accepted electronically the terms and conditions presented in the offer electronically,
b. Goods that have been agreed upon and received in an electronic agreement if the buyer has received it electronically

This will be binding if Electronic Commerce contains a clear and specific statement of Intent and intention in the offer and terms and conditions utilizing an offer that is fair and balanced. As Article 3 letter (a) PP 80/2019 states in conducting PMSE, "parties must pay attention to the principle of good faith" In line with Article 7 letter (b) of the Consumer Protection Law, "The obligation of business actors is good faith in conducting business activities" Article 17 paragraph (2) of the ITE Law "Parties conducting electronic transactions as referred to in paragraph (1) must have good faith in conducting transactions and/or exchanging electronic information and electronic documents during the transaction". Article 1338 paragraph (3) of the Civil Code "An agreement must be carried out in good faith." Article 9 of the Electronic Transaction Information Law stipulates that business actors offering goods or services electronically must provide complete and correct information regarding contract terms, producers, and products.

2.4 Principles of Responsibility in Consumer Protection

The principle of responsibility is an essential subject in the study of consumer protection, in terms of the consumer's right to choose goods and / services and to obtain these goods and / services following the exchange rate and conditions and guarantees promised. Consumers have the right to correct, precise and correct information honest about the situation and guarantee goods and services; it is necessary to trace who should be responsible. In general, the principle of responsibility in consumer protection is based on the element of error/negligence. The burden of Negligence . The conditions that are met in Negligence are:

a. A behavior that causes harm is not in accordance with the norm of prudence
b. It must be proven that the business actor is negligent in his obligation to be careful with consumers
c. This behavior is the real cause of the losses incurred[9].

Business actors in e-commerce transactions will be sued for responsibility if the goods/services offered are not in accordance with the elements of the offer, including specifications of goods and or services, prices of goods and or services offered, requirements in agreements, mechanisms, and systems Payment and payment time responsibilities, mechanisms and systems for delivering goods or services, risks and conditions that are not expected, Limitation of Liability in the event of unexpected hazards due to mistakes/negligence occurring in the behavior of the business actor does not comply with the standard of conduct set by the agreement or Constitution.

2.5 Legal Protection of Consumer Rights in E-Commerce from FiqhMuamalah Perspective

In this discussion,Fiqhmuamalah consists of the words fiqh and muamalah, fiqh in the language is al-fahmu, which is a deep understanding of the term "knowledge related to amaliah laws extracted from detailed arguments." While muamalah in language is *mufa'alah fi al-'amal* (doing work for each other) or *ta'amulma'a al-ghair* (working with others) while muamalah is the term "*laws that govern human relations with each other in worldly matters*".

[9]Ibid., h.116-117

While the definition of muamalah in particular is "the laws that regulate human relations with fellow humans in matters of *maliyah and huquq*(material rights) based on the above understanding Muhammad Usman Syabir explained that muamalah fqih is" the science that regulates the exchange of goods and services between people human beings by means of an intermediary contract and obligation (agreement). From the above understanding, it can be concluded that muamalahfiqh is a law that regulates interactions between humans in matters of material / property. In order formuamalah activities to be in line with Islamic regulations, these activities must harmonize the muamalah principles outlined in Islam. Muamalah principles are the main things that must be fulfilled in carrying out trade activities related to material rights with fellow humans, things that are the principles in muamalah:

a. Mubah, the basic principle of every muamalah in Islam is permissible. Every muamalah contract carried out by business actors to fulfill their needs is acceptable as long as there are no arguments against it. This is based on the rule of fiqh "in principle everything is permissible / mutable until there is an argument that states its prohibition."
b. Halal, in doing muamalah, the substance to be transacted for the holy day is in accordance with QS Al-Maidah verse 88
c. In accordance with the provisions of Sharia and government regulations, in fiqhmuamalah transactions must be in accordance with the sharia and government regulations, Transactions carried out in a way against the applicable law or contrary to the provisions of syriah are deemed invalid
d. The principle of benefit, the object being transacted must have benefits
e. The principle of mashlahat, the principle is in line with the objectives of sharia (maqashidusyariha), which is to bring benefit and avoid harm in every transaction carried out
f. The principle of willingness, every transaction must be made with fellow human beings based on an agreement or desire.
g. The intention, or good faith
h. The principle of please help, every transaction carried out must have an element of help[10].

Muamalah and social change are conditions that are very accommodated in Islam in terms of protection of consumers in e-commerce transactions, which are very important in the study of Islamic sharia. According to the Islamic view consumer protection is not only a civil relationship but also related to the public interest at large.

In the study of fiqhmuamalah, protecting human rights as a society is the obligation of the state, one of which is to provide protection for consumers and also pay attention to every product that is processed by business actors. The study of muamalahfiqh on consumer protection explicitly does not have clear rules stating protection for consumers, but it can be understood in the journey of the Prophets that Allah told in the Al-Qur'an, regarding the consumer's rights from the story of the Prophet Shuaib who was sent by Allah SWT to the Madyan people who works as a trader who, if you consider the trade, always disadvantages other parties for his benefit, this is explained in Quran Surah Al-A'raf verse 85 :

And to the people of Midian We sent their brother Shu'aib. He said, "O my people! Worship Allah—you have no other god except Him. A clear proof has already come to you from your Lord. So give just measure and weight, do not defraud people of their property, nor spread corruption in the land after it has been set in order. This is for your own good if you are ˹truly˺ believers.

[10] Rozalinda, Op.cit h.4-9

As the explanation above, that the concept of consumer protection in the study of muamlah fiqh is not clearly stated, but the principles of consumer protection can be found in trading practices that the Prophet used to do, in interacting, Rasulullah SAW was known to be trusted to be honest and protect himself from matters. - bad things, with his behavior he teaches business actors to make muamalah transactions that are honest, transparent, honest about what they sell, namely about the character and characteristics of the goods and services requested by consumers. In buying and selling transactions in muamalah, especially in the offering of goods and services, it is valid if several things are fulfilled:

a. The agreement between the two parties, based on QS An-Nisa verse 29 and the hadits of the Prophet Muhammad, "buying and selling transactions must be based on the willingness or agreement of both parties."
b. Entrepreneurs are people who are capable, mature, understand the contract
c. Owned goods that do not belong to themselves may not be traded unless there is a mandate given by the owner, such as a wakalah contract. This is in accordance with the hadith of Rasulullah from 'Amru Bin Syuaib that "it is not lawful to buy and sell something that is not in you"
d. The object of the transaction is the object permitted by religion
e. The object of the transaction is an item that can be handed over
f. The nature, size and type of the object of the transaction are known by both parties during the contract
g. Prices must be transparent at the time of the transaction, based on the hadith of the Prophet Muhammad "prohibits buying and selling of gharar (uncertain or clear)[11]

The requirements stipulated in the muamalah fiqh study are in line with those stipulated in PP No. 80 of 2019 concerning PMSE in article 3 that in implementing PMSE, the parties must pay attention to a). Good faith, b) Carefulness, c) Transparency, d). Trustworthiness, d). Accountability, e). Balance and f) fair and healthy and article 13 that business actors are required to provide truthful, transparent, and honest information about the identity of legal subjects supported by valid data or documents, convey true, clear, and honest information at least regarding truth and accuracy. Information, conformity between advertising information and physical goods, the legality of goods and services.

Provisions for Transactions in Fiqh Mumalah and Government Regulation No. 80 of 2019 concerning Trading Through Electronic Systems (PMSE)

No	Rukun, syarat dan ketentuan	Pillar, terms and conditions	PP No 80 tahun 2019
1	Businessmen	Individuals and business actors who are Baligh, sensible and understand the contract (agreement)	Individuals, business entities that are legal entities or non-legal entities which can be domestic business actors and foreign business actors carrying out business activities in the PMSE sector
2	Goods / services (Object of the Transaction)	1. Theobject being transacted is the	1. Every object, both tangible and intangible,

[11]Yusuf Alsubaily, Fiqh Perbankan Syariah: Pengantar Fiqh Muamalat dan Aplikasinya Dalam Ekonomi Modern, alih bahasa Erwandi Tarmizi,MA h.6-8

		mutaqawwim mall, objects that must be holy, it is not legal to buy and sell objects containing unclean 2. Items that are traded are available and have clear characteristics, sizes and types 3. Items or goods that are traded can be handed over	movable or immovable, can be spent or cannot be spent and can be traded, used, used or utilized by consumers or business actors 2. Quality and price of goods are in accordance with information in advertisements as well as accessibility of goods / services 3. Feasibility of consumption of goods or services 4. Legality of goods / services

2.6 Goods receipients on E-Commerce from FiqhMuamalah Perspective

A legal buying and selling contract will have an impact on the transfer of ownership of goods from the seller, in this case the business actor in E-commerce is the organizer of e-commerce, for example,Bukalapak, Lazada, Shopee to the buyer or consumer, ownership is transferred due to an agreement/contract between the two parties even though There has been no qabadh[12], this is in line with what Sheikh Wahbah Az-zuhaily explained that Qabadh in securities trading is sometimes haqiqi (legal ownership) and sometimes Al-qabdh al-hukmi (beneficial ownership)[13]. Al-qabadhhaqiqi is the perfect transfer of traditional ownership of goods by means of touching, receiving with hands, measuring, weighing a food, moving or bringing it to the buyer's control. Meanwhile, al-qabadh al-hukmi is anything that states the transfer of ownership rights or asset management rights according to 'Urf, which applies without the involvement of traditional hand or acceptance elements.

In e-commerce, there are offers from business actors that contain information on an item as well as provisions on the quality and delivery of goods when the consumer has accepted this offer by agreeing to the proposal in the agreement. There has been accepted even though the goods have not been transferred directly, this condition is under the opinion of Sheikh Wahbah Az-zuhaili is al-qabadh Al-hukmi (beneficial ownership). Two things are the consequences of qabadh: 1. The authority to use goods, such as reselling them, is illegal for someone to buy the goods and sell them back before the qabadh occurs, 2. The responsibility for the goods is transferred from the seller to the buyer. If the item disappears or is damaged after it occurs sale and purchase and before the qabadh occurs, the goods are borne by the seller because the goods are still under warranty, unless damaged or lost is caused by the buyer/consumer. This is in accordance with the rule of "goods purchased before being accepted by the buyer are still the seller's guarantee."

[12]DR.Yusuf Alsubaily, *Ibid.*, h.8

[13]Wahbah Al-Zuhaili, *Al-fiqh al-Islamai Wa Adillatuhu*, (Beirut, Daar Al-fikr, 1989 M/1409 H). Juz 3 h.505

3. CONCLUSION

The right to choose goods and or services and get these goods and or services according to exchange rates and conditions and guarantees promised in E-commerce must be under what was promised in the Electronic System offering, regarding the quality, nature, and time of payment, if the buyer has agreed and accepted the offer electronically is legally binding, and there has been a handover of goods even though the goods have not been sent, according to the Fiqh aspect it is muamalah that goods and services traded in E-commerce in the handover of goods are described as included in the QabadhHukmi or it can be said that electronic receipt is anything that states the occurrence of a transfer of ownership rights or asset management rights according to the applicable urf without the involvement of traditional hand or income elements.

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CONSTITUTION VILLAGE (DESA KONSTITUSI) AND THE IMMERSING OF ISLAMIC MODERATION IN DEALING WITH TERRORISM AS A GLOBAL DISASTER

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Abstract
Many studies have been conducted on Islamic moderation, but research related to what is the root cause of the closure of Islamic moderation by the behavior of Muslims still leaves big questions. Based on research using participatory action research methods, it turns out that the mindset of a Muslim who is wrong in perceiving humans as regulated in the Koran (humans as Basyar, Al Ins, Al Insan, An Naas and Bani Adam) turns out to be the main cause of the closing of Islamic moderation. In the context of terror acts using the suicide bombing method, the closure of moderate Islamic attitudes by Muslims as stated by Muhammad Abduh is like getting confirmation. The moderate attitude of Islam, which guides all aspects of the afterlife and worldly life, seems distorted by the suicide bombing. However, if you look at the phenomenon of a Muslim who commits a suicide bombing, there are serious problems related to the concept of body ownership and understanding of humans based on Islam. The haste and reluctance to learn are reasons to continue the radical activities that make up the bodies of suicide bombers. The concept of a constitutional village which grounded the value of Islamic moderation with the involvement of all citizens of the nation became a suggestion when the State Law, as well as law enforcement against the practice of suicide bombing became paralyzed due to the concept of "unity of perpetrators and victims" and the concept of human rights which gives freedom to someone to take care of her own body. Suicide bombing behavior is of course very different according to the Islamic view that threatens activities in the world and in the hereafter due to not understanding human conceptions in a moderate manner.
Keywords: Desa Konstitusi (constitutional village), terorism, Islamic Moderation.

1. INTRODUCTION

Today's identity politics is a commodity that continues to be ignited for short-term political interests and power struggles. This condition peaked in a political year driven by contestation in the realm of general elections. Without realizing it, such fierce competition between camps has eroded national morality, religious values, mutual cooperation, democracy and legal awareness. A further consequence that should be of concern is of course the occurrence of disruption in various sectors and even the disintegration of the nation, one of which is triggered by acts of terrorism. Due to this national condition, the Constitutional Court on November 28, 2018 confirmed Bangbang Village, Tembuku, Bangli, Bali, as one of the constitutional villages. The inauguration of this constitutional village is part of the Constitutional Court's efforts to build a role model in upholding the constitution. The question that then arises is, can the various disruptions and seeds of disintegration of the main nation through acts of terrorism that exploit identity politics be resisted and prevented from expanding?

1.2. Research Method and Benefit

Based on the description of legal issues in the introduction, it is at the culmination of this research that this study aims to examine comprehensively the model of preventing the disruption of identity politics and disintegration of the nation based on constitutional villages, especially in the prevention of acts of terrorism. This is very important to further examine its function, especially if the village constitution is further projected as a role model for strengthening the internalization of Islamic moderation values which actually correspond to the values of Pancasila and the constitution which are then applied in various villages in Indonesia.

Of course, the conception of a constitutional village that was initiated by the Constitutional Court thus needs to be examined through a research. Therefore, this research

conducts an in-depth study regarding the various indicators that make up the Village Constitution, especially when faced with acts of terrorism. Therefore, in order to analyze the role model of such a constitutional village, a Sociolegal Research was pursued. The sampling technique was carried out by purposive random sampling which was used to find suitable sources, namely from stakeholders in the Constitutional Court, community leaders in Bangbang-Tembuku Village and activists of the Village Constitution. The data collection techniques used in-depth interviews, observation, documentation and group discussion (FGD / FGD). The interactive analysis technique as proposed by Miles and Huberman is the data analysis technique used in this study.

1.3. Paper Structure

This research focus on discussing what is the root cause of the closure of Islamic moderation by the behavior of Muslims still leaves big questions. Based on research using participatory action research methods, it turns out that the mindset of a Muslim who is wrong in perceiving humans as regulated in the Koran (humans as Basyar, Al Ins, Al Insan, An Naas and Bani Adam) turns out to be the main cause of the closing of Islamic moderation. In the context of terror acts using the suicide bombing method, the closure of moderate Islamic attitudes by Muslims as stated by Muhammad Abduh is like getting confirmation. The moderate attitude of Islam, which guides all aspects of the afterlife and worldly life, seems distorted by the suicide bombing.

However, if you look at the phenomenon of a Muslim who commits a suicide bombing, there are serious problems related to the concept of body ownership and understanding of humans based on Islam. The haste and reluctance to learn are reasons to continue the radical activities that make up the bodies of suicide bombers. The concept of a constitutional village which grounded the value of Islamic moderation with the involvement of all citizens of the nation became a suggestion when the State Law, as well as law enforcement against the practice of suicide bombing became paralyzed due to the concept of "unity of perpetrators and victims" and the concept of human rights which gives freedom to someone to take care of her own body. Suicide bombing behavior is of course very different according to the Islamic view that threatens activities in the world and in the hereafter due to not understanding human conceptions in a moderate manner.

2. BACKGROUND

One of the advantages in Islam is because its teachings are very balanced (moderate), which according to the Indonesian Dictionary (KBBI) means the tendency to be at the midpoint between two extreme poles. Quraish Shihab revealed that the existence of Muslims in a moderate position would lead them not to drift away as experienced by materialists and not to be complacent in the spiritual realm such as "spiritualism" whose existence often no longer rests on the earth, but combines both in all aspects of life as inspired by the word of God [1]. Seek through what God has given you (happiness) in the Hereafter, but do not forget your part of (pleasure) worldly[2].

In the moderation aspect as mentioned earlier, many studies have been carried out. However, when the study is linked to what is at the root of the problem the closure of moderation of Islam by Muslim behavior still leaves a big question. Based on research using participatory action research methods, the mindset of a Muslim who is wrong in perceiving humans as stipulated in the Qur'an (humans as Basyar, Al Ins, Al Insan, An Naas and Bani Adam) turned out to be the main cause of the closure of Islamic moderation.

In the context of terrorist acts with the method of suicide bombing, the closure of moderation of Islam by Muslim behavior (*Al Islamu mahjubun bil muslimin*) as stated by Muhammad Abduh is like getting confirmation. The moderation of Islam that guides all

aspects of the hereafter and worldly life combines, as if deviated from suicide bombings. But when looking at the phenomenon of a Muslim who commits suicide bombings, there are serious problems regarding the concept of body ownership and human understanding based on Islam. Hurry and unwillingness to learn are the reason for continuing radical activities that make the body a suicide bomber.

Based on the study of State Law, law enforcement against the practice of suicide bombs became paralyzed due to the concept of "union of perpetrators and victims" and the concept of human rights which gave someone the freedom to treat his own body. The behavior of suicide bombings is of course very different according to the perspective of Islam that threatens such activities in the world and the hereafter as a result of not understanding human conception according to the moderation of Islam.

As a more real picture, a year ago Surabaya was rocked by bombs. The bombing in Surabaya was an act of terrorism which must have taken its toll. The main purpose of this action is terror which causes damage. Thus the terrorists are people who have been affected by the notion of destruction [3] .

One cell of the Jamaat Ansharut Daulah (JAD) led by Dita Oepriarto carried out an attack on three churches in Surabaya. The first bomb hit the Church of Santa Maria Immaculate in Ngagel, the second bomb rocked the Indonesian Christian Church (GKI) on Diponegoro Street, and the car bomb driven by Dita crashed into the Pentecostal Church on Arjuno Street [4]. Not only that, the next day, Monday, May 14, 2018, one family with two motorbikes detonated themselves at the Surabaya Police Headquarters (Mapolrestabes) guard post. The police reaction in the form of a wave of arrests made a member of a terrorist cell carry out carelessness and a bomb exploded accidentally in Sidoarjo. In total there were 25 people died and 57 others were injured [5].

The distinguishing factor that makes Surabaya bomb terror feel heartbreaking is the way it is used. JAD cells use children and women in their actions. One family becomes a perpetrator of terrorism. Including minors. Witnessing this reality, the community was shocked and wondered, how could there be a husband telling his wife and child to blow themselves up.

If compared with various practices of suicide bombings, even though it is common in foreign countries, acts of terror with the mode of detonating themselves even involving children and women are the first actions in Indonesia. Suicide bombings as a phenomenon that is very shocking to the public, certainly provokes responses and subjective interpretations that cannot be erased away. Whatever interpretation remains not value free. For this reason, fighting for some communities is worth jihad, but for other communities it is worth terrorism. To die for some communities is worth jihad, but for other communities it is worth dying silly [6]. Once again the sad phenomenon forces everyone to wonder, what is wrong in Indonesian society today? How could an environment like in Indonesia produce monsters like Dita and his friends? What is in the mind of the suicide bomber for his body ownership?

Past memories of the Bali bombing and the present about radicalism-based violence in the form of lone wolf terrorism, unwittingly still give birth to global horrors that undermine Islamic moderation, religious values, respect for human rights, and legal awareness. A further consequence that should be of concern is of course the occurrence of disruption in the implementation of Islamic moderation in various sectors which even has the potential to lead to national disintegration. Due to this condition of the nation, the Constitutional Court (MK) on November 28 2018 confirmed Bangbang Village, Tembuku, Bangli, Bali, as one of the constitutional villages [7]. The inauguration of this constitutional village is part of the Constitutional Court's efforts to build a role model in constitutional enforcement that is in line with the value of Islamic moderation. However, the question that

then arises is whether the political steps of the village government with the inauguration of the village constitution are able to prevent and prevent the expansion of various disruptions and the seeds of national disintegration that are manifested through acts of terrorism?

With all the conditions described earlier, there is a concern that the Indonesian people will only be treated to violence in the form of suicide bombings in the name of Islam. It is as if the Indonesian people are just waiting for another wave of terror attacks to occur and have witnessed the burying of Islamic moderation in the suicide bombings. The question is no longer whether there will be an attack, but when will the next attack occur? Therefore, through this constitutional village concept, the basic disclosure steps regarding the concept of body ownership in terms of human rights and Islamic moderation are explored deeper so that the body is not misused as a tool to carry out acts of terror.

2.1. Body Ownership In Terrorist Ideologies That Negate The Moderation of Islam

After a few years, what's different? Sadly, almost nothing is different. In addition to the police with its Detachment and a handful of deradicalisation movements such as the Peace Circle Foundation (Yayasan Lingkar Perdamaian) which was coordinated by former Assembly Chief Instructor of the East Java Jamaah Islamiyah Bomb, Ali Fauzi, there was almost no difference in attention at all related to the terrorism problem.

As with the events that have already happened, everyone cares about terrorism when an action has just taken place. In fact, acts of terrorism such as in Sobolga (the wife blew herself up with the child when the husband was detained by the police) were only busy being highlighted for three days. After that the news about the acts of terror are immersed in various information that continues to roll on every day.

In fact, the Sibolga bomb case shows that the ideology of jihad as believed by Dita and his friends increasingly became common sense among jihadists. Just to note, the terror group is a salafi jihadi. They have a monotheistic doctrine in such a way that makes them believe that the right to make law and state belongs to God. Consequently, anyone who makes a law is an infidel who is worth fighting. The Caliphate is a must. It was believed by Al Qaeda, then followed even harder by a very terrible splinter, ISIS.

Al Qaeda is the forerunner to what is now called global jihad. The concept of global jihad is a platform that also implies that terrorism is now no longer seeing national borders, but can occur anywhere and by anyone in the world. Al Qaeda's organizational structure as a whole is different from other terrorist movements in the past. Its characteristics change and its shape is horizontal, does not follow the hierarchy of the military organization [8]. Such structures are leaner, more linear, and more an organizationally networked[9] compared to other terrorist groups.

Those two groups of jihad (tanzhim jihadi) formed the modern terror group and had many followers from all over the world. In Indonesia, traditionally, Jemaah Islamiyah (JI) is more oriented towards Al Qaeda [10], while a number of elements who joined JAD gave their allegiance to Abu Bakar Al Bahdadi, the emir of ISIS. The separation of the two groups is actually just a simplification step. Because, many JI elements sympathize with ISIS, and vice versa, so that the dynamics are very complex. However, to facilitate the discussion, the condition is described as such.

More deeply, most of the terror in 2012 was carried out by the JAD group. The scale is still far below JI, as well as the field engineering capabilities it has. But the concept of jihad is different. If JI tends to jihad thalaby (offensive), JAD views jihad difa'i or is defensive. The concept of defensive jihad holds that Indonesia is now under the occupation of the Thaghut regime [11]. Therefore, the jihad that is carried out may use anything and by any means. Including using minors and women in suicide bombings. It is at this point that the moderation of Islam over the body is covered by the concept of defensive jihad. Moderation of Islam is

increasingly marginalized when the bodies of children and women are detonated in order to carry out suicide bombings.

Such a view is very strange for the majority of Indonesian people. But not so for them, the jihadists. Detonating their children and wives in the hope of heaven, they are as sure as when we believe that the stone that is thrown up will surely fall down because of the gravity. The bad news, the view of the jihad is that, there are still many who believe in it.

In Surabaya, according to former combatants who were the speakers, there were 50-100 people who held that view, or at least affiliated with ISIS. They are very closed and hidden [12]. Also doing massive recruitment, something that is very worrying.

2.2. Constitution Village and Body Ownership In Islamic Moderation

The award as a Constitutional Village was given to Bangbang Village, because the Constitutional Court was of the view that Bangbang Village was worthy of being an example in internalizing the values of Pancasila and the constitution in everyday life (living constitution). The success story of the local intellectual community of Bangbang actually inspires and inflames the spirit to always care for reason. To borrow a phrase conveyed by Haedar Nanshir, "reason as an authentic power of conscience is guarded so that it continues to prioritize reason, knowledge, knowledge, and human civilization in all trajectories of space and time"[13]. This point has been eroded some time ago due to the phenomenon of terrorism which has spread fear among the nation's children. When many young people who are knowledgeable in the figure of intellectuals, academics, and even religious leaders are exposed to the terrorism virus so that their clear minds and knowledge dissolve because they are clad in the tendency of partisans to explode themselves as a form of terror, Bangbang residents choose to unite and carry out the routine of customs and local wisdom. So that when many people are trapped in naivety, dwarfism thinks when they get terror, Bangbang village government politics instead projects a role model for strengthening the internalization of the values of Pancasila and the constitution which are then applied in the daily lives of Bangbang people and become the torchlight of scholarship in this constitutional village. One of the important points of internalizing the values of Pancasila and the constitution shown by the Bangbang village community is the respect for humans and their humanity. This point is then correlated with the value of Islamic moderation as the focus of study.

The Islamic law sourced primarily from Quran and hadiths definitely protects and glorifies creatures called human beings. Islam gave humanity an ideal code of human rights 1400 years ago, the purpose of these rights is to confer honor and dignity on humanity and to eliminate exploitation, oppression, and injustice. Human rights in Islam are deeply rooted in the conviction God, and God alone, the author of law and the source of all human rights. Given this divine origin, no leader, no government, no assembly or any others authority can restrict, abrogate or violate in any manner the rights conferred God [14].

Thus, as the phenomenon of suicide bombing, such a thing is very unacceptable in Islamic Law. When the bodies of children and women are detonated in order to carry out suicide bombings is not only seen as a violation of Islamic Law, it is a form of evil to Alloh Subkhanahu wa Ta'ala against His blessings granted to human being as a most glorious creation of the earth.

Such blessings of being created as human being with the glory granted to him/her can be observed in provision of Alloh Subkhanahu wa Ta'ala contained Qur'an mentioning human being in five different terms. The five titles to human being shows the essence of him/her describing functions in life, namely Basyar, Al Ins, Al Insan, An Naas, and Banu Adam [15]. Human being is called basyar and it is repeated 35 times in the Qur'an. It indicates that in his/her life, human being has characteristics as visible creature and has lust with all potentials. Human being as a creature with his/her biological characteristics and physiological functions

is equipped with natural appetites in order to have desire and strength and ability according to mission assigned to him/her in the world. Al Ins is repeated 18 times in the Qur'an and it is frequently paired with *Aj Jin* to denote that human being has characteristics of gentle. Therefore, human in his/her nature is not a violent creature, and when he/she is taught of his/her humanitarian function as Al Ins, then it should be human beings become lenient and loving to other creatures.

Furthermore, Al Insan repeated 65 times in 63 verses and located in 43 surah in the Quran gives a hint that totality of human life as a whole is functioning as a creature commanded by Alloh *Subkhanahu wa Ta'ala* to be a keeper of prosperous life of the world, and his/her duty is a beings who worship only to Alloh Subkhanahu wa Ta'ala. Human being is also called An Naas and it is repeated 241 times in the Qur'an showing that function [16] of human as a social being. Therefore, humans are required to have good relationship to each other, not to hurt each other and also not to boast their superiority to others. An Naas refers to people as communality but with different characters, and they are instructed to know each other (*lita'arofu*) and to complement and to perfect to each other when they are meeting to each other. Furthermore, human is referred to as Banu Adam and it is repeated 7 times in the Quran. This sentence is intended to show 3 meaning of humanity in life. The first meaning based on the sentence aspect can be interpreted as the descendants of Adam Alaihissalam, the second meaning shows the name of men as a community but points to the similarity (non-discriminatory) namely the descendants of Adam Alaihissalam,while the third meaning provides clues for human being to learn from the life of the Prophet Adam Alaihissalam in heaven until he was fallen down to earth [17].

Based on the five titles of human being contained in the Quran, the concept of basyar is the next analysis when it is associated with the misuse of lust in the context of suicide bombing. Basyar will be also further explored in review of characteristics and depictions of human beings expected by the Creator to carry out their humanity functions on earth, to be *Khalifah fil Ardh* [18].

Human being is firstly mentioned in the Quran with the term Basyar. As mentioned earlier, basyar indicates characteristics of human being in the life. The term provides information that, the third creature created by Alloh *Subkhanahu wa Ta'ala* after creation of angels and jinn, has lust with all his/her potential. Previously, there was no response from angels as Alloh Subkhanahu wa Ta'ala said about creation of human (Prophet Adam) to them. However, the angels asked 'question' after knew that the mission of human being creation is to make human being as the Caliph on earth. The angels were concerned of potential lusts possessed by human being that may lead to negative excesses. The concern was expressed in 'a question' why did Alloh *Subkhanahu wa Ta'ala* create the caliph with such characteristics? On the question of the angels, Alloh Subkhanahu wa Ta'ala argued that the lusts with potentially negative effects can be controlled for goodness (*maslakhat*) guided by knowledge on all aspects taught by Alloh *Subkhanahu wa Ta'ala* to Adam *Alaihissalam*.

Such knowledge guidance in attempts of controlling the lusts in the concept of basyar can be observed in many parts of the Quran. As mentioned earlier, the concept of basyar is called 35 times in the Quran indicating a clue about characteristics of a creature having lust with all its potentials. With such lust, human beings have potential to gain strength. However, human being can also be trapped to make badness (munkar) as knowledge taught by Alloh is set aside, and make lust as his/her guide of life.

In fact, Alloh swears on the creation of man by mentioning the three treatises of His prophets and messengers (Quran Surrah 95:4), namely the Isa treatise (tin and olive), the Moses treatise (Tursina Hill-Mount Sinai), the Muhammad treatise (Makkah), about human being as a creature with the best form [19]. Furthermore, the Quran contains a series of verses detailing the process of human birth. Therefore it is very natural when human beingis required

to maintain his/her physical wellbeing by performing ablution, bathing [20], shaving, cutting nails, and giving intake to the body with the best food and drinks sourced from hallal and good sustenances.

As the keeper of the earth (*khalifah fi Ardh*), it is also instinctive that utilization of all potentials of human beings is directed by Alloh in order not to lower their degree as khalifah. It can be noted that with the glorious creation of human being, Alloh demands human beings to use their parts of the body for goodness as possible, for example the eyes function is limited only to see what is good. Watching improper things will decrease the glory of the human's eyes. For men, guidance for the eyes can be read in the Quran Surrah An Nur (24) verse (30) and, for women, in Quran Surrah An Nur 24 verse (31). It is said that 30. "say to the believing men that They should lower their gaze and guard their modesty: that will make for greater purity for them [21]: and Allah is well acquainted with all that They do." Similarly for women, "and say to the believing women that They should lower their gaze and guard their modesty; that They should not display their beauty and ornaments except what (must ordinarily) appear there of; that They should draw their veils over their bosoms and not display their beauty except to their husbands, their fathers, their husband's fathers, their sons, their husbands' sons, their brothers or their brothers' sons, or their sisters' sons, or their women, or the slaves whom their right hands possess, or male servants free of physical needs, or small Children who have no sense of the Shame of sex; and that They should not strike their feet In order to draw attention to their hidden ornaments. and O ye believers! turn ye all together towards Allah, that ye may attain bliss. Based on these verses, it can be understood that human beings are the noble beings, so they should only look at nothing other than any good, because watching any bad thing without controlling passions is not only demeaning the glory of human self, but at the same time, tearing down the human faith as the basyar.

Similarly, the command for hearing and ears. The dangerous thing is that if people are accustomed to hearing bad things, then they will be allergic to good things (Quran Surrah Al Anfal (8): 21). The same is true for the human's mouth, because what comes out and enters the mouth will affect the whole body. The ingestion of (haram) unlawful food into a person's mouth will create a problem of blockage in his ear (Quran Surrah Al An'am (6): 25). Furthermore, as a noble being, human is even set in attitude, that is, he/she must not cheat, lie, and all forms of immoral conducts, no exception concerning suicide bombing as discussed in the study.

So according to the view of Islam, it is very weird if a human being who is not a prophet, not a messenger, and his/her hisab is still uncertain, but instead do immoral, including suicide bombing. Therefore, according to the Islamic law, later in the Hereafter, there will be humans who will be degraded and drowned into the hell because they had abandoned their humanity functionsin the world (Quran Surrah Al A'rof (7): 79). Humans are bestowed with intelligence but it is not used, the eyes and ears but they are not used, so that their function of knowledge is not used, they are like cattle even lower.

Looking carefully at the study of the concept of human being as basyar as associated with immorality in the form of suicide bombing, it can be argued that with lust human has potency to gain strength, but if the lust is not controlled as commanded by Alloh, human beings will be trapped to do munkar (bad things) leading to their life misery both in the world and the hereafter. Therefore, human being is called basyar, because it is actually guidance for all human beings to manage their lusts according to the function of Islamic moderation set by Alloh Subkhanahu wa Ta'ala as *khalifah fil Ardh*.

2.3. Constitution Village as Deradicalization Model and Constraints on Immersing The Moderation of Islam

As a role model, the integration of human values, social justice and maturing

democracy in Bangbang village is an important point in fighting the seeds of terrorism. When religious primordialism, class, ethnicity, regionalism, and all exclusive radical groupings secretly revived, it was compounded with the liberal political process which since the reformation has been transformed into a new “iron cage” that shackles national life. At the culmination of this, the intellectual maturation movement can actually be a milestone for the enlightenment of national life in this country. the dynamics of contemporary life, including the ideology of terrorism which is transnational in nature, whether we realize it or not, have drained the spiritual energy of the country's children to become dwarfed, naive, and have short axes. Democracy which should run well and happily like a contest or competition, apart from being noisy, turns into a war of ideology and identity politics which is constructed absolutely like in a war mandala, and sometimes even ends in acts of terror.

Therefore the question arises, after a few of years, are there significant developments in efforts to combat terrorism and the spread of radicalism? Researchers found a very alarming answer, namely that the development of counter-terrorism was not much done. If it's not called stagnant. Those who really pay attention may only be the National Agency for Counter-Terrorism (BNPT) and Special Detachment 88, and only a handful of observers in the terrorism sector.

What about de-radicalization? Looking at the current conditions, it turns out that almost no deradicalization program has really been felt and comprehensive [22]. BNPT has done it, but the classic problem with the budget continues to smother it. For operations only, the BNPT is still limited, especially to launch a sustainable and comprehensive deradicalisation program. At the same time, the concept of Islamic moderation is also not optimized. In Islamic law, intentional killing is a violent offense and the perpetrator must be punished with appropriate punishment [23]. However, Islamic law like this is open to interpretation. The openness of the interpretation is indicated by killing some people, especially those accused of being infidels, allowed by some groups [24]. Both views that mutually negate this, should be harmonized with Islamic moderation. The moderate aspects of Islamic teachings which contain rabbaniyah and insaniyah elements are not maximally utilized. The element robbaniyah, means that the teachings really come from God, God is the preserver of nature, not of humans. While the second, the human element means that the guidance is directed at humans, therefore his guidance is in harmony with human nature. Therefore, Islam encourages its adherents to attain worldly material, but with a divine orientation. In line with that, Islam does not prevent humans from fulfilling their physical needs, such as eating, drinking, bodily relationships, but in implementing them it is expected to be organized with spiritual values. So even with other dimensions, Islam is not only able to satisfy the ratio, but also the soul and taste. However, it is very unfortunate, Islamic moderation is thus marginalized and not used.

A search of the history of Islam in Indonesia, even if only limited to the surface level, can be used as evidence that the character of Islam in Indonesia is moderate (wasathiyah) which is compatible with the character of Islam. According to Yusuf Qordhawi in Islam the Middle Way, Islam invites to the middle way and forbids overreaching or excessive religious belief (*tatharruf*). Yusuf Qordhawi's statement continues with Muhammad Hashim Kamali's view that "moderation is an aspect, in its Qur'anic projection, of the self-identity and worldview of the Muslim community, or ummah ..." Looking at these two expert views, the moderate character (wasathiyyah) becomes important to continue to be maintained as a collective awareness of Muslims in Indonesia, which in the next stage becomes the bond of civility in the face of diversity within the Muslim body itself, as well as the diversity of other parties, even the crucial contemporary challenges, including acts of terrorism in the form of suicide bombings.

Understanding Islamic moderation in forming such ties of civilization is important to

be internalized. This is because when the ties of civilization are broken, it will be difficult for Muslims to capitalize themselves into a world power when Muslim countries that are in the middle position actually fall into the puddle of prolonged conflict, both because of differences in beliefs and because they are triggered by differences in political economic interests. In the Indonesian context, the problem is that there are still a handful of Muslims, both individually and in a network that has not felt at home. This is evidenced by the carrying out a variety of agendas, both sporadic, systematic, ideological and even terrorist steps that claim themselves theologically correct in Islam in Indonesia.

Jihadist groups such as JI and JAD demonstrate their existence not only as a discourse, but actually manifesting actions that tend to be attached to violence and terror. The phenomenon of infiltration of understanding and radicalism needs to be watched out, considering that it has expanded to the virtual space that grows into hyper-reality [25]. simulacra [26] and difficult to detect. As the strengthening of digitalization, interest and involvement in the understanding and movement of terror can be done individually and quietly. Lately we are often surprised by radical actions carried out individually (lone wolf). After being traced, the action was carried out by the perpetrators after browsing pages in cyberspace which were charged with radicalism and ideology of terrorism. As a result of this series of terrorist acts, the image of Islam began to shift from being moderate to being radical. Strictly speaking, it can be argued that in the end the glory of Islam is closed by moderation and Muslim behavior.

Actually there is one concept that is often used to unravel the complexity of internal relations in musliam, including in Indonesia, namely unity in diversity. At first Islam came from the same source with the same doctrine, especially on aspects that are fundamental. Abdullah Saeed, one of the leading Muslim academics in Australia, said that one thing that brought Muslims together in various parts of the world was shared values that were fundamental and binding.

Thus, when Islamic moderation is internalized as a step of de-radicalization, the weight of de-radicalization actually becomes a program that is even more complicated when compared to the rehabilitation of narcotics addicts. For rehabilitation of nakotika abusers, the parameters are rather clear. The detoxification step for some time, then keep the addict away from the environment, then complete rehabilitation steps. Whereas deradicalization, what is changed is belief. Not to mention talking about economic development. Because most prisoners of criminal acts of terrorism always have economic problems, both work and capital access.

Indeed there is a Peace Circle Foundation and Islamic Boarding Schools in Sumatra that are engaged in deradicalisation. But because of the lack of donations and assistance from the government, they certainly have limitations in recruiting. Even though it is the de-radicalization non-govermental organization that fights in the vanguard with radical groups in fighting for influence.

At this culmination, the city and provincial governments should be able to do more by utilizing the moderation of Islam through a variety of Islamic institutions owned, both through mosque networks, community leaders, ulama and scholars. Unfortunately, it is precisely the obstacle that hinders the pace of easing the moderation of Islam. It emerges from regional officials who view that terrorism and de-radicalization are only issues of the central government. Almost no budget or agency specifically for that at the regional level. Looking at all these conditions, it is very worrying that Indonesia will only wait for a wave of terror attacks to occur again and again.

3. CONCLUTION

Based on a study of "Constitution Village (Desa Konstitusi) and The Immersing of Islamic Moderation" related to terrorism through suicide bombings, several important things were discovered. When the view of difa'i (defensive) infects terrorists, then the act of terrorism develops towards the global. The jihadists even carried out various ways to carry out their actions, including using children and women in suicide bombings. Such actions in the moderate perspective of Islam and according to the constitution are clearly very prohibited, especially when the acts of terror use the body as an instrument of blasting action. So that the moderating study of Islam regarding body ownership is associated with the context of terrorism, provides an absolute prohibition because the degree of the human body in fact is degraded to become a tool in committing crimes. Although the concept of ownership is found for everyone's body, committing suicide bombing is still contrary to the concept of ownership and the concept of humanity as Ardh's caliph fil by which humans and all aspects of their bodies are endowed with a very high standard of human glory.

4. ADVICE

1. The immersing of Islamic moderation and the steps of the Constitutional Court, which started with the Village of the Constitution, should be followed up as role models for other villages that are potentially exposed to the ideology of terrorism.
2. The central and local governments need to further develop a Constitutional Village model that is highly compatible with the concept of deradicalization as practiced by BNPT and the Peace Circle Foundation (Yayasan Lingkar Perdamaian).

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Quran Surrah Al Hijr (15:28)

Caliph (*khalifah*), based from *qolafa* which has meaning: guard, a prosperous (*amara*: usefull, blessings, increasing goodness), a bad successor to be good. So that a caliph of all activities should be usefull.

Namely, it is holier for their heart and purer for the religion followers. Faithful people should not look at what is forbidden to see, except involuntarily. If they look at it unwillingly, they should turn their sights away quickly. As mentioned in hadith, Jarir bi Abad Al-Bajili said, "I asked the Prophet about sudden look unwillingly, he told me to turn away my sight' (Hadith, Muslim). It was said, anyone who keep their sight, then Allah will bestow them with light in their heart.'

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THE IMPLICATIONS OF *ADHOL* GUARDIAN APPOINTMENT IN INDONESIA (Study Of Decision Of The Religious Court No. 448/Pdt.P/2019/PA.Smd)

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Abstract
Islamic marriage law in Indonesia is a general rule that has been regulated in Undang-UndangNomor 1 of 1974 concerning Marriage and also in the Compilation of Islamic Law for Indonesian Muslim citizen. However, for some people sometimes getting married becomes an obstacle because one of the brides does not agree with the marriage of their daughter, so that the parents do not marry the prospective bride, while the role of guardian in an Islamic marriage is one of the pillars that must be fulfilled and if without a guardian, the marriage is considered invalid in the Compilation of Islamic Law. This research is proposed to answer two questions, first to analyze the implications of appointing adhol guardians in marriage in terms of the Islamic Law Compilation and second to find out the legal efforts to appoint the adhol guardians in marriage in terms of the Islamic Law Compilation. This research uses a doctrinal approach, which is a research that provides a systematic explanation of the rules that govern a particular law category, analyzes the relationship between regulations, explains difficult areas and may predict future developments. A marriage that is declared adhol must be based on considerations that are in accordance with the shari'ah, that is, if the bride does not have a nasab guardian at all or a guardian commits adhol, namely refusing to become a guardian of marriage. So, for valid reasons in such circumstances the guardianship does not transfer to another person but by using a guardian judge from the ministry of religion who is appointed to act as guardian of marriage.
Keyword: marriage, wali, adhol

1. INTRODUCTION

Marriage in Indonesia is regulated by Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage and Compilation of Islamic Law.

Islam has explained the purpose of marriage, namely a bond that can legalize the relationship between a man and a woman. Every marriage is not only based on a biological need as legitimate, but as the executor of the natural process of human life. In addition, marriage is also based on religion, meaning that religious aspects become the basic basis of household life by exercising faith and devotion to Allah. The basics meaning of marriage are rooted in the three wholeness that a person needs to have before carrying out it, namely: faith, Islam and sincerity. One of the legal requirements for marriage is the existence of a marriage guardian of the prospective bride which has been regulated in the Compilation of Islamic Law in Article 19 which reads «Guardian of marriage in marriage is a pillar that must be fulfilled for the prospective bride who acts to marry her». However, in reality this problem often arises where the bride's parents do not agree with their child's marriage, so the parents are reluctant to marry off the prospective bride and groom. In this case, the guardian who refuses to become a marriage guardian is called WaliAdhol. Only in cases that are truly considered unreasonable, parents do not approve of their child's marriage and refuse to become guardians,

Marriage is one of the most basic principles of life in a perfect association or society. Marriage is not only a way to the door of introduction between one people and another, and the introduction will be a way of conveying help to one another.

Marriage Law without a Marriage Guardian means the marriage is not valid. This provision is based on the hadith of the Prophet Muhammad SAW which states: it is not valid in a marriage, unless it is married by a guardian.

According to the Islamic scholars, the guardian of marriage is one of the pillars of marriage. Guardians are said to be the pillars of marriage, meaning that they must be in the marriage, without a guardian, the marriage is considered invalid. The guardian is the person

who acts on behalf of the bride and can also be the person who is asked for her consent for the continuity of the marriage. WaliAdhol is a guardian who is reluctant to marry a woman under his guardianship. Those who have very clear authority to become guardians do not want to carry out their duties as guardians of marriage. The issue in question about the authority of fathers over their daughters is whether the father's permission is required for the marriage of his never-married daughter. Article 14 of the Compilation of Islamic Law states that the pillars of marriage consist of a prospective groom, a prospective bride, a marriage guardian, two male witnesses, and ijabqobul.

The appointing of WaliAdhol in the Compilation of Islamic Law is not clearly detailed. The appointing of the guardian of Adhol has an impact on the marriage that will be carried out, in the sense that there will be many marriages that take place by overriding the role of the guardian of the lineage who should be the guardian of marriage. Therefore, the implications and efforts in determining WaliAdhol need to be reviewed in the Compilation of Islamic Law.

2. THE SIGNIFICANCE OF THE STUDY

The author uses a doctrinal research approach. Doctrinal research is a research that provides a systematic explanation of the rules governing a particular category of law, analyzes the relationship between regulations, describes difficult areas and, possibly, predicts future developments. Doctrinal approach views law as a doctrinal or set of normative rules (law in book). This approach is carried out through the study or lawliterature research. In this case the authors analyze legal principles, legal norms and the opinions of scholars.

3. DEFINITION

a. According to Mochtar Kusumaatmadja, law is as the entirety of the rules as well as all the hopes that regulate social life, the social process with the aim of maintaining order and consisting of various institutions aimed at realizing rules as a reality in society.[16]
b. According to Phillipus M. Hadjon, legal protection for the people is a government action that is preventive and resprensive. Preventive legal protection aims to prevent disputes, which directs government action to be prudent in decision-making based on discretion and comprehensive protection aimed at preventing disputes, including their handling in the judiciary.[17]
c. According to Subekti, guardianship comes from the word guardian, which means someone else as a substitute for parents who are legally required to represent children who are not yet mature or have not reached maturity in carrying out legal actions.[18]
d. According to Sulaiman Rasyid, marriage is a contract that legalizes association and limits rights and obligations as well as any kind of unnecessary mutual cooperation between a man and a woman who are neither muhrim.[19]

4. DESCRIPTION

Marriage in the Indonesian legal system, especially for Muslims, requires a guardian in marriage. This obligation can be seen in the regulations issued by the government,

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including in the Compilation of Islamic Law and Regulation of the Ministry of Religious Affair Number 11 of 2007 concerning Marriage Registration. Meanwhile, the legal position of marriage in Indonesia means the laws of several civil regulations according to Islamic teachings that apply in Indonesia.

The position of marriage has a very important role because the law of marriage regulates the procedures for family life which is the core of community life in line with the position of human as the highest being to other creatures of God's creation. Meanwhile, the legal position of marriage in Indonesia means the laws of several civil regulations according to Islamic teachings that apply in Indonesia.

Based on the Compilation of Islamic Law, Article 20 paragraph (2) states that there are two types of marriage guardians, they nasab guardian (wali nasab) and marriage guardian (wali hakim). Walinasab is a guardian whose guardianship is based on blood relations. Meanwhile, the wali hakim is the guardian of marriage appointed by the AppointingMinistry of Religion Affairror an official appointed by him, who is given the right and authority to act as guardian of marriage. Then it is also explained in detail in the Compilation of Islamic Law on guardianship in Article 21 paragraph (1) which reads "the male reative guardian consists of four groups in the order of position, one group takes precedence and the other group is closely related to whether or not the kinship arrangement with the prospective bride. The first group, a group of male relatives straight upward, namely the father, the paternal grandfather and so on. Second, the relatives of their biological brothers or siblings, and their male offspring. Third, the uncle's relative group, namely the father's siblings, siblings and their male offspring. Fourth, the group of the grandfather's siblings, their siblings and their male descendants. "

Waliadhol is to prevent guardianship of adult women from marriages that are sekufu (equal to each other in terms of religion, social, economical, occupation, etc.) and each of the two already loves each other. There is a request from the prospective bride to be married to the prospective bridegroom. The appointing of the guardian of Adhol has an impact on the marriage that will be carried out, in the sense that there will be many marriages that take place by overriding the role of the male reative guardian who should be the guardian of marriage. Therefore, the implications and efforts in appointing WaliAdhol need to be reviewed in the Compilation of Islamic Law. This research shows that WaliAdhol can prevent marriage of adult women from marriage that is equal to each other and each of them already loves each other.

Waliadhol can also be defined as a reluctant guardian or a guardian who refuses. This means that a guardian who is reluctant or refuses to marry or does not want to become a guardian in his daughter's marriage to a man who has become his daughter’s choice. There is a request from the prospective bride to be married off to the prospective bridegroom.

In fact, this problem often arises where the bride's parents do not agree with their child's marriage, so the parents are reluctant to marry off the prospective bride and groom. In this case, the guardian who refuses to become a marriage guardian is called WaliAdhol. Only in matters that are truly considered unreasonable, parents do not approve of their child's marriage and refuse to become guardians, for example, parents refuse on the basis of material considerations, rank and characteristics of the future husband, not on religious and moral considerations. In another case, the whereabouts of a guardian are unknown so that inevitably it is the marriage guardian who has the right to become the guardian of marriage.

5. IMPLICATIONS OF ADHOL APPOINTMENT IN MARRIAGE

This research study several roles, such as the role of parents in the lives of their children from birth to marriage, the role of the family in the Qur'an, there are also many explanations that explain how to organize a family, protect, and purify it from despicable

things. The results of this study support the causes and effects of WaliAdhol's appointing, namely because parents are the bearers of the mandate given by God Almighty. Therefore, parents must be able to carry out the duties and responsibilities that Allah has given to the best of their ability. And the impact that affects both parties is that parents do not give their blessing which has an impact on the relationship between parent and child which becomes disharmonious.

The explanation mentioned above supports a position that has a very important role in the arena of marriage law which regulates the procedures for family life which is the core of all community life with the position of humans he highest being compared to other creatures of God's creation. Meanwhile, marriage law in Indonesia means the law of several civil regulations according to Islamic teachings that apply in Indonesia.

The meaning of parents themselves are two individuals who are given the mandate by Allah to educate a child with full responsibility and compassion. Parents have the responsibility to educate, nurture, and guide their children to reach certain stages that lead them to be ready for social life.

Family is one of the important institutions in human life. Through family institutions, a man and woman have the legal right to have sexual relations, procreation and child care, organize the work in the household, and transfer property rights and other forms of inheritance.

There are several family functions related to marriage, such as:

1. Religious functions

This religious function provides an understanding that a marriage is a form of worship. Based on the explanation above, regarding marriage in accordance with the orders of Allah SubhanahuWata'ala and the teachings of the Prophet SAW, it is very obligatory for parents to impart their children.

The importance of a marriage in Islam with the consent of the guardian is emphasized in the Koran as follows:

أزواجهن)سورةالبقرة :232(

"Then don't you (the guardians) prevent them from remarrying with their future husband ..” From AisyahRadliyallahuAnha she said: RasulullahSallallahuAlaihiWasallam said:

، أيماامرأةأنكحتنفسهابغيرإذنوليهافنكاحهاباطل ، باطل ، باطل ، فإندخلبهافلهاالمهربماستحلمنفرجها

فإناشتجروافالسلطانوليمنلاوليله)رواهالترمذي، رقم 1102 وأبوداود، رقم 2083 وابنماجه، رقم 1879

(وقالأبوعيسىالترمذي :هذاحديثحسن

“*Any woman who marries herself without the permission of her guardian, then her marriage is vanity, vanity, vanity. If her husband has hooked her, then for that woman is a dowry of the honor she has given and legalized for her. If there is a dispute from the guardian of the woman's family, then the ruler or the judge has the right to be a guardian for a woman without a guardian.”*

Based on the hadith, it explains that if the guardian refuses to marry off his daughter to the man she wants without reasonable or justified reasons, the guardianship rights can be transferred to the person after. Guardianship passes from father to grandfather. If a dispute occurs in a woman's family, the ruler or judge has the right to be the guardian of the woman who wants to marry.

2. Education function

Based on the hadith, it explains that if the guardian refuses to marry off his daughter to the man he wants without the law or justified reasons, the guardianship rights can be transferred to the person after. Guardianship passes from father to grandfather. If a dispute occurs in a woman's family, the ruler or judge has the right to be the guardian of the woman who wants to marry.

3. Socialization function

The socialization function in the family is expected to be an effort to help children prepare themselves to become members of society. The term socialization does not mean the fusion of children into social values

Based on this explanation, the socialization function of the family can form and develop social relationships through lineage and marriage. Especially in providing full education for children whoare not yet pubescent, therefore, the role of socialization is expected to be carried out in stages as the way Rasullullah SAW suggests into 3 segments, 0-7 years, 7-14 years, and 14-21 years.

4. Economical function

The economic condition of the family also affects the expectations of the parents for the future of their children as well as the hopes of the children themselves. Families whose economy is very weak, will consider the children as a burden in life rather than a carrier of family happiness. Meanwhile, those with a strong economic condition are able to fulfill their family's needs, so that it will lead to satisfaction for all family members. Based on this research, the role of the family to support in determining adhol's guardian does not explicitly mean that the family also chooses who will be adhol's guardian, because this authority will be given to the panel of judges.

However, in this case, the family, as the smallest organization in society, which becomes the first school for children who are about to marry, must have an understanding of marriage issues. Regarding waliAdhol, what triggers the filing of this legal action can be assumed to be the economic factor of the family. Considering the condition of the underprivileged family, it will raise hopes for the child to marry a partner who is more stable in terms of assets.

Hurairah RA, Rasulullah SAW bersabda,

،عَنْأَبِيهُرَيْرَةَ، عَنِالنَّبِيِّصَلَّىاللهُعَلَيْهِوَسَلَّمَ، قَالَ" :تُنْكَحُالْمَرْأَةُلِأَرْبَعٍ :لِمَالِهَا، وَلِحَسَبِهَا، وَلِجَمَالِهَا، وَلِدِينِهَا
فَاظْفَرْبِذَاتِالدِّينِتَرِبَتْيَدَاكَ

"Women generally marry because of 4 things: property, lineage, beauty, and religion. Therefore, choose those who have a religion, you will be lucky."

6. ANALYSIS OF COURT VERDICT NO. 448/PDT.P/2019/OA.SMD

Based on the Decision of the Religious Court Number 448 / Pdt.P / 2019 / PA.Smd, the Religious Court determined that the waliadhol case that was submitted by the applicant dated 30 October 2019 has submitted a WaliAdhol application registered at the Registrar's Office of the Samarinda Religious Court and the applicant is the biological child of the applicant's father and the applicant's mother.

That the applicant will immediately marry the applicant's husband at the Office of Religious Affairs, North Samarinda District, Samarinda City. Although the KUA did not want to provide a letter of rejection because the applicant's relationship with the applicant's husband had been going on for 2 years, the applicant's father refused the proposal of the applicant's husband because he did not like it and was not oriented towards the applicant's happiness as his child.

In the regulation, precisely in Article 2 paragraph, it is stated that the guardian's adhol is one of the conditions or conditions for allowing the judge's guardian to be the guardian in the marriage of the prospective bride and the prospective groom. Thus preventive efforts cannot be carried out directly against those who are getting married or to those who are authorized to record a marriage or registration staff. Prevention of marriage must first be

carried out according to proper procedures. Among them, namely the prohibition of the existence or conduct of a marriage.

To find out the extent of the legal consequences of a marriage contract, it is necessary to know the legal status of the marriage contract that is carried out in relation to whether or not the pillars and requirements is complete and the conditions that must be contained therein. In general, marriage cancellations are carried out because the conditions of the marriage are not fulfilled in accordance with the applicable statutory provisions. Marriage as an agreement that has legal consequences for the parties. Cancellation of marriage means considering a marriage that has been carried out as an event that is invalid or considered non-existent.

The results of this study led to the incidence of the applicant who still want to continue marriage with the prospective husband because the applicant was an adult according to Law Number 1 of 1974 concerning Marriage in Article 7 paragraph (1) and Presidential Instruction Number 1 of 1991 concerning the Dissemination of the Compilation of Islamic Law. In Article 15 paragraph (1), a woman is considered capable of being a wife or housewife, the prospective husband has a permanent job with an income of Rp. 5,000,000.00 (five million rupiah) per month, the applicant and the applicant's husband have met the requirements. and there are no restrictions on getting married. In the appointing of adhol's guardian in accordance with the provisions of Article 2 of the Regulation of the Ministry of Religion AffairrNumber 30 of 2005 and the judge gave permission for the applicant to be married through the judge's guardian because the guardian of the applicant, namely the applicant's biological father as the guardian of the lineage, was not willing to be the guardian of marriage for the applicant but still with the blessing of the applicant's parents with the process of bringing together the applicant and the applicant's guardian.

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The results of this study led occurrence the applicant who still wanted to continue marriage with the applicant's husband because the applicant was an adult according to Law Number 1 of 1974 concerning Marriage in Article 7 paragraph (1) and Presidential Instruction Number 1 of 1991 concerning the Dissemination of the Compilation of Islamic Law. In Article 15 paragraph (1), a woman is considered capable of being a wife or housewife, the applicant's husband has a permanent job with an income of Rp. 5,000,000.00 (five million rupiah) per month, the applicant and the applicant's husband have met the requirements. and there are no restrictions on getting married well. In the appointing of adhol's guardian in accordance with the provisions of Article 2 of the Regulation of the Ministry of Religion AffairNumber 30 of 2005 and the judge gave permission for the applicant to be married through the judge's guardian because the guardian of the applicant, namely the applicant's biological father as the guardian of the lineage, was not willing to be the guardian of marriage for the applicant but still with the blessing of the applicant's parents with the process of bringing together the applicant and the applicant's guardian.

Adhol's guardian based on the Regulation of the Ministry of Religion Affair Number 30 of 2005 concerning Guardian Judges in Article 2 paragraph (1) which reads "For a prospective bride who is going to marry in the territory of Indonesia or abroad / outside the territory of Indonesia, does not have a legal guardian who has the right or the guardian of

his lineage does not meet the requirements, or mafqud, or is unable to, adhol, then the marriage is carried out by the judge's guardian. " and paragraph (2) which reads "specifically to declare the guardian's adhol as referred to in paragraph (1) of this article is stipulated by a decision of the Religious Court / Syar'iyah Court which is in charge of the residence of the prospective bride."

Regulation of the Ministry of Religion Affair Number 30 of 2005 concerning Guardian Judges is a solution and a technical guide for prospective brides if the guardian is reluctant to become guardians. Meanwhile, the Religious Court is the agency that decides the request. Decisions issued by the Religious Courts can be used as the basis for completing the lack of marriage requirements (guardians). Based on the Court's decision, the right of the guardian of the adhol line is null and void. His right to pronounce the contract passes to the judge's guardian. The WaliAdhol case was included in the Voluntair case, which mean that only one party submitted its application.

In legal remedies on the appointing of guardian adhol in terms of Islamic law, the marriage can be canceled if a deviation occurs in the future against the legal requirements of the marriage. The cancellation of the marriage causes the existing marriage ties to be broken. It means that the marriage is considered non-existent, and the husband and wife whose marriage was canceled are considered never married as husband and wife. . The parties that can prevent marriage are families in the straight line up and down, siblings, marriage guardians, line guardians of one of the prospective brides, interested parties and appointed officials. Any efforts to prevent marriage can only be carried out if a judge has been declared. Thus preventive efforts cannot be carried out directly against those who are getting married or to those who are authorized to record a marriage or registration staff.

7. WALI ADHOL IN MARRIAGE

The Islamic Law Compilation explains in Article 2 that marriage is marriage, which is a strong contract or mitsaqanghalizan to obey Allah's orders and carry out it is worship. Islam views marriage as something noble and sacred, meaning worship to Allah, following the Sunnah of the Prophet and carried out on the basis of sincerity, responsibility, and following legal provisions that must be heeded.

This definition clarifies the notion that marriage is an agreement. As an agreement, it implies the existence of free will between two parties who promise each other, based on the principle of consensuality. The agreement is stated in the form of consent and qabul which must be pronounced in one assembly, either directly by those concerned, namely the prospective husband and future wife, if both are fully entitled to themselves according to law or by those who are empowered to do so. If this is not the case, for example in a state of insanity or underage status, they can act as their legal guardians.

Adhol guardians must be based on careful and comprehensive considerations. This is done to consider what will happen in the future. WaliAdhol itself has been regulated also in the Compilation of Islamic Law and also in several Regulations of the Ministry of Religion.

8. LAWS AND REGULATIONS OF WALI ADHOL

This explanation of Wali Adhol supports the provisions regarding guardian adhol in Indonesian marriage law which are regulated in several laws and regulations, namely:

1. Regulation of the Ministry of Religion AffairNumber 30 of 2005 concerning Guardian Judges. In the regulation, precisely in Article 2 paragraph (2), it is stated that the Adhol guardian (Wali Adhol) is one of the conditions or conditions for allowing the judge's guardian to be the guardian in the marriage of the prospective bride and the prospective groom. In order to declare the adhol of a wali, it is necessary to stipulate an order from

the Religious Court / Syar'iyah Court which is in charge of the residence of the prospective bride;

2. Regulation of the Ministry of Religion AffairNumber 11 of 2007 concerning Marriage Registration The provisions regarding guardian of adhol in this regulation are the same as the provisions in the aforementioned regulation mentioned in Article 18 paragraph (5);
3. Compilation of Islamic Law The provisions regarding waliadhol in Islamic law are regulated in Article 23. The substance is basically the same as the two Regulations of the Ministry of Religion Affairas mentioned above.

The appointing that a wali has adhol must be based on considerations in accordance with the syari'at. In many waliadhol requests, the love affair has been around for so long, that the inner bond between the two has been woven and formed so closely that it is difficult to separate. In such condition, the judge will consider the psychological implications if it turns out that the marriage plan between them is not implemented. In addition, even if it is not granted, it is feared that things will happen that are syar'i prohibited, and this tendency is commonly encountered in today's society.

9. ANNULMENT OF MARRIAGE

Cancellation of a marriage is an attempt to discontinue the marriage relationship after the previous marriage took place. In deciding an application to cancel a marriage, the court must always pay attention to the religious provisions of the bride and the groom. An application for cancellation is submitted to the court in the jurisdiction where the marriage is taking place, or in the residence of the husband and wife. The cancellation of a marriage begins after a court decision has permanent legal force.

Because it is null and void, from the start it is considered that the marriage does not exist, but the decision does not apply retroactively to:

1. The children born from this marriage
2. Husbands or wives who act in good faith, except for joint matrimonial property, if the cancellation of the marriage is based on the existence of another previous marriage.
3. Other third persons are not included in points 1 and 2 as long as they obtain their rights in good faith before the decision on cancellation has permanent legal force.

A legal marriage is a marriage in which all the principles, laws, and requirements that are determined are fulfilled by the bride and groom because if one of them is not fulfilled it will result in invalidity of the marriage or other events that can harm both parties. One of the pillars and conditions of marriage is the guardian of the lineage, in which if there is no guardian, the marriage will not be considered valid either religiously or legally. It is different if, like some cases, there is no guardian or no substitute for the lineage guardian because the straight up descendants of the father, father's brother, or other brother, but the marriage must be carried out in order to maintain the relationship so as not to leave the religious law.

10. PREVENTION OF MARRIAGE

Prevention of marriage can only be implemented if a judge's decision has been obtained. Thus preventive efforts cannot be carried out directly against those who are getting married or to those who are authorized to record a marriage or registration staff. Prevention of marriage must first be carried out according to proper procedures.

The requirements for marriage prevention are divided into two aspects, namely:

1. **Material Requirements**: relating to marriage registration, marriage certificates, and marriage prohibitions. Among them, namely the prohibition of the existence or conduct of a marriage.
2. **Administrative Requirements**: the marriage requirements attached to each pillar of marriage (the prospective bride and groom, witnesses and guardians) and the implementation of the marriage contract.

People who have the right to prevent marriage are regulated in Article 14 of Law Number 1 of 1974 concerning Marriage, namely:

1. The one who can prevent marriage is the family in the straight line up and down, siblings, marriage guardians, guardians of one of the prospective brides and other interested parties.
2. Those referred to in paragraph (1) of this article have the right also to prevent the marriage from taking place if one of the prospective brides is under interdiction, so that the marriage actually causes misery for the other prospective bride who has a relationship with the people. as stated in paragraph (1) of this article.

The results of this study is that appointing adhol guardian in marriage is not an easy thing. Many things must be processed, because if it is determined carelessly it can result in the cancellation of the marriage which makes the marriage invalid. In Islamic law, the role of guardian in marriage is very important because the guardian in question is the giver of blessing including the guardian of the lineage and the law explains that the family can demand annulment if the marriage is not approved and the cancellation is carried out through court channels. In general, the cancellation of a marriage is the damage or invalidity of a person's marriage because one of the conditions and pillars stipulated by syara is not fulfilled. Because it was null and void, it was assumed that the marriage did not exist from the start. In this case, the prevention of marriage can be pursued by anyone, either entitled or not entitled, but it must be carried out according to the procedures and methods through the people appointed to do so.

11. CONCLUSION

The implication of the appointing of Adhol's guardian in marriage can be in the form of separation of the relationship between families, if neither party (child and parent) wants to give in so that the appointment of Adhol's guardian will result in a sense of disappointment felt by both parties who make the relationship. The family is not harmonious anymore. Marriage according to Islamic law as previously explained that the role of the guardian in a marriage is very important because all marriages that are carried out must be with the permission and blessing of the marriage guardian, especially the guardian of the line because the marriage is based on Islamic teachings.

It is different if, like some cases, there is no guardian or no substitute for the lineage guardian because the straight up descendants of the father, father's brother, or other brother, but the marriage must be carried out in order to maintain the relationship so that it does not leave the religious law. However, in the case of an attempt to determine the adhol guardian himself, the family or parents can sue for the cancellation of the marriage if they do not agree to the marriage. The request to cancel the marriage was made through the court.

But of course the cancellation was made because the conditions were not met. Because it was null and void, it was assumed that the marriage did not exist from the start. In determining guardian adhol in a marriage, if it is determined carelessly, it can result in the cancellation of the marriage which makes the marriage invalid. Family or parents can sue to cancel the marriage if they do not agree to the marriage through the court.

12. RECOMMENDATION

To avoid the impact that occurs in the appointing of adhol guardian, the role of the family is needed because in the family which forms functions that can prevent the appointing of adhol guardian, and it is necessary in a family to study more deeply about religion as a basis for life and to prevent undesirable to happen later.

Efforts to determine waliadhol must be based on shari'a reasons such as if the guardian interferes for a healthy reason, such as the man is not commensurate, or the dowry is less than the mitsil dowry, or there are other applicants who are more in accordance with his degree, then in a situation like this guardianship does not pass into the hands of others and this is the reason justified by the Shari'a. However, the stipulation is not an easy thing, so that the appointing of adhol guardian must really be done carefully and deeply so as not to cause new problems after the appointment of adhol guardian.

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LEGAL STRENGTH OF EVIDENCE FROM WITNESSES TESTIMONY OF CHILD VICTIM ON IMMORAL ACT CASE (STUDY DECISION OF TENGGARONG DISTRICT COURT NUMBER 436/Pid.Sus/2018/Pn.Trg)

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Abstract
In immoral act case, there are weaknesses in proving the case because the lack of other witnesses who saw, heard and experienced firsthand the incident except the victim and the perpetrator. The difficulty in proving the case has resulted in an acquittal decision by the judge against the perpetrator of the obscene crime, because it is considered not fulfilling the elements of indictment. In the decision of the Tenggarong District Court Number 436/Pid.Sus/2018/PN.Trg, the judge stated that the testimony of the child victim witness was considered invalid because it stood alone, while the testimony of other witnesses was only *testimonium de auditu*, expert testimony and letter evidence (*visum et repertum*) were overruled by the judge. The defendant denied the crime that he committ while no evidence was obtained because the evidence of witnesses was independent testimony, thus the element of obscene crime was not fulfilled, so the defendant was sentenced to be acquitted (*vrijspraak*). Therefore, in order to guarantee legal certainty and a sense of justice, the panel of judges in their decision must carefully and thoroughly consider the evidence provided in Article 184 paragraph (1) of the Criminal Procedure Code (KUHAP) and not only show the lack of evidence for child victim witness testimony which is *unus testis nullus testis* (one witness is not a witness).
Keywords: children, immoral, witness testimony

1. INTRODUCTION

Criminal procedure law is made to regulate how to implement criminal law itself, starting from the emergence of suspicion a criminal act and collection of provisions regarding procedures for investigating, suing, and prosecuting people deemed to have violated a provision in criminal law until the implementation of a judge's decision. Criminal procedural law exists to realized a fair law enforcement process, by seeking material truth, so there are no mistakes in convicting someone.

Proving the evidence plays a very important role in criminal procedural law, because it can determine the fate of a person who has been accused. Proving the evidence of criminal case which is used as a basis for consideration by the judge in making decision can also be the measure of the value of justice for the community, especially for the victim of crime.

Provision regarding the proof of criminal case is contained in Law Number 8 of 1981 concerning Indonesia Law of Criminal Procedure (KUHAP), which previously applied the *Inlandsch Reglemen* (IR) or *Reglemen Bumiputera* commonly abbreviated as IR with *Staatsblad* Number 16 of 1848 and subsequently renewed to *Het Herziene Inlandsch Reglement* (HIR) or *Reglemen Bumiputera* which was renewed by *Staatsblad* Number 44 of 1941.[20]

Legal evidences according to the Indonesia Law of Criminal Procedure (KUHAP) are witness testimony, expert testimony, letter, instruction, and statement of defendant. A judge may not sentence a person unless there are two valid evidence for the judge to convince that a criminal act actually occurred and it is true that the defendant is indeed guilty of committing the criminal act.

Witness testimony is one of the evidence in a criminal case in the form of testimony from a witness regarding a criminal event that the witness heard, saw and experienced by

[20] Ishaq, 2016, *Pengantar Hukum Indonesia (PHI) Edisi I Cetakan 3*, Jakarta: Rajawali Pers, hlm. 216

stating the reason for the witness's knowledge. Therefore, opinion or conjecture obtained juat from out of thought is not constituted witness testimony.

According to the elucidation of Article 185 paragraph (1) of the Indonesia Law of Criminal Procedure (KUHAP), it is stated that witness testimony is not included in information obtained from other people or *testimonium de auditu*. The statement of a witness who stands alone or *unus testis nullus testis*, without other valid evidence cannot prove the guilt of being carried away as stipulated in Article 185 paragraph (2) and paragraph (3) of Indonesia Law of Criminal Procedure (KUHAP).

There are many cases related to crimes against the honor of a person's decency, especially if the victim is a child. What is meant by child is someone who is under 18 (eighteen) years old, including children who are still in the womb.

The case of obscene crime against children in Tenggarong District Court Decision Number 436/Pid.Sus/2018/PN.Trg on February 6, 2019, the judge stated that the testimony of the child victim witness was considered invalid because it stood alone, while the other witness testimony was only *testimonium de auditu* (testimony heard from other people), while other evidence in the form of expert testimony and documentary evidence (*visum et repertum*) were overruled by the judge. In the trial the defendant denied the action and no evidence was obtained because the testimony of the witnesses was independent statement, so the element of an obscene crime was not fulfilled, the defendant is punished to pure acquittal (*vrijspraak*).

The verdict of the judges which sentenced the defendant to criminal act of sexual violence against children ignored all legal facts that incriminated the perpetrator and ignored the testimony of the child victim witness because it was considered that no other witness had seen the incidents of rape and sexual abuse against the two victims of siblings since 2015 to 2017 by the defendant who is also the uncle of the two victims.

Immoral act cases are very private in nature so no other witness can directly see the incident except the victim's witness and the perpetrator who experienced it, so to guarantee legal certainty and a sense of justice, the panel of judges in their decisions must carefully and thoroughly consider the evidence provided in Article 184 paragraph (1) of Indonesia Law of Criminal Procedure (KUHAP). Thus, the decision of the Panel of Judges is not only based on the lack of evidence for the testimony of the child victim as the witness which is the *unus testis nullus testis* (one witness is not a witness), but the judge should consider the other four evidences in proving the defendant's guilt.

1.1 Research Method and Benefit

This research uses a doctrinal approach (interdisciplinary methodology). This doctrinal legal research is carried out analytically and inductively, that is the process starts from known positive legal norms and ends temporarily on the discovery of legal principles or doctrines.[21] The use of primary legal materials, secondary legal materials, and tertiary legal materials were used in this study. The legal materials obtained during the research will be analyzed qualitatively.

1.2 Paper Structure

The research is aimed at examining several main points, including the strength of the evidence for the testimony of child victim-witnesses who are considered illegitimate, as well as other evidence in the form of expert statements, letters, instructions, and statements from

[21] Bambang Sunggono, 2005, *Metodelogi Penelitian Hukum*, Jakarta: PT. Raja Grafindo Persada, hlm. 86

the defendant which are deemed insufficient to prove that the defendant committed his actions.

In this section, the research explores the proof system in the Criminal Procedure Code with its realization in immoral criminal cases. This research requires literature support on legal theory and principles, as well as analyzing judges' considerations in ruling on immoral crimes.

2. GENERAL UNDERSTANDING OF IMMORAL ACT CASE

The definition of a criminal act according to Wirjono Prodjodikoro is an act in which the perpetrator can be subjected to criminal. Simons in Mustafa Abdullah, Ruben Achmad argues that the criminal incident is "*Een Strafbaargestelde, onrechtmatige, met schuld in verband staande handeling van een toerekeningsvatbaar persoon*". Translation: Wrong action and against the law which is punishable and committed by someone who is able to be responsible."[22]

If we pay attention to the definition of a criminal act above, it can be explained that an action or incident/event can be subjected to be a criminal act if the act fulfills the following elements:

a. There must be a human act,
b. The human action must be against the law (*wederrechtelijk*),
c. The act is punishable by punishment (*strafbaar gesteld*) in the law,
d. The act must be done by someone who can be responsible (*toerekeningsvatbaar*),
e. The action must occured because of the mistake (*schuld*) of the actor.[23]

Furthermore, the definition of immoral act case as meant in the Indonesia Penal Code is crime against decency which is regulated in Chapter XIV of Book II which consists of 20 criminal provisions, starting from Article 281 to Article 303 bis, which in *Wetboek van Stafrecht* is also referred to as *misdrijiven tegen de zeden.*

The decency criminal act regulated in the Indonesia Penal Code (KUHP) include the act of presenting immoral material in public, act of concubinage (*overspel*), act of obscenity, act of rape, immoral act related to pregnancy abortion and act of violating decency. The discussion on the following forms of decency criminal act will focus more on act of obscenity and act of rape.

According to R. Soesilo, what is meant by acts of obscenity are all acts that violate decency (politeness) or heinous acts, all of them are in the environment of sexual lust. For example, kissing, groping genitalia, groping breast and so on.[24] While sexual intercourse is the physic activity between male and female genitalia which is usually carried out to get children, male genital member enter into female member, so the semen is released.[25]

The definition of sexual intercourse was also expressed by S.R. Sianturi that sexual intercourse is the physical action of man's genital enter the woman's genital. How deep or what percentage should be entered does not really matter, what matter is that with the entry of the man's genital, pleasure can occur for both or one of them.[26]

Meanwhile, the definition of rape has been explicitly described in the Indonesia Penal Code (KUHP) in Article 285 and Article 286, namely anyone with violence or threat

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[22] Mustafa Abdullah, 1986, Ruben Ahmad, *Intisari Hukum Pidana*, Jakarta: Ghalia Indonesia, hlm. 25

[23] Ishaq, *Op. Cit.*, hlm. 137

[24] R. Soesilo, 1988, *Kitab Undang-Undang Hukum Pidana Serta Komentar-Komentarnya Lengkap Pasal Demi Pasal*, Bogor: Politeia, hlm. 212

[25] *Ibid*, hlm. 209

[26] S.R. Sianturi, 1983, *Tindak Pidana di KUHP Berikut Uraiannya*, Jakarta: Alumni Ahaem-Petehaem, hlm. 229

of violence forces a woman to have sex with him outside of marriage, even though it is known that the woman is unconscious or helpless.

3. CLASSIFICATION OF CRIMINAL ACT PROCEDURES FOR RAPE AND OBSCENITY AGAINST CHILDREN

In the context of proof, the formulation of offenses in a law apart from being an embodiment of the principle of legality, also has a function of showing evidence. This means that what the public prosecutor has to prove in court are the elements in the formulation of the offense charged against the defendant.

In the case of decency criminal act against children, in particular acts of sexual immorality and rape in the Tenggarong District Court Decision Number 436/Pid.Sus/2018/PN.Trg on February 6, 2019, previously the defendant was charged by the public prosecutor with subsidiary cumulative indictment with the first primary indictment of Article 81 paragraph (2) of Law Number 35 of 2014 concerning Child Protection Jo. Article 64 paragraph (1) of the Indonesia Penal Code (KUHP), the first subsidiary indictment of Article 287 paragraph (1) Jo. Article 64 paragraph (1) of the Indonesia Penal Code (KUHP), the second primary indictment of Article 82 of Law Number 35 of 2014 concerning Child Protection and the second subsidiary indictment of Article 290 in the second part of the Indonesia Penal Code (KUHP).

The discussion on the classification criminal act of obscene crime and rape against children will be described specifically according to the Indonesia Penal Code (KUHP) and Law Number 35 of 2014 concerning Amendment to Law Number 23 of 2002 concerning Child Protection.

3.1 Indonesia Penal Code

Legal protection effort for children as victim of criminal act of sexual abuse and rape are basically regulated in the Indonesia Penal Code in Article 287 paragraph (1), Article 288 paragraph (1), Article 288 paragraph (2), Article 288 paragraph (3), Article 290 in the second part, Article 290 in the third part, Article 292, Article 293 paragraph (1), Article 294 paragraph (1), Article 295 paragraph in the first part (1) Article 295 paragraph in the second part (1) and Article 295 paragraph (2).

Furthermore, regarding the elements of criminal act contained in the provision of Article 287 paragraph (1) of the Indonesia Penal Code (KUHP), says "Any person who out of marriage has carnal knowledge of a woman whom he knows or reasonably should presume that she has not yet reached the age of fifteen years or, if it is not obvious from her age, that she is not yet marriageable, shall be punished by a maximum imprisonment of nine years."

The criminal act of rape against children which is regulated in Article 287 paragraph (1) of the Indonesia Penal Code (KUHP) consists of elements:

a. Subjective elements:
    1) What he knows.
    2) As he reasonably should have presumed.
b. Objective elements:
    1) Any person.
    2) out of marriage has carnal knowledge.
    3) a woman whom has not yet reached the age of fifteen years or still could not married. [27]

[27] P.A.F. Lamintang dan Theo Lamintang, 2011, *Delik-Delik Khusus Kejahatan Melanggar Norma Kesusilaan dan Norma Kepatutan Edisi ke-2 Cetakan ke-2,* Jakarta: Sinar Grafika, hlm. 113-114

Furthermore, the criminal act of child sexual abuse as stipulated in Article 290 in the second part of the Indonesia Penal Code (KUHP), reads " any person who commits obscene acts with someone who he knows or reasonably should presume that he has not yet reached the age of fifteen years or, if it is not obvious from her age, not yet marriageable."

The criminal act of sexual abuse against child as regulated in Article 290 of the Indonesia Penal Code (KUHP) consists of elements:

a. Subjective elements:
    1) What he knows
    2) Reasonably should presume.
b. Objective elements:
    1) Any person
    2) Commits obscene acts
    3) he has not yet reached the age of fifteen years or if it is not obvious from her age, not yet marriageable.

3.2 Law Number 35 of 2014 concerning Amendment to Law Number 23 of 2002 concerning Child Protection

In the next development because of the prevalence of crimes against children in society including sexual crimes requires to increase commitment from the government, local government and the community as well and all of the stakeholders related to the implementation of children protection.

Thus, the government enacted Law Number 23 of 2002 concerning Child Protection which was renewed by Law Number 35 of 2014 concerning Amendment to Law Number 23 of 2002 concerning Child Protection.

The criminal act of rape against children as regulated in the provision of Article 81 paragraph (1) of Law Number 35 Year 2014 reads "Any person who violates the provision referred in Article 76D shall be sentenced to minimum imprisonment for 5 (five) years and maximum imprisonment for 15 (fifteen) years and maximum fine of Rp. 5,000,000,000.00 (five billion rupiah)", refers to Article 76D so it consists of the elements:

a. Any person.
b. Committing violence or threats of violence.
c. Forcing children to have sexual intercourse with him or with other people.

Furthermore, the criminal act of sexual abuse against children as regulated in the provisions of Article 82 paragraph (1) of Law Number 35 of 2014 reads "Every person who violates the provisions referred in Article 76E shall be sentenced to minimum imprisonment for 5 (five) years and maximum imprisonment for 15 (fifteen) years and maximum fine of Rp.5,000,000,000.00 (five billion rupiah) ", refers to Article 76E so it consists of the elements:

a. Any person.
b. Committing violence or threats of violence.
c. Forcing, tricking, committing a series of lies, or persuading a child to commit or allow obscene act.

4. LEGAL STRENGTH OF WITNESSES TESTIMONY OF CHILD VICTIM ON IMMORAL ACT CASE

Regarding the evidence in immoral act case, it is certainly not an easy thing, especially in cases of rape and sexual abuse of children. In general, witness testimony is the

main evidence in a criminal case.[28] However, for immoral act case, finding witnesses other than victim is difficult, especially in case of rape and sexual abuse of children.

This is a quite complex case, especially if the child of the victim is the only witness who witnesses and even experiences obscene crime, then the testimony of the child victim's witness is deemed not meeting the criteria as valid evidence because it is independent or *unus testis nullus testis*, while the testimonies of other witnesses also do not meet the criteria as evidence for witness testimony because they are information obtained from other people or *testimonium de auditu.*

The principle of one witness is not a witness as valid evidence or *unus testis nullus testis* (Latin) or *een getuige geen getuige* (Dutch) contained in the Criminal Procedure Code. This is summarized in Article 185 paragraph (2) of the Indonesia Law of Criminal Procedure, which states "The testimony of a witness is not sufficient to prove that the defendant is guilty of the act he is accused of."

This provision was then followed by the provisions of Article 185 paragraph (3) of the Indonesia Law of Criminal Procedure (KUHP), which reads "The provision referred to in paragraph (2) is not valid if accompanied by a valid evidence."

The provision of Article 185 paragraph (2) Jo. Article 185 paragraph (3) of the Indonesia Law of Criminal Procedure (KUHAP) is not only related to the *unus testis nullus testis*, but also closely related to the minimum principle of proof as regulated in Article 183 of the Indonesia Law of Criminal Procedure (KUHAP), which states the defendant is guilty in a criminal case, namely two of evidences.

Furthermore, the provisions in Article 55 of Law Number 23 of 2004 concerning the Elimination of Domestic Violence have provided separate arrangements for the evidence of victim witness testimony in the scope of domestic violence, the article says "As one of the evidence legally, the testimony of a victim witness is sufficient to prove that the defendant is guilty, if accompanied by other valid evidence."

In assessing the veracity of a witness's testimony, the judge must really watch the compatibility between the testimony from one witness to another witness. In addition, it must also be noted that the correspondence between one witness and another witness in the context of theory is known as corroborating evidence. Likewise, the judge must watch the witness's way of life and morals as well as anything that in general can affect whether or not the testimony is believed.

Another thing that is regulated in proving criminal cases in Indonesia is the problem of *testimonium de auditu*, which literally means testimony obtained from other people. Article 185 paragraph (1) of the Indonesia Law of Criminal Procedure (KUHAP) states that witness testimony as evidence is what a witness declares in court. Furthermore, in the explanation it is explained that in the witness testimony, it does not include information obtained from other people or *testimonium de auditu*. This means that the Indonesia Law of Criminal Procedure (KUHAP) states explicitly that the testimonium de auditu is not evidence.[29]

In its development, the definition of a witness as referred to in Article 1 number 26 Jo. Article 1 number 27 Jo. Article 184 paragraph (1) letter a of the Indonesia Law of Criminal Procedure (KUHAP) is extended based on the Decision of the Constitutional Court Number 65/PUUVIII/2010 on 8 August 2011. The opinion of Constitutional Court is "the importance of a witness does not lie in whether he saw, heard, or experienced a criminal

[28] M. Yahya Harahap, 1993. *Pembahasan Permasalahan dan Penerapan KUHAP Jilid II Cetakan ke-3*, Jakarta: Pustaka Kartini, hlm. 808

[29] *Ibid*, hlm. 105-106

event himself, but on the relevance of his testimony to the criminal case that is being processed."[30]

Thus, based on the decision of the Constitutional Court, the definition of witness testimony as evidence is information from witnesses regarding a criminal event which he himself heard and he himself experienced by stating the reason for his knowledge, including information in the context of investigation, prosecution and trial of an criminal act that he did not always hear about himself, he saw and experienced himself.[31]

The Constitutional Court in Decision Number 65/PUU-VIII/2010 gave a new interpretation of witnesses in the Indonesia Law of Criminal Procedure (KUHAP) which acknowledged the witness *testimonium de auditu*. Since now, the decisions of the Constitutional Court have become binding laws for everyone. However, not all decisions of the Constitutional Court are followed by judicial institutions when hearing concrete cases.[32]

The Constitutional Court Decision Number 65/PUU-VIII/2010 provides recognition and guarantees for suspect and/or defendant to present witness who can provide favorable statements that must be obligated by everyone, especially investigators, public prosecutors and judges.[33]

To assess the strength of evidence of witness testimony of child victim in immoral act case, the evidence used by judges in making a decision must be in accordance with the minimum principle of proof abstracted from Article 183 Indonesia Law of Criminal Procedure (KUHAP).

The testimony of a witness alone is sufficient to prove that the defendant is guilty of the act he is accused, if accompanied by a valid evidence as stipulated in Article 185 paragraph (3) of the Indonesia Law of Criminal Procedure (KUHAP).

Analysis of statutory regulations related to the rights of children whose testimony can be heard in immoral act case is needed to strengthen the writer's argument in examining the legal strength of evidence of witness testimony from child victim. The provision governing the rights of children as witnesses of obscene crime in the applicable laws and regulations can be seen below:

4.1 Convention On The Rights Of The Child

The statement of a child in an immoral act case can be heard about what is needed to bring guidance of a criminal case for the purposes of examination and evidence. The right of children to give testimony in court is protected by the law as stipulated in Article 12 paragraph (1) and paragraph (2) of the 1989 Convention On The Rights Of The Child which was ratified by Presidential Decree Number 36 of 1990 concerning Ratification of the Convention On The Rights Of The Child.

Article 12 paragraph (1) of the Convention On The Rights Of The Child, states that "States parties must ensure that children who are able to form their own views, have the right to express their opinion freely in all matters affecting the children and children's opinions are considered according to their age and maturity."

Article 12 paragraph (2) of the Convention On The Rights Of The Child that "for this purpose children are specifically given the opportunity to be heard in every judicial and

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[30] Steven Suprantio, *Daya Ikat Putusan Mahkamah Konstitusi Tentang "Testimonium De Auditu" Dalam Peradilan Pidana Kajian Putusan Mahkamah Konstitusi Nomor 65/Puu-Viii/2010*, Jurnal Yudisial Vol. 7 No. 1 April 2014, hlm. 36

[31] Eddy O.S. Hiariej, 2012, *Teori dan Hukum Pembuktian*, Yogyakarta: Penerbit Erlangga, hlm. 102-103

[32] *Ibid*, hlm. 34

[33] *Ibid*, hlm. 48

administrative process affecting them, either directly or through an appropriate representative as long as in accordance with national procedural law."

Thus, if the Panel of Judges in its consideration ignores the testimony of child victim witnesses in the implementation of the evidentiary law, it is false and wrong because the right of the child to give testimony in court is protected by the law as regulated in the provisions of Article 12 paragraph (1) and paragraph (2) of the Convention On The Rights Of The Child.

4.2 Law Number 35 of 2014 concerning Amendment to Law Number 23 of 2002 concerning Child Protection

The Law on Child Protection states that child protection aims to ensure the fulfillment of children's rights so they can live, grow, develop and participate optimally in accordance with human dignity, and receive protection from violence and discrimination for the realization of Indonesian children that have good quality, noble and prosperous character.

Law Number 23 of 2002 concerning Child Protection regulates the rights and obligations of children. The rights of the child are regulated in the provisions of Article 4 to Article 18. The right of children who can express their opinion is contained in Article 10 of Law Number 23 of 2002 concerning Child Protection, which regulates "Every child has the right to express and hear their opinions and every child has the right to receive, seek and provide information according to their intelligence level and age for self-development in accordance with the values of decency and propriety."

Then the right of children to have their opinions heard is further regulated in Article 24 of Law Number 35 of 2014 concerning Amendment to Law Number 23 of 2002 concerning Child Protection, which reads "The State, Government and Local Government guarantee children to use their rights in conveying their opinion according to the age and level of intelligence of the child."

4.3 Law Number 11 of 2012 concerning the Juvenile Criminal Justice System

Children's statements can be heard as witnesses are also strengthened by the provision of Article 1 point 5 of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, that children who are witnesses of criminal act are referred as child witnesses, the children are not yet 18 (eighteen) years old who can provide information for the purposes of investigation, prosecution and examination in court about a criminal case they heard, seen and/or experienced himself.

Based on the discussion that the author has describe above that in handling cases of obscene crime against child victims, special arrangements can be given to assess the strength of evidence of child victim witnesses, because in immoral act case, there are minimum evidence of other witnesses who hear, see and experience firsthand the incident except for the victim and the perpetrator.

In handling of cases of criminal act of domestic violence has implemented the provision of Article 55 of Law Number 23 of 2004 concerning the Elimination of Domestic Violence. Thus, the implementation of Article 55 can be interpreted as ignored the principle of *unus testis nullus testis* in assessing the strength of victim witness testimony in the scope of domestic violence.

Therefore, it is hoped that in the preparation of the draft law, the Indonesia Law of Criminal Procedure (KUHAP), the principle of *unus testis nullus testis* is no longer applied in immoral act against child victim. Meanwhile, for amendment to the Child Protection Law, it is possible to provide special arrangement in assessing the strength of the witness

testimony of child victim in immoral act case which is in line with the provisions of Article 55 of the Law on the Elimination of Domestic Violence.

5. CONCLUSION

The legal strength of the evidence for the witness testimony of the child victim in immoral act case which is reviewed through the Tenggarong District Court Decision Number 436/Pid.Sus/2018/PN.Trg, that the witness testimony of child victim alone is sufficient to prove that the defendant is guilty if accompanied by valid evidence as the minimum principle of proof in the provisions of Article 183 of the Indonesia Law of Criminal Procedure (KUHAP) and by prioritizing the constitutional rights of child victim witnesses in giving testimony at trial.

Judges' consideration in ruling the decision of immoral act case reviewed through the Tenggarong District Court Decision Number 436/Pid.Sus/2018/PN.Trg, have not used the basis of consideration by prioritizing justice. The evidence and legal facts that are considered are limited to those that are favorable to the defendant, while other evidence or clue including the testimony of child victim witness which can be the basis for consideration for the judge to obtain the conviction that the defendant is legally proven and convincingly guilty is not considered carefully and thoroughly.

5.1 RECOMMENDATION

a. The panel of judges should identify and watch case involving children from different perspective, by prioritizing children's constitutional right in giving statements in court based on the best interest of the child. The government is expected to make more specific and detailed arrangements in the Draft Criminal Procedure Code and the Child Protection Law, regarding the testimony of child victim witnesses, especially immoral act case where there are at least other witnesses who hear, see and experience directly the criminal incident except the perpetrator and the victim

b. It is hoped that the Panel of Judges in considering the witnesses testimony of child victim during the evidence proving at court examination, judges should carefully and thoroughly use the basis of consideration by prioritizing justice and not only prioritizing juridical aspect. A decision is expected not only to contain article of statutory regulations or law as legal certainty, but also justice and benefit as the purpose of the law is made.

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BANK MUAMALAT'S STRATEGY IN DEALING WITH CORONAVIRUS DISEASE (COVID-19) IN INDONESIA

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Abstract

The national economy has arrived to a recession phase because economic growth in Q3 2020 was -3.49%, which previously experienced growth in Q2 of -5.32%. This is due to decreased purchasing power during the pandemic. Banking, including Islamic banks, is one of the institutions that have the impact of this pandemic. Bank Muamalat, as the first Islamic bank in Indonesia, has a strategy to deal with this epidemic. The strategies implemented by Bank Muamalat include selective distribution of funds, efficiency in all lines, and internal improvements related to the end-to-end financing process. On the other hand, related to the plan to merge state-owned Islamic banks, which is a challenge for Bank Muamalat to remain competitive. This merger will impact the total assets and network of BUMN Islamic banks resulting from the merger. It is a challenge for Bank Muamalat to provide the best comfort and experience for its customers not to move to use this BUMN sharia bank. This paper describes how the strategy of Bank Muamalat in dealing with the pandemic and the impact of the merger of state-owned Islamic banks on the sustainability of Bank Muamalat's business. The research method employed in producing this paper is the normative legal research method and the data analysis technique used in this research is the qualitative data analysis technique.

Keywords: Bank Muamalat, Sharia Bank, Strategy, Merger Bank.

1. INTRODUCTION

1.1. Issue Background

Banking institutions are the main system of a country's finance. A bank is an institution whose business line includes collecting funds from parties that have excess funds. These funds will then be channeled back to the public who need financing within a predetermined period of time. The growth of a bank's assets is strongly influenced by the bank's ability to seek and collect funds in the form of deposits because the greater the funds obtained, the more funds the bank can develop [1].

As the largest Muslim population country in the world, Indonesia facilitates the existence of Islamic banks in addition to the existing conventional banks. Islamic banks are banks that carry out business following and are based on the Islamic economic system. The emergence of Islamic banks is a response from a group of Muslim banking practitioners who want to accommodate various parties' suggestions. At that time, various parties requested that financial transaction services be provided in line with Islamic Sharia's values and principles. As a Muslim majority country, it is hoped that Muslims can support the existence of Islamic Banks.

To support the existence of Islamic banks, the Government issued Law No. 7 of 1992 on Banking. Banks are given the freedom to determine the type of compensation taken from their customers, either interest or profit-sharing. Then the issuance of PP No. 72 of 1992 concerning Profit Sharing Banks, there is a strict limit that profit-sharing banks are not allowed to carry out business activities based on interest; on the other hand, banks whose business activities are based on interest are not allowed to conduct business activities based on profit sharing principles [2]. UU No. 7 of 1992 was published because, in that year, Bank Muamalat was born as the only bank that runs business activities based on the principle of profit-sharing [3].

The next development is the enactment of Law No. 10 of 1998 concerning Banking. This law opens an opportunity for anyone who will establish a sharia bank or convert from

a conventional system to a sharia system. This law also provides an opportunity for conventional banks to provide sharia services through the Islamic Window mechanism by first establishing a Sharia Business Unit (UUS). After that, several conventional banks began to follow the sharia trend by providing Islamic units. Then, government support for Islamic banking became increasingly visible when enacting Law No. 21 of 2008 on Islamic Banking.

As mentioned earlier, Bank Muamalat is the first Islamic bank in Indonesia. PT Bank Muamalat Indonesia Tbk started its business journey as the first Islamic bank in Indonesia on November 1, 1991. The establishment of Bank Muamalat was initiated by the Indonesian Ulema Council (MUI), the Indonesian Muslim Intellectuals Association (ICMI), and Muslim entrepreneurs who later obtained support from the Government. Since officially operating on May 1, 1992, or 27 Syawal 1412 H, Bank Muamalat Indonesia has continued to innovate and issue sharia financial products such as Sharia Insurance (Takaful Insurance), Muamalat Financial Institution Pension Fund (DPLK Muamalat), and Islamic finance (Al-Ijarah Indonesia Finance), which has become a breakthrough in Indonesia.

On October 27, 1994, Bank Muamalat Indonesia obtained a license as a Foreign Exchange Bank and was registered as a public company not listed on the Indonesia Stock Exchange (IDX). As the capacity of the Bank is increasingly recognized, the Bank is expanding by continuing to expand its branch network throughout Indonesia. In 2009, the Bank obtained a license to open a branch office in Kuala Lumpur, Malaysia, and became the first bank in Indonesia and the only one to realize business expansion in Malaysia. The Bank has 325 service offices, including one branch office in Malaysia [4].

However, an unexpected incident occurred in 2020, which impacted the development of Islamic banks, including Bank Muamalat. The banking industry is currently sighing because it has to face the pandemic coronavirus disease (Covid-19) outbreak. Covid-19 is a respiratory tract infection caused by severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) or the coronavirus. This virus has a high mutation rate and is a zoonotic pathogen that can persist in humans and animals with a very diverse clinical presentation, ranging from asymptomatic, mild to severe symptoms, even to death.

Reporting from the WHO website, globally, until October 23, 2020, there were 41,570,883 confirmed cases of Covid-19, including 1,134,940 deaths reported to WHO [5]. In Indonesia, the last update when the author wrote this article, namely 23 October 2020, positive cases reached 381,910, with 63,733 active cases, 305,100 declared cured, and 13,077 died [6]. The ferocity of Covid-19 has paralyzed several economic activities that have caused people's purchasing power to decline, employment opportunities have declined, and businesses have eventually gone bankrupt. The Central Statistics Agency (BPS) noted that Indonesia's economic growth in the second quarter (Q2) of 2020 contracted by 5.32 percent year on year (YoY). This figure worsened from Q1 2020, which reached 2.97 percent, and Q2 2019, which reached 5.05 percent [7]. Some reports even mention that Indonesia is already on the verge of a recession because, in Q3, it is projected to be still minus but not worse than economic growth in Q2 [8].

As one of the drivers of the country's economic growth in the face of the Covid-19 pandemic, the Islamic banking industry must make adjustments quickly. Uncertain economic conditions require the Islamic banking industry to move quickly in making new strategies and innovations accompanied by precise and careful, and creative risk mitigation to survive the Covid-19 pandemic. This strategy will determine whether a bank can survive this uncertain economic condition. Departing from this, the author is interested in researching Bank Muamalat's strategy in dealing with the Covid-19 pandemic in Indonesia.

1.2. Research Method

The research method employed in producing this paper is the normative legal research method. Legal research is a scientific activity based on methods, systematics, and certain thoughts that aim to study one or more specific legal phenomena by analyzing them. In normative legal research, researchers only use library materials or secondary data consisting of primary legal materials, secondary legal materials, and tertiary legal materials that regulate or discuss banking, Islamic banking, and Islamic economics [9]. The data analysis technique used in this research is the qualitative data analysis technique. Efforts are made by working with data, organizing data, sorting it into manageable units, synthesizing, looking for and finding patterns, finding something important to learn, and deciding what to write for others to read [10].

2. DISCUSSION

2.1. Development of Sharia Banks in Indonesia

The Islamic community in Indonesia is divided into two; the first is the Islamic group based on a pure understanding. The fundamentalists are sometimes called conservative Islam, and the second group is moderate Islam, which tends towards liberal Islam. The first group consists of those whose members consist of Muhammadiyah, Nahdatul Ulama (NU), Hizbut Tahrir, Front Pembela Islam (FPI), Dewan Masjid Indonesia, and Laskar Jundullah. This group clings to the Al-Quran and Hadith, the enforcement of pure Islam, and adheres to an Islamic economic system. The second group consists of those who are influenced by Western thought. Most of them come from at the State Islamic University (UIN), Paramadina University, and Activist of Non-Governmental Organizations (NGOs). These groups criticize Al-Quran and Hadith, accepts modernization and religious liberalism, recognizes religious pluralism, and operates a western economic system [11].

All Muslim communities in Indonesia, both conservative and moderate or liberal, are under one official institution, namely the Indonesian Ulema Council (MUI), established and recognized by the Indonesian government. MUI, which is a community institution that covers ulama, Islamic scholars in Indonesia, has the task of fostering, guiding Muslims throughout Indonesia, the institution, which was founded on 7 Rajab 1395 Hijriah or 26 July 1975 in Jakarta, has 5 (five) roles and functions, namely: (1) As heir to the duties of the Prophets (*warasatul anbiya*); (2) As the provider of a fatwa (*mufti*); (3) As a guide and servant of the people (*ri'ayaat wa khadim al ummah*); (4) As a movement of *al-islah wa al tajdid*; and (5) As an enforcer of *amar ma'ruf nahi munkar* [12].

From 18 to 20 August 1990, the Indonesian Ulema Council (MUI) held a bank and banking interest seminar in Cisarua, Puncak, Bogor, West Java, Indonesia. The seminar results were then discussed in more depth at the IV MUI National Conference in Jakarta on 22-25 August 1990, which resulted in a mandate to establish a Sharia Banking Establishment Task Force in Indonesia. The working team was called the MUI Banking Team. It was assigned the task of conducting approaches and consultations with all parties related to the establishment of an Islamic Bank in Indonesia. As a result of the MUI Banking Team, PT Bank Muamalat Indonesia, Tbk has been established. On November 1, 1991. On May 1, 1992, PT Bank Muamalat Indonesia officially operated with an initial capital of Rp. 106,126,382,000,- [13].

At the beginning of its operation, the national banking sector structure regarding Islamic banks was not optimal. The legal basis for bank operations is only accommodated in one of the paragraphs concerning "banks with a profit-sharing system" in Law Number 7 of 1992, Article 6 letter m, namely financing based on the profit-sharing principle. In 1998, the Government and the DPR made improvements to the Law into Law No 10 of 1998, which explicitly placed the Sharia Banking System as part of the National Banking System. This Act was followed by implementing provisions in several Decrees of the Board of

Directors of Bank Indonesia dated May 12, 1999, namely, Commercial Banks, Commercial Banks based on Sharia Principles, Rural Banks (BPR), and Rural Banks based on Sharia Principles (BPRS). The new regulation is very important because conventional commercial banks that have Sharia Business Units can open sharia branch offices or convert conventional branch offices into sharia branch offices [14].

Based on Law No. 10 of 1998 concerning Banking, various other Islamic banks emerged. In 1999, a second Islamic bank was established, namely Bank Syariah Mandiri (BSM). The emergence of BSM is a determinant for Indonesian Islamic bankers to continue the development of Islamic banks. Furthermore, several Islamic banks were established in Indonesia either in the form of a Sharia Commercial Bank (BUS) or a Sharia Business Unit (UUS) from Conventional Banks such as Bank IFI, Bank Niaga, Bank BTN, Bank Mega, Bank BRI, Bank Bukopin, BPD Jabar, and BPD Aceh, and others.

On July 16, 2008, Law No. 21 of 2008 on Islamic Banking was passed, which provides the legal basis for the national Islamic banking industry and is expected to encourage Islamic banking development. Several new legal institutions were introduced in Law Number 21 of 2008, including those concerning UUS' spin-off both voluntarily and compulsorily and the Sharia Banking Committee. Besides, there are several PBIs mandated by Law No. 21 of 2008. At this time, banking institutions in Indonesia are divided into two types of banks, Commercial Banks (BU) and Rural Banks (BPR). Commercial Banks have two forms, Conventional Commercial Banks (BUK), based on the interest system, and Islamic Commercial Banks (BUS), which are based on sharia principles. Conventional Commercial Banks may establish Sharia Business Units (UUS). Rural Banks (BPR) are also divided into two, namely Conventional Rural Banks (BPR), which are based on an interesting system, and Sharia Rural Banks (BPRS), based on sharia principles.

According to the OJK website data as of June 2020, the number of Islamic banks in Indonesia is currently around 198 Islamic banks, namely 14 Islamic Commercial Banks (BUS), 20 Sharia Business Units (UUS), and 162 Sharia Rural Banks (BPRS), so that the total number of the Islamic Banking Industry is 196 institutions (Otoritas Jasa Keuangan, 2020).

2.2. Brief History of Bank Muamalat

Bank Muamalat Indonesia is the first commercial bank in Indonesia to apply Islamic sharia principles in carrying out its operations. Founded on November 1, 1991, initiated by the Indonesian Ulema Council (MUI) and the Indonesian Government. The idea of establishing Bank Muamalat Indonesia (BMI) was sparked in an MUI workshop themed "Bank and Banking Interest Issues," which was held in mid-August 1990 in Cisarua, Bogor. As the General Chair of MUI, Hasan Basri brought the matter to the MUI National Conference, which was held at the end of August 1991. The MUI National Conference decided that MUI took the initiative to establish an interest-free bank. For this reason, a working group chaired by the then secretary-general of the MUI was formed HS Prodjokusumo. Lobbying was carried out through BJ Habibie until President Soeharto finally approved Bank Muamalat Indonesia (BMI).

The Islamic bank that was formed was agreed to be named Bank Muamalat Indonesia (BMI). "Muamalat" in the term fiqh means the law that regulates human relations. Another alternative name that emerged at the time of its formation was Islamic Sharia Bank. However, given the experience of using the word 'Sharia Islam' in the Jakarta Charter, the name was not chosen. Another name proposed is Bank Muamalat Islam, Indonesia. President Soeharto then approved the latter's name by omitting the word "Islam." The Jakarta Charter was a document drawn up by members of the Indonesian Investigating Committee for Preparatory Work for Independence on 22 June 1945 that subsequently formed the basis

of the preamble to the Constitution of Indonesia. It included an obligation for Muslims to abide by Shariah Law.

The establishment of the first Islamic bank in Indonesia has started a new era in implementing Islamic principles in the Indonesian banking world. At first, PT Bank Muamalat Indonesia Tbk, or better known as Bank Muamalat. Bank Muamalat was founded based on the rules or regulations of Conventional Banks, namely Law No, 7 of 1992 concerning Banking, which was subsequently enhanced by Law No. 10 of 1998 concerning Banking. Based on a report issued by Bank Indonesia (BI), Islamic banking is experiencing very rapid development. The Sharia Bank network grew from 529 branch offices in 2005 to 1763 branch offices in 2010, 2066 branch offices in 2011, and 2917 branch offices in 2019

Viewed from its development, Islamic banking has a greater growth than conventional banking, even though the current condition of Islamic bank assets in Indonesia is still far from conventional banks, which is approximately 6% in 2020. Therefore, the acceleration of the Bank Indonesia Acceleration Program (Acceleration The development of Islamic Banking) must be prepared. Still, the conditions of the Covid-19 pandemic are a challenge for the development of Islamic banks, especially Bank Muamalat.

2.3. Bank Muamalat's Strategy in Dealing With Covid-19

The Covid-19 pandemic that emerged from the end of 2019 and spread to Indonesian territory in March 2020 has had a significant impact on various lifelines, be it health, economy, social, culture, and even lifestyle. Apart from health, the economic sector is the line that has been significantly affected. On November 5, 2020, the Central Statistics Agency (BPS) officially announced that Indonesia's economic growth was entering a recession phase. BPS officially released Indonesia's economic growth in the third quarter of 2020, experiencing minus 3.49%. Previously in the second quarter, the Indonesian economy experienced a growth of minus 5.32%. This indicates that Indonesia has experienced a recession due to two consecutive quarters of negative economic growth [15].

Years	Quarter	Economic Growth (%)
2018	First	5,06
	Second	5,27
	Third	5,17
	Fourth	5,18
2019	First	5,07
	Second	5,05
	Third	5,02
	Fourth	4,97
2020	First	2,97
	Second	**-5,32**
	Third	**-3,49**

Table 1. Indonesia's Economic Growth

One of the institutions that were badly affected by the economy during the Coivd-19 pandemic was banking. Banking as the main sector of a country's economy has a role as an intermediary institution. The operation of a bank is highly dependent on the rotation of the economic wheels driven by public activities. However, the plague has brought panic in the community, especially panic towards the banking system (bank panic). This crisis condition has prompted the public to take action to take funds on a large scale from banks, both conventional and Islamic banks. The community is doing this to meet their daily needs,

which are also affected during this pandemic. Sources of funds in banks that are usually used for distribution of funds are funds originating from third parties (the public/customers), the condition of customers who withdraw a lot of their savings causes the source of funds for channeling financing to be limited, or in other words, the assets owned by the bank have decreased. To deal with this, each bank has a strategy to survive this crisis.

Bank Muamalat, as the first Islamic bank in Indonesia, in the face of the Covid-19 pandemic, has a strategy to keep the business running and survive to get through this crisis period. Bank Muamalat's strategy is basically the same as other banking companies, namely trying to survive the pressure of a lack of income. This strategy was chosen because it is impossible to do a business expansion in the current conditions. After all, it is a risky thing.

If under normal conditions, all income from the financing provided by Bank Muamalat can be predicted so that the bank can run as it should. However, the current condition, because the existing financing requires restructuring and relaxation, the income from all types of Bank Muamalat financing is uncertain and unpredictable. Restructuring and relaxation are meant to improve financing activities for debtors experiencing difficulties in fulfilling their obligations. The conditions mentioned above lead to the need for a strategy. The following are the strategies carried out by Bank Muamalat in dealing with the Covid-19 pandemic.

First, selective distribution of funds. Selective is done to strictly select new financing so that existing financing during this pandemic does not need restructuring again. Bank Muamalat, to regulate this strategy began to enter sectors that have a small risk of experiencing defaults in this pandemic. When a bank implements selective distribution of funds, the bank no longer emphasizes the margin level but on the risk mitigation process that is likely to occur in the future. Concerning assets, Bank Muamalat continues to raise funds from third parties. The advantage of Bank Muamalat compared to other Islamic banks is that Bank Muamalat has sufficient funds (reserve funds) from branch offices located abroad. Even though the Covid-19 pandemic has an impact on the company, customers can still feel safe knowing that there are sufficient funds. The use of funds originating from abroad cannot be used in its entirety because it can experience a loss in the value of the exchange rate, which results in unoptimal financing.

Second, do it efficiently. The point is that Bank Muamalat also cuts unnecessary expenses. This is the key to Bank Muamalat. In the conditions of the Covid-19 pandemic, it does not make significant work terminations because the tertiary needs that were given previously were stopped to fulfill other needs that had more urgent value.

Third, make internal improvements related to the end-to-end financing process. Bank Muamalat makes improvements to prepare a system that can select and perform accurate financing analysis. This is done considering the number of financing facilities before the pandemic that must be relaxed. It is closely related to the first strategy to avoid relaxing financing facilities. It is necessary to have a system with a high level of risk awareness within Bank Muamalat. Every element in Bank Muamalat is aware that these risks must be recognized and anticipated early so that the possibilities that occur in a pandemic do not occur again in the post-pandemic period. If the risk has been properly mitigated during a pandemic, then the financing payments provided can occur without any relaxation after the pandemic.

2.4. The Effect of the Merger of State-Owned Sharia Banks to Bank Muamalat

The national banking sector's total assets reached IDR 8906.96 trillion, while Islamic banking's total assets were only IDR 550.63 trillion. The number of Islamic banks in Indonesia is 14 Islamic Commercial Banks and 20 Sharia Business Units, while the Conventional Commercial Banks reach 96 banks. The proportion of the number of Islamic

Commercial Banks to the total number of banks in Indonesia is 12.72%, and the market share for Islamic banks is 6.18%. This indicates that Islamic banks have a relatively small size compared to conventional banks. This is why the need for a large-scale Islamic bank so that it can become the prime mover of the development of the Islamic economic and financial ecosystem in Indonesia. This then led to the idea of forming the largest Islamic bank in Indonesia by conducting a merger between Bank Rakyat Indonesia Syariah, Bank Syariah Mandiri, and Bank Negara Indonesia Syariah.

The Islamic banking industry's current condition does not yet have the competitiveness to be able to beat or at least equal to the existing conventional banks. The problems encountered by Islamic banks can be in the form of internal and external problems. From an internal perspective, Islamic banking problems include limited capital, quality and quantity of human resources, limited information technology and networks, and uniqueness of products/business processes. On the external side, literacy and public education on Islamic banks are still not optimal, and the supporting infrastructure is minimal. Therefore, to encourage the Islamic banking industry, consolidation is needed to increase competitiveness through strengthening the capital structure and optimizing bank synergy in one ownership [16].

However, the impact of this BUMN Islamic bank merger on other Islamic banks should also be noted, one of which is Bank Muamalat. The merger of state-owned sharia banks will have an impact on other smaller Islamic banks in the future. At least two things impact Bank Muamalat, namely in terms of total assets and in terms of the network.

In terms of total assets, with the BUMN Islamic bank merger, the merged bank's assets will be the largest compared to other Islamic banks. Bank Muamalat, which previously was not far behind, became the affected bank because its assets would look small compared to the merged bank later. This will lead to the potential for customers of Bank Muamalat to become customers of the bank merger. The too big to fail principle will affect here. When there is one Islamic bank with a large and strong system in a system, the possibility of failure is getting smaller because many interventions will later try to make this large system survive. If this large system fails, it will have an external impact on the system under it. Besides, Indonesian customers will feel safe if they save at a bank with a large number of assets because they feel that the bank will return their funds.

From a network perspective, state-owned sharia banks have become stronger and wider so that they can more penetrate further than other Islamic banks with limited networks. A good system will make an impression on the customer experience. Customer experience can lead to Bank Muamalat customers because customers who have a good experience at the BUMN Islamic bank will invite Bank Muamalat customers to move to the bank they use.

To deal with this, Bank Muamalat, as the first Islamic bank, will focus on its own advantages, namely financing businesses related to da'wah activities such as NU and PP Muhammadiyah that have not been worked on. To be an advantage, too, the BUMN Islamic bank's merger will take a long time to unify the company's vision and mission. So that in this condition, state-owned sharia banks in the next few years will at least keep their customers using their facilities, less likely to expand their business. This condition provides an opportunity for other Islamic banks to focus on developing their business. When using an analysis of strength, weakness, opportunities, and threats. Its strength is that Bank Muamalat has a name and brand as the first Islamic bank in Indonesia. The weakness is the conditions mentioned above. Opportunities are an untapped and potential market for Bank Muamalat to work on. Finally, the threats are the state-owned Syariah bank merger condition that may attract Bank Muamalat customers.

3. CONCLUSION

Bank Muamalat Indonesia is the first commercial bank in Indonesia to apply Islamic sharia principles in carrying out its operations. Like most business lines, Bank Muamalat is also affected due to the current pandemic conditions. The national economy entered a recession phase because economic growth in Q3 2020 was -3.49%, which previously experienced growth in Q2 of -5.32%. This pandemic condition causes every banking institution to have a strategy to survive until the pandemic is over; Bank Muamalat is also included. The strategies implemented by Bank Muamalat include selective distribution of funds, efficiency in all lines, and internal improvements related to the end-to-end financing process.

On the other hand, an issue that has spread and is very certain is the plan to merge state-owned sharia banks. This consolidation will impact the number of assets and the Islamic bank network, which will affect customer confidence in saving their money. Bank Muamalat's customers may switch to become customers of the smelting bank. To anticipate this, Bank Muamalat focuses on its advantages, namely the financing of businesses related to da'wah activities such as NU and PP Muhammadiyah, which are not optimal. In essence, Bank Muamalat is trying to survive in this pandemic condition and optimize the timeframe for merging state-owned Islamic banks to expand its wings.

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THE STANDING OF QONUN JINAYAT UNDER THE GOVERNMENT OF ACEH'S EXCLUSIVITY IN HUMAN RIGHTS STIPULATION IN INDONESIA

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Abstract
Under Law Number 11 of 2006 on the Government of Aceh, the Aceh Province is given special authority to stipulate and self-manage its governmental matters and local people's interests. The constitutional basis of this region's privileges is, among others, Article 1 paragraph (1), Article (5) paragraph (1), Article 18, and Article 18B of the 1945 Constitution of the Republic of Indonesia. Qanun governs various governmental matters and others under Islamic sharia law, among them is on Jinayat (criminal law). Substantively, Qanun Aceh Number 6 of 2014 on Jinayat Law is considered contrary to the laws and regulations on human rights. On the other hand, Qanun Aceh is based on laws and the Constitution as required by Law Number 12 of 2011 on Laws and Regulations. The main issue of this paper is whether the Qanun on jinayat conflicts with stipulations on human rights? This normative judicial research analyzes from a historical and regulatory perspective and proves that Qanun Aceh's validity on the jinayat law is already appropriate based on its standing in the Constitution of the Republic of Indonesia.
Keywords: Aceh Regional Regulation, Constitution of RI, Jinayat Law

1. INTRODUCTION

During its monarchy-governed period, the people of Aceh have applied a legal system that is based on Islamic sharia law. The establishment of Qanun as a constitution for the Aceh Darussalam monarchy began during the reign of Sultan Alaiddin Riayat Syah II Abdul Qahhar (1539 - 1571) who issued Qanun Al-Asyi, which was then perfected by Sultan Iskandar Muda (1617-1636) and during the reign of Ratu Tajul Alam Safiatuddin (1641-1675) was known as Qanun Meukuta Alam or Adat Meukuta Alam, also known as Adat Aceh. Qanun Meukuta Alam had established the state ideology, governmental system, division of powers, and state institutions within the Aceh Darussalam monarchy[1].

During the independence war period, the people of Aceh's contribution and participation was great, and since the Indonesian nation proclaimed independence on 17 August 1945 as a free and sovereign nation and state, Aceh became one of the regions or part of the Republic of Indonesia, a residency of the Sumatera Province[2]. After undergoing several status changes from being a residency under the North Sumatera Province to being a separate province, in 1959 the Aceh Province was given the "Special Region" status, having its complete name as the Special Provincial Region of Aceh. By that predicate, Aceh had extensive special autonomy rights in the field of religion, adat (tradition), and education. This status was affirmed with Law Number 18 of 1965. In line with the central government's program of giving Special Autonomy, Law Number 18 of 2002 was enacted, and the Special Provincial Region of Aceh became the Province of Nanggroe Aceh Darussalam.

Currently, Law Number 11 of 2006 on the Government of Aceh (hereinafter referred to as Aceh Government Law), provides special authority to stipulate and self-manage its governmental matters and local people's interests. The constitutional basis of this region's privileges is, among others, Article 1 paragraph (1), Article (5) paragraph (1), Article 18, and Article 18B of the 1945 Constitution of the Republic of Indonesia. In essence, the Constitution grants the right for each region to self-manage governmental matters under the regional autonomy principle. Article 7 paragraph (2) of Law Number 12 of 2011 on the Establishment of Laws and Regulations and its elucidation has affirmed that the legal force of regional laws and regulations is applied according to a hierarchy, namely, the order of each type of law and regulation based on the principle that subordinate legislation may not be in contrary to superior legislation.

Article 16 of the Aceh Government Law explains that the substantive content of qanun is, among others, the administration of the Aceh Government. The Aceh Government's mandatory business within its authority includes the administration of education, the hajj pilgrimage, traditional (adat) life, and others. The undertaking of Islamic sharia comprises of religious observance, ahwal al-syakhshiyah (family law), muamalah (civil law), jinayah (criminal law), qadha' (judiciary), tarbiyah (education), dakwah (missionary endeavour), syiar (preaching), and the defence of Islam, permits for the establishment of places of worship, and procedural law at the Mahkamah Syariah; as well as being able to establish different sanctions under Regional Regulations.

Criminal sanction content in qanun is commonly known as Jinayat, which is set out in Qanun Aceh Number 4 of 2016 on Jinayat Law that contain issues and potentially is in contrary with higher laws and regulations particularly Law Number 39 of 1999 on Human Rights; even deemed as possibly in conflict with the Constitution of the Republic of Indonesia that contains the protection of human rights. The Institute for Criminal Justice Reform (ICJR) is of the view that several articles about qanun have significant issues, particularly regarding corporal punishment. There are at least 10 (ten) principal criminal offenses (jarimah) governed in this qanun (Article 3) that includes 46 types of criminal offenses whereby almost all of them impose corporal punishment for offenders.

On one hand, it can be understood that there is a dualism of criminal law, that is, having the Indonesian criminal law as contained in the Criminal Code (Kitab Undang Undang Hukum Pidana /KUHP) that is stipulated by Law Number 1 of 1946 on KUHP, which generally applies also for the Aceh Province as Aceh is an integral part of the unitary state of the Republic of Indonesia. On the other hand, there is the existence of Qanun (Perda/Peraturan Daerah or Regional Regulation) based on Islamic Sharia and made by the people of Aceh themselves as further specific provisions because, under the Aceh Government Law, Aceh has been given the most extensive autonomy as possible to apply Islamic Sharia[3]. Therefore, the issue at hand in this paper is whether Qanun on jinayat is in contrary to the prevailing laws in Indonesia, particularly with the stipulations on human rights?

1.2. Research Method and Benefit

In seeking answers to the problems, the research was conducted using normative legal research on secondary data (Soekanto and Mamudji, 2006). This paper will endeavor to discuss this by using judicial normative research method to review the standing and applicability of Qanun from a historical and regulatory perspective, that is, the 1945 Constitution of the Republic of Indonesia and other relevant regulations.

1.3. Paper Structure

This paper analyzes two things: Qanun's Standing in the Constitution of the Republic of Indonesia and The Enforcement of Islamic Criminal Law (Jinayat) in Aceh. This normative judicial research concludes that Qanun Aceh's validity on the jinayat law is already appropriate based on its standing in the Constitution of the Republic of Indonesia.

2. DISCUSSION

2.1. History of Qanun

Aceh is the first point of entry for Islam in Indonesia and the place where the first Islamic kingdoms came to be, namely the Peurelak and Pasai. The height of Aceh's glory was achieved at the beginning of the 17th century, during the reign of Sultan Iskandar Muda. During this time, Islam and Islamic culture were such a large part of people's everyday life thus earning this region the byname of 'seuramo Mekkah' or Mekkah's Foyer[4].

It was also during these monarchy periods that the people of Aceh came to know the legal system based on Islamic sharia, called the Qanun. Linguistically, Qanun means law, and according to the Aceh-Indonesia dictionary, Qanun means regulation, laws or traditional customs. The people of Aceh have known qanun through the Hadith Maja, that is, the teachings or doctrines of the respected elders that states, "Adat bak puteu meureuhom, Hukom bak Syiah Ulama, Kanun bak Putroe Phang, Reusam bak Laksamana."

Hadith Maja is a concept of division of powers within a state that is construed as follows[5]:

1) The executive and political (adat) power are in the hands of the Sultan (king).
2) The judicial power or the implementation of the law is in the hands of the Ulemas who are the Kadli Malikul Adil (the Mufti of the Kingdom of Aceh).
3) Legislative power or the power of law-making is in the hands of the people, namely the Majelis Mahkamah Rakyat (People's Tribunal Council), which in Hadith Maja is signified by the "Putro Phang" or Pahang Princess as the establishment of the Majelis Mahkamah Rakyat was initiated by the Pahang Princess who was at that time the Queen Consort of Sultan Iskandar Muda.
4) In times of war, all powers were held by the Commander-in-Chief of the War Fleet, namely the Laksamana (Admiral).

However, after the death of Sultan Iskandar Muda, his successors were unable to maintain the kingdom's greatness thus somewhat weakening its position. The Aceh sultanate became the target of western nations, marked by the signing of the London Treaty and the Sumatera Treaty between England and the Netherlands that stipulates on their interests in Sumatera. The western nation's intention to control Aceh territories became apparent on the 26 March 1873 when the Dutch declared war on the Sultan of Aceh. The battle that was known as the "Sabil War" continued for 30 years, claiming quite a significant number of lives and forced the last Sultan Aceh, Teuku Muhammad Daud to concede to Dutch sovereignty over Aceh land. Upon such admittance to sovereignty, the Aceh region was officially included administratively into the Dutch East Indies (Nederlandsch Oost-Indie) in the form of a province, which since 1937 became a residency up to the end of Dutch colonial power in Indonesia. The rebellion against the Dutch colonialism continued, reaching the most remote places of Aceh.

Warfare then turned against the Japanese that came in 1942. This war ended with Japan's surrender to the Allies in 1945. During the war for independence, the people of Aceh's contribution and participation were so great that the first President of the Republic of Indonesia, Ir. Sukarno dubbed the Aceh region as the "Capital Region." Ever since the Indonesian nation proclaimed independence on 17 August 1945 as a free and sovereign nation and state, Aceh became one of the regions or part of the Republic of Indonesia as a residency of the Sumatera Province. In parallel with the establishment of the Aceh Residency, under the Letter of Establishment of the Governor of North Sumatera Number 1/X dated 3 October 1945, Teuku Nyak Arief was appointed as the Commissioner (Residen). As part of the Republic of Indonesia's territory, Aceh region has experienced several status changes. During the revolution for independence period, at the beginning of 1947, the Aceh Residency was under the administrative region of North Sumatera. As the Dutch launched military aggression towards the Republic of Indonesia, the Aceh, Langkat, and Tanah Karo Residency were established as military regions that were positioned at Kutaradja (now Banda Aceh) with Teungku Muhammad Daud Beureueh as the Military Governor[6].

Aceh gained extensive autonomy rights in the field of religion, tradition (adat), and education after its status as "Special Region" was affirmed by Law Number 18 of 1965. Various policies in past governmental administration had emphasized on a centralized system, which was regarded as a source of injustice in the life of the people and the nation,

and such condition gave rise to turbulence. The central government responded by giving Special Autonomy with the enactment of Law Number 18 of 2001, and the Special Provincial Region of Aceh became the Province of Nanggroe Aceh Darussalam. Furthermore, under the Regulation of the Governor of Aceh Number 46 of 2009 on the Use of the Aceh Name and Titles of Governmental Officials within the Administrative Document Templates and Management of the Aceh Government Environment dated 17 April 2009, it is affirmed the term Autonomous Region, Regional Government, Head of Region/Deputy Head of Region, Regional House of Representatives, Nomenclature and Name Plate of the Aceh Government Work Unit (Satuan Kerja Pemerintah Aceh/SKPA), Authorized Signees, Stamp of Office, and Stamp of Agency within the Administrative Document Templates and Management of the Aceh Government Environment is changed from the nomenclature of "Naggroe Aceh Darussalam" (NAD) to be termed as "Aceh.

The current stipulation on Aceh also contains Aceh's privilege, namely in Article 1 number 2 of the Aceh Government Law:

"Aceh is a provincial region that constitutes a unified legal society that is special in nature and is given special authority to govern and self-manage governmental affairs and the local people's interests in accordance with laws and regulations within the system and principal of the Unitary State of the Republic of Indonesia under the 1945 Constitution and [Aceh] is led by a Governor."

2.2. Qanun's Standing in the Constitution of the Republic of Indonesia

At the time that the founding fathers of the Republic of Indonesia declared the concept of state for the Republic of Indonesia, their choice fell on the principle of a democratic state in the form of a unitary state, and its governance is a republic. This matter is stated in Article 1 paragraph (1) of the 1945 Constitution: "The State of Indonesia is a unitary state in the form of a Republic." The term unitary state, or in Dutch is called eenheidstaat, is a form of state where the central government holds the highest power to govern all of its territories. In looking at its structure, a unitary state is a singular structure, meaning that in such a state, its regions do not constitute as other states. According to AV Dicey, as cited by C.F. Strong, the term unitary state or unitarism is the "habitual exercise of supreme authority by one control of power."[7] According to CF Strong, a unitary state is a form of state that has the highest sovereignty in the hands of the central government. The characteristics inherent in the unitary state are[8]:

1) There is supremacy from the central parliament.
2) The absence of other sovereign bodies.

Article 18 paragraph (6) of the 1945 Constitution of the Unitary State of the Republic of Indonesia has given authority to regional governments to establish local regulations and other regulations to carry out autonomy and co-administration tasks. For the Aceh Province, in particular, regional regulations are known as 'Qanun Aceh.' The constitutional basis of this region's privileges is, among others, Article 1 paragraph (1), Article (5) paragraph (1), Article 18, and Article 18B of the 1945 Constitution of the Republic of Indonesia. Article 18A notably places regional variations and particularity in authority relationships between the central government and the regional government.

Stipulations on qanun are contained in the Aceh Government Law. Its definition is stipulated in Article 1 number 21, which states that Qanun Aceh is a type of legislation that is equivalent to a province regional regulation that governs the administration of government and the lives of the Acehnese people. In Article 1 number 22, it is stated that district/municipal Qanun Aceh is a type of legislation that is equivalent to a district/municipal regulation that governs the administration of government and the lives of the Acehnese people at district/municipal level. The reference to qanun as the same type as

a regional regulation is further affirmed in the elucidation of Article 7 paragraph (1) letter f of Law Number 12 of 2011 on Legislation Making (hereinafter referred to as Law on Legislation Making), as follows:

"Included as a Province Regional Regulation is any Qanun that is enforced at the Province of Aceh and any Special Regional Regulation (Perdasus or Peraturan Daerah Khusus) and any Province Regional Regulation (Perdasi or Peraturan Daerah Provinsi) that is enforced at the Province of Papua and Province of West Papua."

Furthermore, the elucidation of Article 7 paragraph (1) letter g of the Law on Legislation Making states that: "Included as a District/Municipal Regional Regulation is any Qanun that is enforced at any District/Municipal at the Province of Aceh." Stipulations on regional regulations are also set out in Law Number 223 of 2014 on Regional Government (hereinafter referred to as Regional Government Law). Regional regulations are made in the context of regional autonomy administration and co-administration tasks at provincial and district/municipal level and constitute as a further elaboration of higher legislations by due observance of the distinctive features of each region and the prohibition to make regional regulations that are in contrary to public interest and higher legislations. Article 236 of the Law on Regional Government describes that to administer regional autonomy and co-administration tasks, any region shall establish a regional regulation that is made by the Regional House of Representatives (DPRD or Dewan Perwakilan Rakyat Daerah) with the joint approval of the head of the region. The regional regulation shall contain content on the administration of regional autonomy and co-administration; and as further elaboration on the provisions of higher legislations. Also, regional regulations may include local content in accordance with the provisions of laws and regulations.

In reference to Article 236 paragraph (3) and paragraph (4) of the Law on Regional Government, the norms of qanun are sourced from higher norms and is a further elaboration of these higher norms. As a consequence of such hierarchy, the qanun is prohibited to be in contrary with higher level legislations and public interest. Article 250 paragraph (1) of the Law on Regional Government states that, "Any regional regulation and Perkada [peraturan kepala daerah or regulation of the head of the region] as referred to in Article 249 paragraph (1) and paragraph (3) is prohibited to be in contrary with any provision of higher laws and regulations, public interest, and/or ethics."

Regional regulations have an attributive function that is governed under Law No. 32/2004 on Regional Government, particularly Article 146 and also has a delegation function of higher legislations. Such functions are[9]:

a) to regulate the administration of regional autonomy and co-administration tasks;
b) to regulate as a further elaboration of higher legislations by due observance of the special features of the respective regions;
c) to regulate matters that are not in contrary to the public interest;
d) to regulate matters that are not in opposite with higher legislations.

The special limitations and provisions of qanun's content contained in the Law on Regional Government are, among others:

a) Qanun is made to administer the Government of Aceh that pertains to all authorities of the Government of Aceh stated in Article 7. Such article gives authority to the Government of Aceh and district/municipal government to govern and manage governmental affairs in all public sectors except governmental affairs that are within the authority of the [central] government;
b) May govern all mandatory matters that are within the authority of the Aceh Government that is stated in Article 16 paragraph (1) that consists of 15 (fifteen) mandatory matters;
c) Governing all mandatory affairs stated in Article 16 paragraph (2) that includes the

administration of religious life, customs (adat), education, and the hajj in the Islamic Sharia implementing form;

d) Aceh Governmental affairs that are optional and in fact potential in increasing the people's welfare according to the conditions, specialty, and excellent potential. These are stipulated in Article 16 paragraph (3);

e) The content that stipulates on the implementation of Islamic sharia, namely any qanun that stipulates on religious observance, ahwal al-syakhshiyah (family law), muamalah (civil law), jinayah (criminal law), qadha' (judiciary), tarbiyah (education), dakwah (missionary endeavor), syiar (preaching), and defence of Islam, permits for establishing worship places, and procedural law at the Mahkamah Syariah (Sharia Tribunal);

f) Qanun may contain sanctions that differ from the penalties in regional regulations. For the implementation of Islamic Sharia such as the Qanun Jinayah (criminal), the provisions on sanctions as stipulated in Article 241 and Article 143 of the Law on Aceh Government are made into exceptions;

g) Content as further elaborations of higher legislations.

The abovementioned qanun content that is stipulated in the Law on Aceh Government is an embodiment of the implementation of Article 18B paragraph (1) of the 1945 Constitution that states: "The state recognizes and respects the units of regional governments that are unique or special, which is governed by law. Indonesia's recognition of the uniqueness and specialty of the Aceh Province is through the Law on the Aceh Government; whereby among others is the right of the Aceh Province to self-administer its special governance, the recognition of customary institutions such as the Wali Nanggroe and Mukim, the implementation of Islamic Sharia, and the recognition of qanun as a legal product within the Aceh Province[10].

2.3. The Enforcement of Islamic Criminal Law (Jinayat) in Aceh

It is explained in Article 241 of the Law on the Aceh Government that the Qanun may contain criminal sanctions outside the ones set out in laws and regulations. As a written law that has been promulgated, qanun has a purpose to (a) Bring prosperity; (b) Peacefully regulate human interaction; (c) Achieve and enforce justice; (d) Maintain the interest of every human so that they are not disrupted (Kansil, 1992). The consideration part of the Law on the Aceh Government states that Islamic Sharia is the breath of qanun Aceh since based on the history of Indonesia's governance, Aceh is a unit of regional government that is unique or special in regard to one of the special characters of the Acehnese people which are high endurance and fighting spirit. Such high endurance and fighting spirit come from a life perspective based on Islamic Sharia that gave birth to strong Islamic culture so that Aceh became a capital region for the fight to seize and maintain Indonesia's independence.

According to Islamic Sharia, the criminal law recognizes three categories, namely hudud, tazir, and qisas. Hudud crimes include adultery, false allegations of infidelity, apostasy, and theft. Hudud crimes are regarded as crimes against Allah (God) and have special punsihments that are set out in the Alquran. Tazir is a crime that is not in accordance with the hudud and qisas category. Sentences are left to the judge's discretion at the Islamic law court, but at the same time, it is advised that sentences for such crimes should have a deterrent effect. Qisas crimes include torture and premeditated murder[11].

Jinayat is a part of Islamic sharia that is carried out in Aceh, as stipulated in Article 125 paragraph (2) of the Law on Aceh Government and in accordance with its paragraph (3) is stipulated in a Qanun. The previously mentioned Qanun has been promulgated as Qanun Aceh Number 6 of 2014 on Jinayat Law. In the considerations part of the Memorandum of Understanding between the Government of the Republic of Indonesia and the Free Aceh

Movement, drawn up in Helsinki on the 15 August 2005, the Government of the Republic of Indonesia and the Free Aceh Movement affirmed their commitment to resolve the Aceh conflict peacefully, comprehensively, and in a sustainable and dignified manner for all, and all parties are determined to create a condition so that a Government of the Aceh People can be materialized through a democratic and fair process within the Unitary State of the Republic of Indonesia.

In reference to Qanun Aceh, Number 6 of 2014 on Jinayat Law, the considerations part in letter b and c states that Aceh as part of the Unitary State of the Republic of Indonesia has a Special and Specific Autonomy, one of them is to implement Islamic Sharia and uphold justice, well-being, and legal certainty. The jinayat in this law is based on the Alquran and Al-Hadist that are the principal basis of Islam to bring blessings for all and has become the faith and way of life of the Aceh people.

The Qanun Aceh that was officially in effect on October 2015 contained ten principal criminal offenses (jarimah) and included 46 types of new criminal offenses punishable by a criminal sentence of lashings for perpetrators. This Qanun governs criminal offenses of immoral (kesusilaan) acts that are in accordance with Islamic sharia in Aceh. This qanun constitutes as a consolidation of three (3) prior qanuns that were enacted in Aceh in 2012 with additions of more criminal offenses. The criminal sentencing formula in qanun duplicates the criminal stipulations in the Criminal Code and other laws in Indonesia. According to the Institute for Criminal Justice Reform (ICJR), this qanun causes a dualism of criminal law enforcement in Aceh, especially for the articles on immoral acts already governed in the Criminal Code [12].

Qanun Jinayat also legitimizes corporal punishment in Indonesia, namely lashings although the criminal sentencing system firmly prohibits the use of lashings as a punishment. This use of lashings as punishment is considered as torture, cruel, inhumane, and degrading. It also breaches international law on torture, other cruel, inhumane, or degrading treatment contained in the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment (CAT) whereby Indonesia is one of the ratifying countries. In 2013, the UN Human Rights Committee that monitors countries for their compliance to obligations under ICCPR called for Indonesia to revoke the provisions that legitimize the use of cruel punishments and other local laws and regulations in Aceh. In 2008, UN Committee Against Torture also called for Indonesia to evaluate all national and local laws and regulations that legalized the use of cruel punishment as a form of criminal sentencing, with a view to eliminating all similar types of that punishment[13].

In the context of the Aceh Province, the hierarchy theory with its lex superior derogate lex inferior principle (a law higher in the hierarchy repeals the lower one) is limited by the lex specialis derogate lex generalis (a special law repeals a general law). The existence of qanun in the Aceh Province, in fact, is strong as it has obtained direct instruction from the Law, namely the Law on the Special Autonomy of the Government of Aceh that is a lex specialis of the Law on Regional Governments. Qanun is also an implementation of the Law on the Special Autonomy of the Government of Aceh where Article 25 stipulates that the Islamic Sharia Judiciary in the Aceh Province is part of a national judiciary system carried out by the Mahkamah Syariah (Sharia Tribunal) that is free from the influence of any party. The authority of the Mahkamah Syariah is based on Islamic Sharia within the national legal system that is further governed with qanuns of the Aceh Province.

Qanun's strength at the next stage is even stronger with Law Number 11 of 2006 on the Government of Aceh that revokes Law Number 18 of 2001 on the Special Autonomy of Aceh. The general provisions of Law Number 11 of 2006 number 21 and 22 states that Qanun Aceh is any laws and regulations that are the same type of regulations as provincial

and district/municipal regulations that stipulates on governmental administration and the lives of the Acehnese people or the lives of the people of districts/municipals in Aceh.

Government Regulations on Islamic Sharia do not collide with Law Number 22 of 1999 in conjunction with Law Number 32 of 2004 on Regional Government. Such law mandates that the religious domain belongs to the authority of the Central Government through the House of Representatives. Article 7 of Law Number 22 of 1999 stipulates that" Regional authority includes authorities on all governmental sectors except the authority in foreign politics, arms and defense, the judiciary, monetary and fiscal, religion and other sectoral authorities." However, regional regulations that have sharia nuances are kept open according to the elucidation of that Law, namely, in particular, the religious sector where parts of its activities may be assigned by the Government to regions as an effort to increase regional participation in developing religious life. Also, juridically, there will be a legal certainty because Islam as teaching contains a value system as stated in the Alquran and Hadis.

Qanun as an implementation of the Islamic sharia in Aceh adheres to the principle of Islamic personality, meaning that qanun sharia as described above only applies to Muslims, while non-Muslims in general (Protestants, Catholics, Hindus, Buddhists, even believers of the 'Aliran Kepercayaan' (meditation-based spiritual path) are not included, or even forced to implement it. Therefore, there is no difficulty for non-Muslims in Aceh to remain in the Aceh Province as they are subject to the Criminal Code as a legal provision that is in force nationally, in addition to being compliant to qanuns that are non-sharia in character. This kind of conclusion can be understood from Article 25 paragraph (3) on the Special Autonomy of the Government of Aceh that states,"The authority referred to in paragraph (2) is in force for Islam believers." and Article 2 paragraph (2) of Regional Regulation No. 5 of 2000 that states,"The existence of other religions outside of Islam are recognized in this region and their believers may observe their religious teachings."

From a sociological perspective, the majority of Indonesia's population are Muslims, especially in the Aceh Province where the people indirectly has shown that they observe Islamic teachings in their everyday lives. Even though there are different levels of acceptance of Islamic laws itself, Islam has become a dominant value in everyday life through spiritual content, language, culture, behavioral practices up to the actual implementation of Islamic Sharia itself. Islamic law has become a living law within the society. The integration of Islamic law into national law in Aceh society in addition to the awareness of observing religious teachings has made Islamic law as the best alternative to overcome complications of the legal sphere[14].

Philosophically, Islamic law content is laden with justice themes. Islam, whose teachings also contain legal stipulations is a system of teachings which at the same time includes the methodology to achieve it because every nation has the same and universal vision of justice, order, peace, harmony, sanctity, and others. This rule, of course, is in accordance with human needs on this earth.

3. CONCLUSION AND RECOMMENDATIONS

Qanun is a special regulation forced in the Aceh territory and based on Islamic Sharia. Its enforcement is in line with the Constitution, particularly in exercising special autonomy. Included in qanun is the provisions on Jinayat or criminal law that has the same power to go against human rights. Therefore, its existence is clearly not in juridical conflict as it has the legislative basis mandated by Law No. 12 of 2011, also sociologically and historically in line with the Aceh people that is based on Islamic value.

To avoid deviation from applicable provisions, the application of Jinayat must be supervised by the Central Government and the Aceh Government by due observance of

provisions of laws and regulations that are higher in the legislation hierarchy according to Law No. 12 of 2011.

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Kitab Undang Undang Hukum Pidana

Qanun Aceh Nomor 4 Tahun 2016 tentang Hukum Jinayat

IMPORTANCE OF EMPOWERMENT RESOLUTION THROUGH MEDIATION IN DIVORCE CASES AT THE RELIGIOUS COURT

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Abstract
Settlement of divorce cases through mediation will change the habit of litigating in court through litigation. The plaintiffs and defendants must understand that mediation is a negotiation of the parties that is guided and organized by a neutral and impartial mediator called the mediator. The principle of complicating divorce means that it is like an emergency exit in an airplane which does not need to be used except in an emergency to overcome a crisis. Uncontrolled use of divorce will harm not only both parties but especially children, families, and society. As far as possible the verdict handed down by the judge will be considered and considered fair by the winning party. Another case with peace, a sincere peace result based on mutual agreement of the disputing parties. The problem is, How Important is the Empowerment of Divorce Case Settlement through Mediation in the Religious Courts. The research method used is normative juridical, which includes research on the principles of law which is very basic in law that can be guided. Legal principles reveal themselves to the surface through the rule of law. Legal principles can also change, changes in legal principles are very slow compared to legal regulations. Settlement of mediation at the Religious Court can lead the parties to the realization of a permanent and sustainable peace agreement, considering that dispute resolution through mediation places both parties in the same position, win-win is an agreement between the two parties and ends with shaking hands. The fact in the Religious Courts is that not all judges have the talent and skills to carry out their duties as mediators, especially those who have never received professional training. The mediation room is small with minimal facilities such as chairs and room arrangements that do not meet the mediation room requirements so that it affects the outcome of the mediation.
Keywords: Empowerment, Mediation, Religious Court

1. INTRODUCTION

Supreme Court Regulation No. 1 of 2016 concerning Mediation Procedures in Courts, requires judges at the Court on the day of the first trial to order the litigants to go through mediation. The use of mediation in Indonesia, especially in court channels, has a peculiarity, namely that it is carried out when the case has been registered in court (court-connected mediation) [1]. The requirement to carry out mediation in court is one of the interesting provisions that should not be ignored and must be considered by the parties in proceedings at the Religious Court. All rules that are enforced must not conflict with Islamic law. To maintain the existence of laws applied in the Religious Courts.

People who have inherited a cultural tradition that emphasizes the importance of harmony and togetherness in life will be more able to accept and use consensus methods in dispute resolution. Culture can be formed or influenced by several factors, including religion seeing that Islamic values have the importance of mutual forgiveness and the concept of Islah (peace) is a normative factor that encourages Muslims to pursue dispute resolution through a consensus approach between parties in addition to the approach disconnect.

The problem is, How Important is the Empowerment of Divorce Case Settlement through Mediation at the Religious Courts.

2. RESEARCH METHODS

The research method used is normative juridical, covering research on legal principles which is very basic in law that can be guided. Legal principles have an important meaning for the formation of law, the application of the law, and the development of legal science. [2] The nature of the research carried out is descriptive. Descriptive research aims to accurately describe the characteristics of an individual, condition, symptom, or group, or to determine the spread of a symptom, or to determine whether there is a relationship between a symptom and

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other symptoms in society. Data analysis in the research carried out is using qualitative methods, namely, the description of the data contained in the data is not analyzed using statistics but is analyzed against the formulation and explanation.

3. DISCUSSION

Settlement of cases through mediation by Islamic law means that mediation is seen from the theory of equality with *tahkim*. Dispute resolution through the *tahkim* institution was practiced during the caliphate of Ali bin Abi Talib and Muawiyah. This means that disputes between the two parties are settled amicably through negotiation (deliberation) of both parties, or negotiation of both parties. The deliberation activity is a very important element for the two parties in a court case to carry out a mediation facilitated by a mediator appointed by the Chairperson of the Panel of Judges who hears the case. In Indonesia, as a country with a majority Muslim population, dispute resolution through mediation is the most widely used method of dispute resolution in practice. Mediation is one of the methods used to find the best solution in solving problems, including problems in cases that are mediated in the Religious Courts. The results achieved through a deliberation process involving experts in their fields are much better than just thinking about one person.

This illustrates that the integration of mediation in court proceedings including the Religious Courts is not against Islamic law. Therefore, mediation must be empowered by its use in the Religious Courts to achieve the maximum possible peaceful settlement of cases, because the settlement of disputes in a peaceful manner is a settlement with the highest benefit value compared to other dispute resolution methods in court. [3]

4. RECOGNITION

Peaceful dispute resolution is actually the culture of the Indonesian people. The values of harmony, tolerance, and communalism or togetherness take precedence over individualism. The culture of deliberation is the value of society in Indonesia in peaceful dispute resolution. Resolving a case in court may yield a big advantage if you win, but relationships are damaged. Saving one's face (face-saving) or a person's good name is an important thing which is sometimes more important in the dispute resolution process in Eastern cultured countries, [4] including Indonesia.

Apart from being a private matter, marriage is also a family affair. One of the goals of marriage is to build a happy household together, marriage is also a matter for two families. The people in question are a group of members of unilateral descent from one original mother (grandmother) which includes no more than five generations and organizations that are still alive. [5] If there is a conflict between the two candidates and the clan, the interests of the people are prioritized because it is called consanguine marriage.

The implementation of Supreme Court Regulation No.1 of 2016 concerning Mediation Procedures in Courts can be an effort to resolve civil disputes so that civil dispute resolution through mediation is the main choice because it can negotiate the wishes of the parties in a way of peace. Mediation efforts will certainly also benefit the court because the use of mediation is expected to solve the problem of case accumulation. [6]

The judge's action in reconciling the disputing parties is to stop the dispute and strive to prevent the divorce from occurring. The judge who has a role in pursuing peace is the judge in the trial of divorce cases when the trial begins, while the mediator is a judge appointed by the panel judge to seek peace for the parties outside the court session based on the agreement of the parties. The mediator has a decisive role in the mediation process. The mediation failure is also largely determined by the role played by the mediator. The mediator plays an active role in bridging a number of meetings between the parties.

A mediator is a judge or other party who has a mediator certificate as a neutral party

who helps the parties in the negotiation process to find various possible dispute resolutions without using a way to decide or force a settlement [7] (a person who arranges a meeting between two or more disputing parties) to achieve a result. A fair ending without wasting too much cost, but still effective and fully accepted by both parties to the dispute voluntarily. Mediation as a method of peaceful dispute resolution has a great opportunity to develop in Indonesia.

Divorce itself means the abolition of the marriage by a judge's decision or the demands of one of the parties in the marriage. [8] Judging from the aspect of the perpetrator of the divorce, divorce is divided into two, first, *permohonan talak*, namely divorce by husband against wife. Second, gugat cerai, namely divorce by the wife by submitting a divorce request to the Religious Court, divorce cannot occur before the Religious Court officially ruled.

To empower mediation in court, the Supreme Court ensures that mediation is a prerequisite before a civil suit can be further heard. Efforts to empower mediation in courts in the Supreme Court Regulation Number 1 of 2016 concerning Mediation Procedures in Courts include:

1. Mediation is not just a formality for resolving civil disputes, because if the mediation process fails due to the parties' bad faith, then the lawsuit cannot be continued.
2. The parties' obligation to be present in person in court, while previously being attended by attorneys who often took the initiative not to want to reach peaceful settlement.
3. The time for the mediation process was reduced to 30 days, however, there were opportunities to extend the time in the process of reaching a peaceful settlement.
4. The flexibility to choose judge mediators and certified non-judge mediators in court.

The public must not forget that the value of deliberation for consensus is a reflection of the mediation process. Mediation can be carried out anywhere and anytime according to the volunteerism of the parties who are in a case. Voluntary values must be instilled in the minds of the people so that mediation is not only born and limited in court.

To empower mediation, the mediator must improve competence. To become a reliable mediator, everyone only needs to equip themselves with the ability to organize and lead negotiations, the ability to listen, the ability to analyze problem maps, and the ability to communicate. As long as the case has not been decided, efforts to reconcile can be made at each trial hearing. [9]

5. CONCLUSION

Settlement of mediation at the Religious Courts can lead the parties to the realization of a permanent and sustainable peace agreement, given that dispute resolution through mediation places both parties in the same position. Judges of the Religious Courts carry out the function of reconciliation because no matter how fair the decision will be the better and fairer the result of peace is. The expertise and professionalism of judges who carry out the mediator function are needed to affect the success of mediation in the Religious Courts because judges also handle other cases, and there is a court that does not have a non-judge mediator and the judge is not yet a certified mediator. The fact in the Religious Courts is that not all judges have the talent and skills to carry out their duties as mediators, especially those who have never received professional training. The mediation room is small with minimal facilities such as chairs and room arrangements that do not meet the mediation room requirements so that it affects the outcome of the mediation.

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WAQF DISPUTE SETTLEMENT PATTERN IN THE COASTAL AREA OF SEMARANG CITY

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Abstract

The existing dialectical In the coastal region in Semarang, Central Java, Indonesia, the majority of the society obeys the religious principles of Islam because historically, the entrance of Islam Religion through the coast region for the first time. The implementation of diversity, including waqf becomes daily routine activities. The practice of waqf become the tool for doing worship and maintenance good relationship in socialization. However, Waqf that is related to social interest and has economic value, often causes dispute. The research will analyze land waqf disputes happened in the coastal region of Semarang City and its settlement patterns, considering that the coastal region has its unique characteristics. The objective of the research is to identify waqf disputes and find their settlement patterns. The benefits give an idea for the government in implementing the settlement pattern of land waqf dispute settlement for the coastal society. This is a field research with sample area of the research in the coastal region of Semarang City. The approach method in socio-legal research and case study. The data waqf were obtained through literature, interview, and document, and the data is analyzed qualitatively. The result of the research shows that the land waqf disputes that occur in the coastal region are as the following; nadzir (people who responsible about waqf assets) did default, land waqf was not certified, withdrawal of waqf land by wakif or the heirs of wakif, the function change of land waqf, the waqf doing that was not appropriate and without agreement from the heirs and the heirs have bad intensions to waqf assets. Its settlement pattern was suitable for the cultural characteristic of the coastal society who are egalitarian. The waqf dispute was solved together by attending the disputing parties. In case It was not appropriate; the parties agree to ask a mediator who has the closeness of social relations in order to solve the dispute.

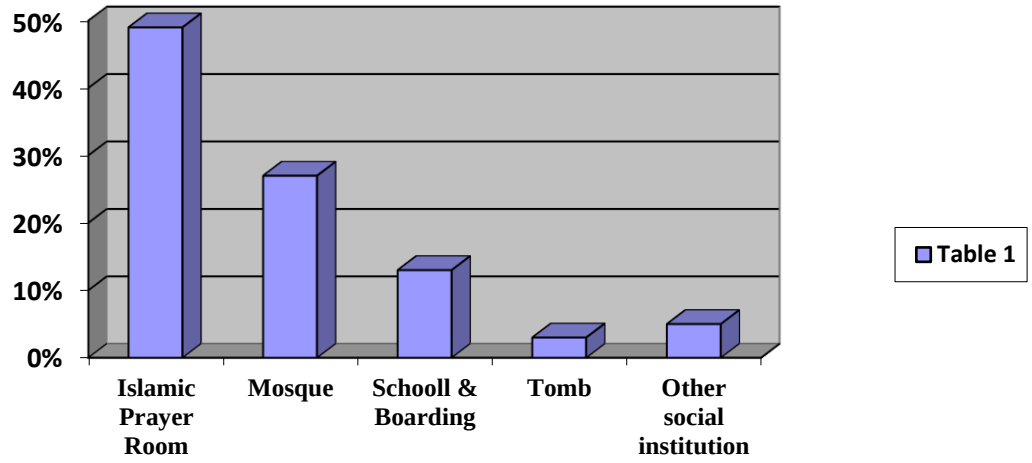
Keywords: land waqf dispute, settlement pattern, coastal region

1. INTRODUCTION

The coastal region of Semarang is the north region of Java Island that lay along the coastline, reaching 36,63 kilometers. It makes Semarang City quick in development and becomes potential for industrial activities, trading, and service, including religious activities. The build of the Mutual Mosque of Kauman Semarang, MMCJ (Mutual Mosque of Central Java), and the location of the Johar market shows that waqf action done by the society in Semarang City become one Religious tourist destination in Indonesia. The existence of MMCJ shows that Islamic people who live around the coastal region in Semarang are the majority of people who obey the principle of Islamic teaching because historically, the entrance of Islamic people through the coastal area for the first time. Moreover, MMCJ laid on the coastal region of Semarang. The coastal society considers waqf as one religious' activity in their daily life. The practice of waqf become the mean of maintaining a good relationship in worship and social life.

Waqf is the action of diverting the benefits of assets from individual assets to become public assets based on Islamic Syariah. Waqf assets may not be sold, loosen, and given to anyone, but it must keep their existence. Based on Article 1 The Rules of Waqf, waqf is the legal action of wakif (the people who did waqf) in order to separate and give some of their assets to be used in the long term or for a specific time based on their interest for the worship activity and the public prosperity based on Syariah. Waqf is one of asset usage based on the Islamic Principles because in waqf doing; there are assets practice for social interest. *Wakif* understand that God entrusts assets, moreover, assets are not individual possession, but they have a social function. This understanding grows the awareness of the coastal society in Semarang in doing waqf. Thus, waqf assets become developed and productive.

The number of waqf assets in the coastal region in Semarang consists of Tugu Region, Gayamsari, Pedurungan, East Semarang, and Genuk in 2016, about 566.737 m2. Its use is explained like the table below;



The data above shown that, the allotment of waqf assets are as the following; for Islamic Prayer Room 49%, mosque 27%, school and boarding school 13%, and tomb 3%, whereas the other social institution is 5%. The land waqf condition about 79% of the existing land waqf has possessed certificates, and 21% only have waqf pledge deed.[1] The state of land waqf that has not certified will cause waqf disputes because there is no authentic proof of waqf action.

Based on the research of Upi Komariah [2] about Settlement of Waqf Disputes in the Religious Courts, it explains that the factor of waqf disputes are a lot of spoken waqf and they base on the feeling of trust between them. Moreover, there is no authentic proof; hence it can cause disputes. The efforts of waqf settlement can be through discussion, mediation, arbitration, and if it cannot be solved, it can be through Religious Court. That data shows that the understanding of society about the certification of waqf assets is still low for the community again practice waqf traditionally. They have not based waqf on the Rules. If wakifdeceased, it can cause waqf disputes from the heir of wakif, from the society who use waqf assets or nadzir who maintain waqf assets.

Based on the research done by Ibrahim Siregar [3] in his study about *Settlement of Waqf Disputes in Indonesia: The Social Historical Approach of Islamic Law (2017)* explains that the disputes occurred in the early period of Islam and the contemporary cases about waqf dispute caused by social change; the shift of value and rules in the society. Besides, there wasn't written proof which states that the status of certain assets is an object of waqf. The settlement is through discussion that is led by a nearby religious leader and social leader.

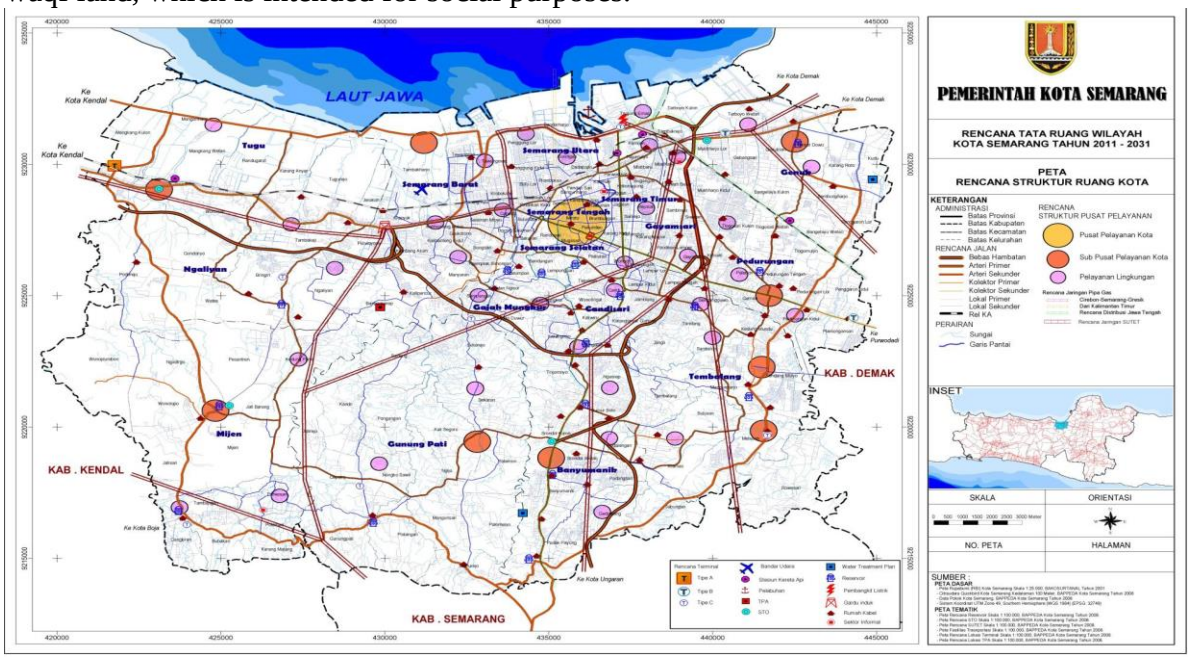
According to the research done by Islamiyati and Dewi Hendrawati [4] about, Settlement of Uncertified Waqf Land Disputes in the North Coastal Region of Central Java (Settlement of Uncertified Waqf Land Disputes in the North Coast of Central Java), 11,86% of land waqf located in the coastal region of Central Java, and they have not certified. This condition becomes the reason for land waqf disputes in north beach region of Central Java. The efforts of dispute settlement through non- litigation pathway, discussion (23%), and mediation (60,8%) because the coastal society in the north of Central Java has the condition that integrated with nature. Therefore, the social relationship becomes more in-depth or friendly. Moreover, the family factor is very preferred.

Based on the above explanation, the implementation of waqf in the coastal society has not been appropriate with the rules of law wholly, since there is land waqf that has not been certified this condition cause waqf dispute. The settlement is done mostly through a non-litigation pathway that is easier and does not need much time. Moreover, it does not seem rigid/formal in delivering complain or in responding to the issues.

Based on the previous explanation, legal issues about the practice of waqf in the coastal region in Semarang city that does not comply with rules of the law causes dispute. The research will analyze land waqf disputes happened in in the coastal part of Semarang and its settlement pattern considering that coastal region has its specific characters. Waqf land dispute frequently occurs in the coastal area of Semarang City. However, research on the settlement pattern is minimal. The objective of the study is to analyze and observe the settlement pattern of land waqf disputes, which often used. The benefit can give an idea for the government in implementing the policy of settlement pattern of land waqf dispute for coastal society.

1.2. Research Method and Benefit

The survey location of the study was in the coastal region of Semarang City According to Law No. 1 of 2014 concerning Management of Coastal Areas, explains that coastal areas/regions are transitional areas of land and sea ecosystems that affect each other, in which direction is 12 miles from the coastline for the province and one third of the sea area for the city district and towards the land administration boundary regencies/cities with landward characteristics may include both dry and submerged land areas which are still under the influence of marine characteristics. Based on the map below, it shows that the coastal areas of the city of Semarang, consisting of Semarang City, Genuk, Gayamsari, Tugu, and East Semarang. In the coastal area of Semarang there were land that functions as waqf land, which is intended for social purposes.



Picture 1 Map of the Semarang City Coastal Study Area (Source : Spatial Plan for the Semarang city area, 2011)

The type of research is socio-legal research because it analyzes the issues of procedures in waqf disputes and the settlement pattern used in society. That aims to develop a theoretical concept based on the data and research sources. The method of approach uses juridical empirical. Juridical means the research that studies something correlated to the

fundamental law of the rules used, namely The Rules No. 41/2004, about Waqf, The Rules No. 42/2006 about the regulations of implementing Waqf. Empirical means the research about the implementation rules of the law about the settlement of land waqf dispute in the society the relation of law and the community.

The research data consisted of primary and secondary data.

Primary data comes from an interview with the institution of waqf service in the society, namely; Wakaf Pledge Official Certificate (WPOC), there were three WPOC, namely; WPOC Tugu, Genuk, and Gayamsari sub-districts), nadzir (there were three nadzir, namely; nadzir Tugu, Genuk, and Gayamsari sub-districts), Indonesian waqf institution of regency (two persons), Indonesian waqf institution of the province (two persons), Religious Court Judge (two persons), and community. Secondary data gained from the study of literature and archive law. That includes primary, secondary, and tertiary legislation. The material of fundamental law comes from the legal foundation of waqf dispute settlement. The secondary law material comes from reference, journal, and other reading materials that are related to waqf law and the arrangement of waqf disputes. Whereas for tertiary research material comes from reading articles about non-legal, encyclopedia, web or journal to complete the other research materials. The conclusion was drawn based on phenomena and regularity of case settlement gotten from every case searched. The data analysis was done using the inductive method to conclude specific problems in the waqf dispute case that happened in the research area. Then it developed into the general statement.[5]

1.3. Paper Structure

This research focuses on discussing how the waqf dispute occurs and to find the settlement pattern. The initial problems are the trust issue between stakeholders and no authentic proof in waqf settlement. From the background, this research question is, “How to find the waqf settlement pattern in the coastal area of Semarang City?”

2. RESULT

2.1.1. Land Waqf Dispute Happened in the Coastal Region of Semarang City

Based on the result of the research, in the coastal region of Semarang City, generally, seldom happen waqf dispute because wakif does not always take into account the problems about the use and the functioning of waqf assets. According to Ahmad Riza (kecamatan Genuk. There is no waqf dispute in law region of KUA Genuk because of 2 possibilities: (1) the society, generally, does not make an issue about the status of waqf land for his interest, (2) organization has a mechanism of the land status of waqf with the procedures that focus peace. Besides, the homogeneous social condition causes the existing law obeyed by society, and the rules of society leaders in the coastal region are dominant. Related to waqf assets, society leaders do not dare to take into account the problem because they consider that waqf asset is possessed by God. If there is someone so that Allah will reply to it. This belief makes society afraid and being reluctant to make it a problem.

The coastal society of Semarang City practice waqf based on Islamic legal teaching that comes from understanding studies of Islamic religion intensively done twice a week minimally. That religious activity can be used as a tool in order to tie society relationships, improve the behavior in social ties, discuss social problems, and solve social issues. Even it becomes a motivation to do waqf because waqf is jariyah charity, which results in reward continuously although wakif has rested in peace. As a result, the practice of waqf uses existing rules in society; therefore, it becomes the norm that must be enforced by all people of the community.

Social enthusiastic about doing waqf is very high; even waqf doing can use as the measurement of individual and the success of someone's life. The people who do waqf feel

happy and satisfied because they use waqf assets together with village assets to serve society need, for example, worship, social activity, meeting place, education means/ madrasah/ TPA (Al'quran Education Garden), even become rest area for society.

However, there is waqf problem in certifying land waqf. Until 2016, there is 11,6 land waqf in the coastal region of Semarang City that has not to be certified; hence there is no authentic proof of waqf doing.[6] Based on PP No 28 the year 1977, land waqf must be certified to National Land Body to get legal certainty and avoid dispute after wakif rest in peace. Besides, the Waqf certificate aims to make an order of waqf assets so that they can be saved from the party that wants to possess land waqf. Hence, why there is uncertified land waqf? This condition influenced by many factors;[6]

a. Wakif still uses the old paradigm of waqf, which believes that in giving his property for waqf, it comes from the heart to get Allah Blessing, and it does not need to be known by other people. For wakif, doing waqf is for Allah. If the land waqf is certified, it will decrease its pure charity, and even it is called arrogant action.
b. Nadzir does not understand the procedures or techniques of certification of land waqf; moreover, they feel afraid of the cost that is charged for this land waqf certification. Generally, Nadzir manages waqf assets are willed or to do reward. He does not hope a wage or salary at all. For that reason, nadzir feels hard if he has to certify the land.
c. The place between waqf assets and BPN is far so that it makes nadzir impatient and not serious to certify that land waqf.
d. Lack of law waqf training which explain the development of waqf law including certification of land waqf, therefore it causes misunderstanding about information of waqf law.
e. The happen of law collision between religious law and national law that make an arguement about reaching waqf objective as aimed by wakif.

These conditions become factors of causing waqf disputes. Furthermore, there are still other reasons for waqf disputes in the coastal region of Semarang City, namely;

a. Nadzir default to wakif. Nadzir does not do his promise well to wakif about the allotment about the use of land waqf,
b. Withdrawal of waqf assets by wakif. Wakif withdrawal his assets and cancel his waqf action,
c. Withdrawal action from the heirs of wakif. It relates to economical reason,
d. The functional shift of waqf assets. The waqf assets are shifted its function to the other people. It is not appropriate with the goal of waqf assets, as stated in the waqf pledge deed. The change of waqf usage happens,

Based on data that is found in the field, waqf problems that happen in the coastal region of Semarang City, are the following;

a. Land waqf that has no certificate and has no proof of waqf action, and if wakif rest in peace, sometimes the heirs take the waqf.
b. The majority of nadzir have not understood their primary task and function well. In reality, it shows after receiving waqf assets. He gives that assets to the mosque takmir, headmaster, or the official of Boarding House. Moreover, nadzir releases his task. Nadzir becomes the one who manages and responsible for waqf assets. He does not ensure that those assets are distributed based on their use..
c. The dispute of boundary of land waqf between the heirs with the others. This is the a.The dispute of boundary of land waqf between the heirs with the others. This is the effect from uncertified land waqf. For example: the case of Palegon mosques case, Genuk, coastal region of Semarang City, which the building across the land of society nearby. The case of Baitul Mustagfirin, Gayamsari where heirs build the building that indented to the land waqf mosque which up to now the settlement has not achieved.

d. Many waqf assets have not empowered productively or optimally. It becomes a problem because the objective of waqf assets has not reached. It is caused by nadzir who will not maintenance, care, waqf assets; hence it will be meaningful for the society. Nazir acts such actions because so far, the work of nadzir is considered as side business only. Therefore the task and authority are not fulfilled. Besides, the source of nadzir, government policy, the participation of society become the reasons why waqf assets do not make productive.
e. Land waqf has lived freely by other party because land waqf is not maintained well by nadzir or nadzir just let it. Moreover, land waqf is not certified. If that case is not considered and unfinished hence land waqf will be authorized by the third party and slowly the possession rights of that asset will be moved.
f. Land waqf use for public interests, such as; the development of a highway project and the wider of the road for the public interest. It will be a dispute if the substitution of land waqf is not appropriate with the rules of law. The regulations of waqf explain that waqf asset maybe not loosened, changed, sold, granted, and bequeathed. Waqf assets are everlasting. However, if the assets are used for a public interest so that the assets must be changed/ exchanged with the other assets as if value and function at least the same with previous assets (Article 40-41 of Waqf Rules).

Based on the data that found in the field, the land waqf dispute happened in the coastal region in Semarang City; it divided into three, namely: based on waqf subject (perpetrators and some parties that are related to waqf doing), waqf object (waqf assets) and the procedures of waqf. The explanation areas the following;

a. Land waqf dispute based on the subject of waqf. It is the dispute of land waqf that occurs between disputing parties, namely; wakif, nadzir, society, and government. The disputes of this land waqf are divided into five, namely;
    1) Land waqf dispute that happens between wakif and nadzir, in which wakif have believed to nadzir to maintenance and save their waqf assets so that those assets become meaningful to the society. However, in the middle of the journey, in fact, nadzir does not do his tasks and his authority, so that wakif is not satisfied and it causes the disputes.
    2) Land waqf disputes that happen between nadzirs. Nadzir, based on the rules of waqf, is consisted of three. He has to cooperate in order to do the tasks and their authority. However, among those nadzirs sometimes happen the different opinion that makes their relationship is not harmonious, and one party consider that emotionally so that it becomes disputed. The example of the case is in the Tugu Region of Semarang, where between nadzir does not have a good relationship in managing waqf assets so that the existence of nadzir is not effective. Besides, in the Genuk region, coastal of Semarang City happen the dispute that is caused by the changing of new nadzir, which is done by wakif without the knowledge of old nadzir. The old nadzir responds emotionally because he is not appreciated and treated unfairly. And then old nadzir report to WPOC and WPOC must finish it.
    3) Dispute of land waqf that happens between nadzir and the heirs of wakif. This dispute happens after wakif rest in peace, and the heirs of wakif give negative action to wakif that has given the land for waqf. It happens because of waqf assets has reduced the part of land waqf to the heirs. Furthermore, If the heirs are in economic problems, they look for the reason to take and even to seize waqf assets to be the heirs' assets. It means, at least, reduce some waqf assets that is given by the wakif.

4) The dispute of land waqf occurs between nadzir and society. This dispute happens in waqf assets boundary. It is the limitation of waqf assets and the possession asset of the society; for example, there is a person that builds the building that breakthrough the waqf assets, hence it reduces waqf assets. Besides, there is a citizen that stay or use waqf assets for individual interest without the permission of nadzir. If the action of society is harmful to the existence of land waqf, hence nadzir will make an issue of it. As a result, there is a dispute between society and nadzir.
5) The land waqf happens between nadzir and government/ office. This dispute is happened because of the changes of waqf function of land waqf, for example, waqf assets that become a mosque/worship place, education, the hospital changes its function into a bay pass. If there is an agreement between nadzir with the development party of a highway project in order to change land waqf that is based on its value and function, hence it is no problem. Besides, if waqf dispute happens in relation to changing of land waqf, and if nadzir make an issue of it so that it must be solved.

b. The dispute of land waqf based on the object of waqf assets, namely the dispute of land waqf concerning waqf assets, namely, nadzir changes the goal of waqf without the permission of wakif, nadzir does not maintain or neglect waqf land. Moreover, nadzir loses land waqf. Besides, the mixing of nadzir assets with waqf assets. In this case, nadzir uses the result of waqf assets more than 10%; even more, there are waqf assets that bequeathed to the heirs of nadzir. This waqf dispute happens because the waqf assets have no legal certainty in the form of a land waqf certificate. The example of the case is in the loose of assets in Mosque of Kauman, Semarang that is donated by Kyai Ageng Pandanaran, Semarang. In 2015, that waqf asset was returned by the controlling party that to the society. The fact is just some assets that given.
c. The land waqf dispute based on waqf procedure, namely land waqf that is caused by waqf action, which is not appropriate with the rules of the law, hence its legality is argued, for example; waqf dispute did in spoken, and it is done based on their beliefs. It causes waqf dispute if wakif rest in peace. The parties that have the closeness with wakif will have an authentic about waqf action. For that reason, waqf doing who's its procedure is inappropriate with the rules of law will cause dispute easily.

2.1. 2. The Settlement Pattern of Land Waqf in the Coastal Region in Semarang City

The settlement pattern of waqf disputes that happened in the coastal region of Semarang city is a form, procedure, or the model of waqf dispute settlements used by the society in solving land waqf disputes. Start from the previous waqf dispute settlement, the effort of the settlement includes not only the disputing parties but also need the other elements of society that are considered capable of solving the waqf dispute. Those are scholars, clerics, mosque takmir, the leader of RT/RW, and the Village Official. It is done with the consideration that the waqf dispute relates to valuable things and has economic values. Moreover, it recognized that the more parties included, the more parties understand the case status. As a result, it can minimize the next disputes.

The result of the research shows that there are two approaches used by society in land waqf disputes. Those are juridical and sociological approaches. The explanation is as the following;

a. Juridical approach. It is the settlement of waqf dispute by using the existing law in the Rules, namely the Rules of Waqf No. 41/2004, PP No. 42/2006 jo PP No. 25/2018. The Article 42 of Waqf Rules explains that there are three ways of land waqf settlements, such as; (1) the solution of waqf dispute is done through discussion to get

one agreement, (2) If the solution as stated in paragraph (1) does not work, so that the dispute can be solved through mediation, arbitration or court (Religious Court). The description of article 62 of Waqf Rules explains that there are two alternative settlements of waqf dispute, namely litigation pathway and non-litigation one. The explanation is as the following;

1. Non-litigation pathway, it is the alternative settlement of waqf dispute outside of the court. The parties consider that the mechanism of waqf dispute settlement through non-litigation become the first effort (*firs result*), it includes;
    a) Discussion is the settlement of waqf dispute from the disputing parties, through a process or the activity that listens to each other opinion, accepts the opinion, and willingness that based on heart among the parties. According to Islamic Law, the discussion is called a peace (*sulh*), namely the kind of contract in order to solve or finish disputes.[7] Al-Qur'an, as the base of Islam law, told its believers to discuss in ending a case. This thing is included in Al-Qur'an Letter Ali Imran Verse 159 and Al-Syura Verse 38. Settlement of waqf dispute through discussion happened on waqf dispute case at Tugu, Semarang Sub-district about waqf land that placed as a place for the sale and parking area without permission for the nadzir.
    b) Mediation is the settlement of waqf disputes through the process of discussion among the parties that is helped by the mediator. The implementation of mediation can be done through litigation or non-litigation as well. Mediation through litigation did after the waqf dispute becomes a dispute in Religious Court, and the Judge points the mediator to finish that waqf dispute. However, if it is not successful, it needs the third party (mediator) to solve that waqf dispute. The mediator is pointed by the disputing parties in order to pacify them, like the case of function addition of waqf assets used in Genuk Subdistrict, Semarang, from worship, develops to the function of education, and the Tahfizd Al-Qur'an Boarding School.
2. Litigation pathway is the settlement model of waqf assets through the legal process in the Religious Court. The products of Religious Court Judge are;
    a) The Peace Pledge, If the settlement of waqf dispute through mediation in Religious Court, for example in settlement of waqf dispute between nadzir in Genuk, Semarang.
    b) The determination of the Judge of Religious Court, If the settlement of the dispute has been done through procedural law that is decided by the judge of Religious Court.

If it is related to the result of the research above, so that disputing parties use the non-litigation pathway, namely discussion (23%), mediation (60,8%), litigation pathway through Religious Court 1,9% and there is no settlement through arbitration. The case of Settlement of waqf dispute in the coastal region in Semarang City mostly uses non-litigation pathway through discussion and mediation because the characteristic of the people in the coastal area, and the situation is integrated with nature hence their social relationship becomes more profound and more familiar. The factor of familiarity is preferred, the member of society one and another is close; thus, they considered as their own family. In the Settlement of waqf dispute, they tend to open and honest in expressing their complaints, so that related parties can listen to them in doing waqf. The disputing parties, as a part of society, use discussion as the most straightforward method.

Moreover, it is suitable for Islamic Teaching, which commands Islamic People to finish their disputes through analysis (Q.S. Al-Syura Paragraph 36)

Some things that cause disputing parties do not choose litigation pathway in solving the dispute are as follows [7]: the process of finishing argument is too formal and rigid, and it is not flexible. Furthermore, the most method of the court includes the legal aspects only, and it less pays attention to psychological and sociological perspectives. The judge tends to place the parties as objects that must be examined and judged. The judge dominates in the process of the court, and the decision of the judge tends to formal because it just pays attention to a formal legal aspect that based on doctrine and the rules' text. Besides, it takes a long time starting from the process of registration, calling of the parties, examining, proving, etc. It also needs many funds. There are a winner and loser and also the factor of time and distant place. Those reasons are contrary to the characteristic of coastal society.

In this research, It does not use the settlement method of arbitration because waqf assets that issued are in the form of permanent assets (land). In the waqf dispute, there is no relation to trading. The arbitration method usually used in the casethat relates to trading and business, and this case, if related to waqf dispute settlement, the object of the dispute is assets in the form of not permanent things, for example, money, gold, HKI, etc. However, in the future, the model of settlement in waqf disputes can use the method of arbitration because the waqf assets have more extend meaning. Waqf assets do not include permanent assets only, but also movable assets that relate to business or trading.

b. The settlement of waqf dispute through a sociological approach, namely the solution of waqf dispute by looking at the relationship of law with typical symptoms in society. It uses the code as existing rules in society. The result of the research shows that the community has its model in settlement of waqf dispute. They use the provisions of law that practiced in hereditary and became existing law in society. That law comes from the teaching of Islam in the form of principles applied in the community. Islamic Law explains that settlement of waqf dispute through discussion to gain peace, mediation and court judge.[8] Those laws have practiced by scholars/clerics or WPOC in settlement of waqf dispute.

Based on the result of the interview with WPOC the task of WPOC, as national official, is giving service of waqf action in society. Its mission is not only as a mediator, but it also has to finish those waqf disputes. Hence, it can be explained that WPOC should do his tasks with the reasons as the following;

a. Society needs the settlement of waqf dispute because the understanding about waqf rules in society is very low,
b. Society sources who handle settlement of waqf dispute is just a few, hence it asks for help to Wakaf Pledge Official Certificate (WPOC) in settlement of waqf disputes. If it is not done, it is considered that waqf disputes will not be finished,
c. Related to religious teaching, WPOC often uses religious approach in settlement of waqf disputes,
d. WPOC is as the form of waqf service because society needs it,
e. In order to save waqf assets,
f. WPOC roles as a waqf legal enforcer institution.

In settlement of waqf dispute, the mediator is WPOC because WPOC considered as an expert of waqf law by society. If waqf dispute happens, WPOC has to finish that dispute;

hence waqf dispute can be completed relatively, and waqf assets can be saved, and waqf law can be enforced in society. The role of culture in settlement of waqf disputes can see from their participation in controlling and evaluating waqf usage, although it is indirectly. The example of social engagement is reporting to wakif /heirs of wakif or WPOC if nadzir breaks his tasks and obligations. The position of society in law waqf action areas waqf users that their participation required in managing waqf assets, for example, by keeping the cleanness when they pray/ sholat, and return things after used.

2.1.3. Discussion

Considering the previous study, it can analyze that waqf dispute is always dynamic and developed based on the condition of social relationships. The disagreement still began by conflict, and this conflict comes from the instability of structural relationships among strong and weak parties. Hence it causes disharmony among society members. The theory of conflict uses many variables in analyzing a case, for example, economy, social, culture, interest, communication, religious teaching, values that are alive in society. Simon Fisher [9] states that there are six (6) theories explaining the cause of conflict, namely; the method of society relationship, negotiation of principal, identity, misunderstanding, conflict transformation, and human need.

In relation to waqf dispute in coastal region of Semarang City, it can be analyzed that the causes of waqf dispute are relationship between disputing parties in waqf action (wakif and nadzir) with society and governmental institutions, violation of agreement principal that is made between wakif and nadzir in relation to national law about waqf procedure, the economical need of heirs hence waqf dispute happens when wakif rest in peace, and the everlasting identity of waqf assets.

The pattern of resolution is more through the mechanism of deliberation through customary practiced in the community, if the deliberation is not finished, the parties ask for help from other parties, who are considered or believed capable of resolving the waqf dispute. The other party are from Wakaf Pledge Official Certificate (WPOC) or religious figures/clerics who are considered to know about waqf law. WPOC or religious leaders are domiciled, namely third parties who assist the parties in providing alternative waqf dispute resolution. This means that the community tends to use a method of settlement derived from the law practiced in the community (*living law*).

This condition is appropriate with the opinion of Eugen Ehrlich, who formulate a law that is not as opinion implementation in social behavior. He considers that the law appears from the awareness of society about their needs (*opinion necessities*). A good law is a law that is suitable for existing law in society (Fisher 2001). According to Ehrlich,[9] in his book W.Friedmenn entitled “Legal Theory, Steven & Son,” the legal theory does not think formally and logically. However, the law is only a part of dynamic society development. Learning the law will always relate to social context and historical context. Furthermore, Ehrlich explains that the meaning of the law is, indeed, the reality of human relationships themselves. In this case, the law meant as “relationship among human” .[10]

According to the result of research, it can be analyzed that the applicable law in the procedure for the resolution of waqf disputes through non-litigation mechanisms, namely; deliberation, if not finished, then use mediation. If not finished, then use arbritation. The law was in the form of norms or values which become the norm and obeyed, because it can bring great benefits to the community that is able to resolve waqf disputes. In addition, it can also lead to good relations after the dispute, establish harmonious relationships among all members of the community, establish intimacy and foster brotherhood, and can manifest the functions and benefits of waqf in the community.

The practice of mediation, in reality it shows that WPOC or religious leaders, have the position of mediator and arbitator who are tasked with providing alternative solutions for the resolution of waqf disputes and resolving waqf disputes, because WPOC is considered as an expert in waqf law. This is a local policy/local wisdom that applies in society, local policy/local wisdom is derived from community knowledge for generations or comes from the practice of WPOC or religious leaders in the resolution of waqf disputes. Local policy/local wisdom was a legal requirement that is needed by the community, so that the endowment dispute can be resolved so that the waqf law can apply in the community.

However, the local wisdom/local wisdom above, if correlated with the laws and regulations used in general dispute resolution, namely Law No. 30 of 1999 concerning *Arbitration and Alternative Dispute Resolution* (ADR), some are in accordance with the laws and regulations and some are not in accordance with the laws and regulations. This happens in the position of WPOC or religious leaders, whether WPOC or religious leaders are domiciled or mediated. If WPOC is a mediator, then the task is limited to providing alternatives for parties in the resolution of waqf disputes, but in practice WPOC or religious leaders also resolve waqf disputes. If so, then the conduct of WPOC or religious of illegal leaders. If WPOC is located as an arbitator, then the measurement of WPOC or religious leaders as an arbitator is not in accordance with No. 30 of 1999 concerning *Arbitration and Alternative Dispute Resolution* (ADR), which explains that the agreement of the parties to the dispute must be made an agreement strengthened by the Religious Courts.

Thus, the practice of resolving waqf disputes in the coastal areas of Semarang that uses the law that lives in the community still has weaknesses. This was because the main tasks and functions of WPOC or religious leaders in the resolution of waqf disputes do not yet have the principle of legal certainty, which is used as a benchmark for the validity of the actions that have been carried out. As a result of the law, the practice of resolving waqf disputes does not yet have uniformity of rules, in particular the main tasks and functions of mediators and arbitrators, for example; the seriousness of the mediator in conditioning or providing an alternative to the parties to the dispute to resolve the waqf dispute, the strength of the arbritator in establishing the waqf dispute settlement agreement. Such circumstances cause waqf disputes are not resolved, for example; the case of the Palegon mosque, Pedurungan, the coastal area of Semarang City, the building of which struck the land of the surrounding residents, the case of the Baitul Mustagfirin mosque, Gayamsari, Pedurungan, where the heirs built buildings that jutted into the waqf land of the mosque which until now has not yet been resolved Islamiyati and Dewi Hendrawati.[11]

3. CONCLUSION

Based on the above descriptions, it can be concluded that the waqf dispute happened in the coastal region of Semarang City include waqf dispute as a subject, object, and waqf procedure. The cause is disharmony in the relationship among the parties in doing waqf (wakif and nadzir) with society and governmental institutions, violence in principle of agreement made between wakif and nadzir about the usage of waqf assets, misunderstanding between religious law and national law about the procedure of waqf, the need of economy of wakif heir hence waqf dispute will happen when wakif rest in peace, and the everlasting identity of waqf assets.

The most settlement patterns use the sociological approach through the procedures applied by society, namely, discussion to reach peace for simple problem and mediation that is helped by the mediator in order to finish waqf dispute in society. In reality, WPOC is a service body of land waqf in a society that becomes a mediator that finishes the waqf dispute because society needs it in order to enforce waqf law. Society does not use a litigation pathway or legal process because it will affect the response of society in doing waqf.

4. ADVICE

The suggestion is that waqf dispute, which happened in society, should be finished by harmonizing between religious rules (Islamic Rule) and national rules. It is done in order to finish waqf dispute efficiently. Moreover, waqf law can be enforced, and waqf assets can be saved.

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THE REGULATION OF WAQF MANAGEMENT BASES UNIVERSITY TO INCREASE THE INDEPENDENCE OF UNIVERSITY FOR SOCIAL WELFARE IN INDONESIA

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Abstract

Waqf is one of Islamic Philanthropy. It is need to be empowered to social welfare. In the history of the development of Islam, waqf has an essential role in supporting mosques, boarding school, taklim assembly, schools, hospitals, orphanages, educational institutions,etc. Initially, the object of waqf was only the fixed object. However, the promulgation of Law No. 41 of 2004 on Waqf, in Article 16, the item of waqf is not only fixed objects but also other movable objects such as money, shares, intellectual property rights (HAKI) etc. This study endeavors to answer the following questions: How is the management productive waqf bases university in Indonesia, What is the form of productive business that must be managed (Nazhir) as waqf for university of productive businesses towards social welfare in Indonesia. The management productive waqf bases university is important because university is educational institution that form generation of faith and noble character as the next generation.The regulation of waqf has not given permission to university to manage waqf in Indonesia. Airlangga University is the only university that manages waqf. Meanwhile, other universities also need regulation to be able to manage waqf in order to support funding to educate the life of Indonesia. Money as a new waqf object causes Nazhirs a manager of waqf assets in University has to produce waqf. Education is crucial for the civilization of a nation. University can manage productive waqf such as money by collecting temporary waqf for every new student. The collected money waqf funds can be investing for development such as student dormitories, hotels, and swimming pools whose management results used to help underprivileged students, outsourcing employees and cleaning services, disadvantaged people around the campus.

Keywords: Regulation, Waqf Management, Productive, Independence, University.

1. INTRODUCTION

Everyone longs for a prosperous life both physically and mentally. Happiness does identify if it is offered, accompanied by maximum effort and hard work. It's always thought about it. As a matter of a prosperous state because it does inform with its nature. The modern state, in general, clearly states that interest is its goal. According to Islamic teachings, the purpose of establishing an Islamic State is also to create prosperity, which it does embody in the words "baldatun, tayyibatun warabun ghafur," namely a prosperous and fair society under the auspices of Allah's mercy.

The welfare that the community aspires to will have a positive impact on increasing peace during society. Besides the existence of security, it will also prevent the less fortunate from maintaining, as a matter of fact, this faith. Because in Islam, poverty is one of the causes of kufr. Islam, as a religion of rahmatan lilalamin provides a solution for distributing rich wealth to the poor through worship with social dimensions, namely alms, zakat, and waqf.

Zakah is a social tool in Islam for basic human needs, such as meeting the need for food and clothing. Simultaneously, a waqf is a social tool in Islam that makes the company offer invested first after producing it because we provide informed productively. Its management does the company expert to help mauqufalaih. The products of this waqf management can not only give the community around the waqf object. Still, they can also are offered d by people who are outside the waqf object. This medium occurs because of the cash waqf collected by Islamic financial institutions (LKS-PWU). Waqf with waqf can donate their money in other areas where the nazir resides outside the Wakif place. They are very beneficial for all Muslims in Indonesia.

Before the existence of Law no. 41 of 2004 concerning waqf, the allocation of waqf is generally for constructing mosques, madrasas, and tombs. The Muslim community in Indonesia has not felt the results of the economical use of waqf. With the issuance of the Waqf Law in Article 16, will be, which the company does offer that the object of waqf is not only fixed objects but also movable objects such as money, vehicles, gold, shares, and even intellectual property rights. Higher education, basically one of the places where the producers of copyrights such as books, open opportunities for lecturers with intellectual property rights. Especially somebody can give of the proceeds of the waqf can be given to underprivileged students.

Waqf money is one of the waqf objects that makes everyone able to do waqf, wakif if you want to do waqf, you don't need to be rich first, only Rp. 10.000, - (ten thousand rupiahs) can already have waqf, and somebody can combine this money waqf collection with waqf for fixed objects, such as land and buildings. Cash waqf provides an opportunity to empower land waqf assets which have no identified the company offer does the company offer due to funding constraints

During the Covid period, funds were very much needed, especially for purchasing medical devices and helping community businesses in the capital. Somebody permitted the Indonesian to fulfill their lives, primarily to finance their children. So far, the government has not opened up opportunities for universities basically to act as nazir Waqf. Higher education has an excellent opportunity to become Nazir if the government makes changes to Law No. 41 of 2004 concerning Waqf where nazir also universities both public and private. The results of managing waqf money in universities will make each university independent to manage its waqf funds. The management results can help provide scholarships, research, and the development of the college itself. In this case, the government will also be satisfied because each university is much more independent in terms of funding and can even create jobs for alumni. Funds that will dose the company offers from cash waqf can also make the offer for alumni. Waqf funds, donated by students, lecturers, education staff, and alumni, can be temporary or permanent. Somebody was not is interpreted somebody religion as a mere ritual. It is much more profound if religion is also making the company offer as a means to cultivate affection between rich and poor The fraternal integrity that exists among fellow citizens in the context of improving social welfare is to utilize the results of productive waqf management to make changes to the level of life of disadvantaged people, with basically waqf investment towards productivity in the form of regulations that make it easier for Nazhir to improve the community's welfare, especially Nazhir in college.

Somebody's religion should not interpret somebody as a mere ritual. It is much more profound if religion does the company offer and cultivate affection between Sikaya and the poor. The fraternal is the integrity that exists among fellow citizens. Social welfare is to utilize productive waqf management results to make changes to disadvantaged people's lives. It as a matter, significant waqf is an investment towards a constructive direction in the form of regulations that make it easier for Nazhir to invest in improving the welfare of the community, especially Nazhir in higher education; Nazir's was the existence in the development of waqf can be likened to a manager in a company. It plays a role in developing waqf to produce something useful for religious and social interests according to the waqf's expectations and intentions. As a manager, Nazir was formed from one person or several people or institutions and basically, mandated by the wakif.

Regarding cash waqf as one of the productive waqf, although it is relatively new for Indonesians, public knowledge of this issue is still minimal. When viewed from the Indonesian Ulama Council's initiative, at the same time, the laws and regulations governing waqf, let alone cash waqf is not yet available. Only government regulation No. 28 of 1977, which regulates the recording of land waqf, explains the waqf arrangement. Somebody

passed The law on waqf was given in the second half of 2004, namely Law no. 41 of 2004, consisting of 11 chapters and 71 articles. One of the crucial parts of the regulation of waqf in this law is the expansion of waqf objects to immovable and movable objects, including cash waqf and establishing a particular institution in charge of developing waqf, namely the Indonesian waqf body. In the future, we hope that universities can become the nazir of cash waqf so that somebody was basically of somebody prosperity throughout Indonesia.

1.2. Research Method

The implementation of this research does offer research from literature sources. This study aims to provide direction for government policy in issuing regulations so that universities are identified on the authority to become managers (nazir), Waqf, so that universities can collect cash waqf collected from students, lecturers, education staff, alumni, and the community around campus, which results from Its management can be enjoyed by students and also the community around the campus.

1.3. Paper Structure

The focus of this research is to discuss how the Management of Higher Education-Based Productive Waqf in Indonesia. What is the form of productive enterprises that must be managed (Nazhir) Waqf for higher education-based productive enterprises towards Indonesia's social welfare? Most Muslims in Indonesia have an initial problem, but the poverty rate is still high. Many of our younger generations cannot continue their studies at University due to financial constraints. As a matter of fact, To clarify the limitations of the research, this study only tries to answer the question of how somebody can doe the company offer university the authority to become waqf nazir so that the results of the collection of waqf funds can make the company offers so that the results of their management can give scholarships to underprivileged students and also help capitalize communities around the University so that the people of Indonesia can achieve welfare.

2. BACKGROUND

Islam, as complete teaching, has an economic concept for the welfare of the people. One of the Islamic economic systems that have an essential role in developing community welfare is waqf. Waqf is an Islamic financial instrument unique and unique and makes the company offer by other economic systems. Non-Muslim communities may have the concept of generosity (philanthropy), but it tends to be like a gift or alms, different from waqf. The uniqueness of waqf is also evident compared to the zakah instrument, which the company offers to ensure the continuity of meeting the needs and increasing the mustahig community's welfare. (1)

Article 29 paragraph (2) of the 1945 Constitution clearly states that the state guarantees each resident's freedom to embrace their religion and worship according to that religion and belief. According to Islamic teachings, one of the forms of prayer is ibadat maliyah, namely worshiping over the property (mal) owned by someone according to prescribed methods. One of them is waqf worship. This worship concerns others' rights and interests, administrative order, and other aspects of public life. As the community's rights and interests can run and work together, the government needs to regulate them by statutory regulations. (2)

The objectives of the Unitary State of the Republic of Indonesia, as mandated in the Preamble to the 1945 Constitution, among others, are to promote public welfare. To achieve these goals, efforts should make the company offer to explore and develop the potential of religious institutions that have economic benefits. One of the strategic steps to improve public welfare, it is deemed necessary to increase the role of waqf as a religious institution

which not only aims to provide various religious and social facilities but also has economic power that has the potential to, among others, promote public welfare, so that its use needs to be developing following sharia principles. (3)

Waqf is one of the essential Islamic philanthropies, primarily to be managed productively by Nazir. So far, people only know that waqf is only a fixed object such as land and buildings. So far, the allotment of waqf is only for mosques, prayer rooms, and tombs. The potential of waqf has not was fully are explored, even though waqf has the potential to develop socio-economically whose management results can help improve social welfare, especially during the Covid period, where the budget for health and education is very lacking with the productive management of waqf so we can help government programs for the purchase of medical equipment and in the field of education it can help students and students provide scholarships to continue their education because many of the students and students whose parents have been lai are offered (dropping out of work relations) because the impact of Covid has narrowed employment opportunities.

In the early days of the pandemic, the entire community was shocked. Hospitals have difficulty accommodating patients. Even some buildings that were not hospitals have even is transformed to treat patients. Large-scale social restrictions apply, but many people scream because they cannot meet their daily needs anymore due to limited activities

This condition reminded the Deputy Chairperson of the Indonesian Waqf Board, Imam Teguh Saptono, of conditions that were inversely proportional to the past. In 981 AD, a hospital called Al-Adudi was established in Baghdad. Not only was Baghdad the most magnificent at that time, but this hospital also served its patients tremendously.

"There the story was that one hospital does the company by one village land of agriculture. So that one hospital is backed up by a farm. What could the hospital do at that time? One, patients don't need a membership. Two who are sick do not cost you one bit. Citizen, not citizen, or traveler. And if they recover and they find out they are underprivileged, they will be given capital to do business, "said Imam on Thursday (7/5/2020) yesterday. (4)

In Article 16 of Law no. 41 of 2004 concerning Waqf, there have been new waqf objects in moving objects and fixed objects. The accommodation of movable objects as waqf objects in this law provides an opportunity for these waqf assets to make the company offer productively. This medium makes it very possible for the manager or Nazhir to be professional to invest the waqf funds in the form of money in developing business fields such as plantations, agriculture and can also invest in mining. information

Waqf is a form of Islamic Philanthropy that needs to basically for the benefit of the people. In the history of Islam's development, waqf has played an essential role in supporting the establishment of mosques, pesantren, majlis taklim, schools, hospitals, orphanages, educational institutions, and other Islamic social institutions. The donated property can be in the form of land or other property. Juhaya S. Praja explained that objects that can be presented are not, only, property, but also other stuff, fixed items called al-'aqr or moving objects called al-musya ', (5)

The investment of waqf assets in an Islamic order was something that is very different from investment in the government sector (public sector) and the private sector (private sector). So peculiarly, the waqf sector is sometimes even referred to as a 'third sector,' which is different from the government and private sectors. This peculiarity appears that the development of assets through waqf ais offered to achieve investors' profits, both government and personal. Still, it is based more on the elements of kindness and cooperation. Investment activities are carried out to develop, utilize, and provide, additional, economic, value, and social benefits for waqf assets. Investment activities are aimed at the real sector; it is profitable according to the target market and risk acceptance criteria. This activity will

be carried out using waqf funds collected according to the waqf program. Funds can also be raised with a commercial investment cooperation pattern from investors using the Musharaka, Ijaroh, and other commercial investment patterns according to sharia. (6)

The management of this waqf needs to make a new breakthrough by making higher education a productive waqf nazhir, such as cash waqf and intellectual property rights. As Nazhir, universities can collect cash waqf and the results of managing these waqf money can be used to help underprivileged students and also to help contract employees and communities around campus. Arrangements for administrators need to be regulated in special rules so that each college high level in Indonesia can be a cash waqf manager. For this reason, the authors are interested in raising this paper with the title Management of Higher Education-Based Productive Waqf Management Towards Social Welfare in Indonesia.

2.1. The Regulation of Waqf Management Bases University In Indonesia

The transformation from the form of waqf from the formal document intended for waqf for buildings such as mosques, madrasas, and tombs to productive ones such as cash waqf and vehicle waqf has led directly to the transformation in waqf goods. In traditional waqf, waqf items often rely on fixed interests. As for productive waqf, waqf undergoes many changes from just fixed objects to movable objects. Specified goods here refers to non-transferable goods such as land and buildings. Movable property refers to items that transfer mostly cash and other items such as books, vehicles, gold, furniture, tools, etc. In recent times, efforts to strengthen waqf have tried to free waqf objects from those attached to fixed objects and open more expansive space to moving objects. This effort is based on legal innovation and the formation of new fatwas. (7)

Productive waqf when management willbe give up to equipment assistance for hospitals and supporting people affected by Covid, such as providing capital assistance for community businesses. The waqf management of products can be done by collecting cash waqf by pointing to a certain nazir at a sharia bank, where the funds collected are bought, for example, land in the city center, a shop or building can be built for rent, and the results of the management of the shop or multipurpose building earlier 10% for administrators and 90% for mauqufalaih.

Result management from endowments of productive, good endowments fixed objects or endowments abundant of moving objects can be developed within the meaning of the word does not have to all be given for purposes that do not affect the economy. Still, the profits of management endowments could be developed further from one shop to be two, or the next three shophouses, with the condition that after the mauqufalaih needs make the company offer, the results of the management was used for the development of the waqf assets themselves. The allocation of these waqf products can also be given to MSME, especially during the Covid-19 pandemic; many businesses were primarily affected by the community's weak purchasing power.

Coaching is fundamental to be carried out by universities such as that carried out by Andalas University with research and community service institutions by building the Tageh village. Creating a tageh nagari is a form of andalas university's concern in helping the community, especially rural communities, to help their businesses develop and improve community welfare. This activity is carried out by Andalas University in the form of community service. With this activity, it is hoped that it can help people, especially in rural areas, develop businesses and open jobs for the community and improve community welfare, which was also expected to participate by serving in their respective villages. After they finish their studies and don't leave anymore, they have to make an effort to develop their respective nagari.

An authentic example of managing a waqf productive business through this object's transformation is what has been done by the Dhu'afa wallet Jakarta, Indonesia. Dompet Dhu'afa established the Waqf Tube, intending to collect waqf in cash. Then it is used to finance the operational development of both traditional waqf and productive waqf (which is also the term alternative waqf). Traditional waqf is in the form of schooling for needy students, while productive waqf is in the way of a free health service institution called Free Health Service (LKC) for a group of poor people. The wakif's names are written on the front wall of the LKC as a way of appreciating their contribution and perhaps encouraging others to contribute. (8)

Waqf is one of the potential Islamic institutions to be developed, especially in developing countries. Based on the experience of countries with advanced waqf institutions (9), waqf was to be used as one of the economic pillars. In general, like Saudi Arabia, Egypt, Jordan, Turkey, waqf is managed productively. Productive management of waqf is actually, been done since the beginning of Islam (10), so that at that time, waqf could use to empower people (11). This waqf was appropriately developed and correctly. (12) According to Hasan Langgulung, waqf institutions reached their golden age in the 8th and 9th centuries of Hijriyah. At that time, the number of waqfs was huge and could be used for the community's welfare. At that time, waqf was generally managed by the sultans and emirs, children, or who were determined by the wakif. They consist of employees, emirs, and their staff as waqf supervisors. (13)

The development of waqf has brought collective benefits to the ummah and has been proven to do through many writings (14) and discourse. (15) Likewise, the need for waqf to be empowered has been expressed in various ways, both in writing and in the form of action. In Malaysia, for example, some of the State Islamic Religious Council built a system of cash waqf and shared waqf, and the Johor Corporation (JcoP) implemented it. Corporate waqf, while in Indonesia, Dompet Dhu'afa Jakarta fosters the Waqf Tube to finance traditional waqf and productive waqf, and the Tree Waqf Movement (GWP) in Bandung carries out economic programs from the natural surroundings. In Singapore, Majlis Ugama Islam Singapore (MUIS) fostered a Mosque Building Fund (MBF) to build and control mosques and develop waqf through the corporate system by establishing a company called Warees Investments and introducing Asset Migration by combining waqf assets. Small to make it big, and in the United States, the Muslim Union of Memphis established the Muslim Society of Memphis Endowment Fund to meet the Muslim community's needs there.

In other words, the development, and strengthening of waqf's role have become axioms (a principle that many people believe). During the social problems of Indonesian society and recent economic welfare guidance, cash waqf has become very strategic. Apart from being one aspect of the spiritual dimension, waqf money is also a teaching that emphasizes the people's welfare. (17) Moreover, in our country, Indonesia is a country where the majority of the population is Muslim. The number reaches 87.2% or 207,176,162 of Indonesia's total population of 237,556,363 people (BPS in 2010 figures). This Muslim population has great potential in community economic empowerment and national economic development. One example of empowerment that can be utilized is waqf, which is productive in fronts of economic, such as waqf land, the management for livestock and agriculture, and non-economic productivity, such as building schools the area of waqf land.

This statutory regulation regarding waqf, which in the provisions of Article 215 point 1 of the Compilation of Islamic Law, states that a waqf is a legal act of a group of people or a legal entity that separates part of their property and institutionalizes it forever for worship or other public purposes according to the teachings. Islam. In Islamic teachings, waqf is one of the practices that will continue to flow its rewards even though the waqf has passed away. (18)

Arrangements regarding the management of higher education-based productive waqf do not yet exist in Indonesia. The only university in Indonesia that grants rights by the Waqf body in Indonesia is Airlangga University. The Indonesian Waqf Board (BWI) issued a decision letter to approve waqf management to UNAIR on Thursday (23/8/2018) in Jakarta. More precisely, through the UNAIR Social Fund Management Center (PUSPAS). The agreement made UNAIR the first university and the only waqf manager in Indonesia.

In this decision, UNAIR legally and legally became the first university approved to become Nazhir Waqf or the waqf manager. This achievement is extraordinary. Given, that has not been achieving by the University of Indonesia (UI), the Bandung Institute of Technology (ITB), and the Gadjah Mada University (UGM), Andalas University, including other campuses. Other universities can follow Unair as a waqf nazir. Unair can collect waqf funds bot from teaching staff, in the form education staff, students, alumni, and the general public who want to be waqf.

Andalas University, as one of the universities outside the island of Java, is also eager to become a waqf nazir, but this wasn't because Andalas University has not become a State Higher Education Legal Entity (BHPTN) university. Andalas University's desire to become a waqf nazir is constrained by the rules in Law No. 41 of 2004 concerning Waqf. Where in Article 9 states that can be Nazhir: a. individuals; b. organization; or c. a legal entity. Because of these constraints, it is necessary to conduct a review that must be carried out by the Government and the DPR to rearrange the requirements to become Nazir, one of which is that both public and private universities are Nazir, so that they can fund activities at their respective universities and reduce dependence on universities in Indonesia. To the Government. Each university can manage waqf funds by encouraging students to donate money through financial institutions in their respective universities.

2.2. Bentuk Usaha Produktif yang harus dikelola (nazhir) Wakaf untuk Usaha Produktif Berbasis Perguruan Tinggi Menuju Kesejahteraan Sosial di Indonesia Forms of Productive Business that must be managed (Nazhir) Waqf for Higher Education-Based Productive Enterprises Toward Social

Currently, waqf's role is still not optimal in dealing with the Covid-19 (coronavirus) pandemic. Funds delivered to those affected are greater than Zakat, Infaq, and Alms (ZIS). This will happens because the waqf funds collected are in the form of cash waqf. The results of its management cannot be used to help people affected by Covid, such as providing capital for workers affected by the termination of employment. (19)

“Currently, a lot of waqf land has not been productive. Hence, the role of waqf in the pandemic is still not optimal compared to zakat, which are distributed directly," said the Commissioner for the Indonesian Waqf Board (BWI) for Advocacy and Institutional Affairs, Iwan Agustiawan Fuad, quoted from Republika Monday (4 / 5/2020).

He reveals, the benefits of waqf are actually significant during this pandemic. In Islamic history, many waqf assets have been utiliz Through waqf, and it can be used to help solve the Covid-19 problem. For example, waqf hospitals, waqf properties, waqf land for the graves of pandemic victims, waqf restaurants, and others. "In addition to these assets, the results of productive waqf investment can also be channeled to help people affected by the Covid-19 pandemic," said Iwan. Iwan said that some nazir has currently carried out various waqf-based assistance, but it is not yet perfect. This will depend on the size of the waqf assets being managed and the waqf accumulation. Generally Nazir inside distribution of aid, combining with other sources of funds such as zakah and donations. "Because waqf was must be produced, the funds distributed to the community during the Covid pandemic (mauquf alaih) greatly depend on the productivity results of the waqf management," he said.

As an example, Andalas University had students in 2019, undergraduate students 24,891 people, D3 students 1,039 people, S2 students 2,165 people, S3 students 433 people, Professional students 945 people, Specialist students 491 people, total 25,930 people (20), each, For example, our students have temporary money waqf of Rp. 100.000, - (one hundred thousand rupiah) at a Syariah financial institution that collects cash waqf (LKS-PWU), and each student was given a cash waqf certificate. After they graduate, they can take the temporary waqf back by returning the cash waqf certificate temporarily or not taking waqf. Their money was assumed as perpetual waqf. The students' wakif is 25,930 people, each with a waqf of Rp. 100,000, - the result is 2,593,000,000 (two billion five hundred ninety three million rupiah). The collected waqf funds can be invested in constructing a student dormitory or hotel construction where the was proceeds from the hostel or hotel rental can be used for scholarships for was underprivileged students, research funds, and funds for conducting comparative studies by lecturers and education staff.

Nazir Airlangga University was established in September 2018 and already has assets of Rp. 315,450,107 per December 2018. The waqf assets are assets owned by the people that must be managed following the waqf assets' Sharia objectives. Nadir's accountability and transparency in making financial reports and compliance with financial reporting standards are needed. This will because the nadir is not only responsible for the community but also responsible to Allah SWT for waqf students and to educate that waqf can be done in the form of money. The management of waqf assets is the distributor for the welfare of students and the community in UNAIR. The distribution of waqf benefits is used to pay single tuition fees for underprivileged students, then given to mosque administrators and student boarding schools at Airlangga University. (21)

3. CONCLUSION

Management of campus-based productive waqf management needs to be precisely regulated to provide opportunities for public and private universities to manage waqf funds collected from both students and alumni. The government of waqf funds collected from students and alumni can be controlled both economically and socially. In economics, the waqf funds can be invested in constructing a student dormitory or hotel development. The results can to provide scholarships to underprivileged students or for research by lecturers and help people around the college.

4. ADVICE

Arrangements for the management of waqf funds should be carried out as quickly as possible by the government, especially at the Covid 19; the government will find it very difficult to fund the education and health sectors because economic recovery will use substantial funds. Investments in waqf funds can be beneficial if there is a partnership with the business world basically directly related to education.

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THE ROLE OF ISLAMIC LAW IN ENRICHING THE DECISIONS OF THE INDONESIAN CONSTITUTIONAL COURT

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Abstract
This article discusses the role of Islamic Law in enriching legal considerations of constitutional court decisions. As one of the recognized laws in Indonesia, it turns out that Islamic Law has an essential role in the development of national law, including the Constitutional Court decision. It was proven by the existence of 20 decisions by the Constitutional Court on judicial review of laws with Islamic Law. However, of the 20 decisions, there were only six decisions in which the Constitutional Court used Islamic Law as the basis for its consideration. In this article, we will discuss several things, namely the construction of Islamic Law and the development of positive law in Indonesia. Meanwhile, the penultimate part argues that efforts to legal positivism in Indonesia have been going on for a long time. Before conclusion, the last part believes that in fact, there are nuances of Islamic theory or Islamic Law used by the Constitutional Court judges in several decisions of the Constitutional Court.
Keywords: islamic law, constitutional court, decision, nuances

1. INTRODUCTION

Adhere to law, Indonesia adheres to three legal systems at the same time that lives and develops in society, namely the civil law system (Dutch colonial heritage), the adat law system, and the Islamic law system. The three legal systems complement each other independently [1]. Islamic Law affects the style of Indonesian Law due to the majority of the population in Indonesia adheres to the religion of Islam (87.2 % of the total population of around 268 million people) [2] which allows Islamic Law to become an essential and influential part of the legal system in Indonesia. Islamic Law is also a source of national law development [3]. The three legal systems also eclectically colour the laws issued by the State from the level of legislation to the level of technical regulations [4]. The enforcement of Islamic law as a source of national law development was in accordance with Pancasila, especially the first precepts, namely "God Almighty" and Article 29 of the 1945 Constitution.

Article 29 of the 1945 Constitution above is the basis of legitimacy for the positivization of laws derived from Islamic law into national law through the legislative process. Islamic law influences Indonesian legislation because many laws have Islamic legal nuances. For example, Law Number 1 of 1974 concerning Marriage, Law Number 7 of 1989 concerning the Religious Courts, Law Number 23 of 2011 concerning Management of Zakat, Law Number 41 of 2004 concerning Waqf, Law Number 19 of 2008 concerning State Sharia Securities, Law Number 21 of 2008 concerning Sharia Banking, and Law Number 33 of 2014 concerning Guarantee of Halal Products.

In practice, justice seekers not only resolve various legal problems through the judiciary under the Supreme Court, but also through the Constitutional Court by taking judicial review because they think that a provision in the Law is contrary to the 1945 Constitution. Then, based on the recapitulation of judicial review at the Constitutional Court, until the end of 2020, there were at least 20 decisions regarding the judicial review of laws that were of Islamic law. This fact shows that the Court has a role in determining the dynamics of the development of Islamic law in Indonesia. Besides that, it also plays a role in enriching the legal considerations of constitutional judges in deciding cases that have Islamic legal material. Because, when there is such a case, it is obligatory for Constitutional Court Judges to use an Islamic legal approach in resolving the case.

1.2. Research Method and Benefit

This paper is the result of normative legal research. There are two legal approaches used in this research, namely the statutory approach, namely by examining laws with Islamic legal nuances; and the case approach by examining judicial review decisions against laws containing Islamic law. This reserach aims to analyze the constitutional court decisions which contain Islamic law in its legal considerations.

1.3. Paper Structure

This article will discuss how the role of Islamic law ensuring that the legal reasoning of the Constitutional Court. This paper construct the argument as follows. In the first section discuss the construction of Islamic law and the development of positive law in Indonesia. Meanwhile, the penultimate part argues that efforts to legal positivism in Indonesia have been going on for a long time. Before conclusion, the last part believes that there are nuances of Islamic theory or Islamic law used by the Constitutional Court judges in several decisions.

2. BACKGROUND

2.1.1. The Contribution of Islamic Law on the Growth of Indonesian Positive Law

Law Number 1 of 1974 concerning Marriage is one example of the legislation that accommodates religious values. In Article 2 of this law, religion determines the marriage legitimation, so that marriage in Indonesia obey religious marriage. The formulation of that article has some legal consequence that every Indonesian who adhere to Islam, have to follow the Islamic Law first to be able to legitimate their marriage. It was proved that the existence of Islamic Law took some effect on lin life as a nation and state.

The other existence of Islamic Law is the regulation on zakat. The regulation concerning zakat was regulated by the Ministry of Religion Circular Letter Number A/VII/17367 of 1951, wich is passed on the provisions of the Dutch ordinance, that explained if the state only stands as supervision, and will not interfere in the matters of collecting and distributing zakat [1]. In 1991, the government issued The Joint Decree of the Minister of Home Affairs and the Minister of Religion of the Republic of Indonesia Number 29 and 47 of 1991 concerning the Development of Amil Zakat, Infaq, and Sadaqah Bodies [1]. In 1998, the Minister of Home Affairs Instruction Number 7 concerning the Funding of the Amil Zakat and Sadaqah Bodies was issued [1]. This time, the management of zakat is set on the Law Number 23 of 2011, which is the result of an revision of Law Number 38 of 1999 concerning Zakat Management.

Law Number 41 of 2004 concerning Waqf is an application of Islamic Law that contains several new and quite important matters, such as *nazhir*, *maiquf bih* (the propoerty that will be set in waqf), *mauquf 'alaih* (the allocation of waqf property), and the importance of Indonesia Waqf Board. In Article 28 paragraph (2), it is stated that the Indonesian Waqf board can collaborate with the Government Agencies, both in the central or regional level, community organizations, the experts, international bodies, and the other parties if needed.

Apart from marriage, zakat, and waqf, Law Number 13 of 2008 concerning the Administration of Hajj is also one proof of the existence of Indonesian Islamic law. Article 8 paragraph (2) of this law explains the policies and implementation of the hajj pilgrimage are national duties and are the responsibility of the government. The existence of Islamic law is increasingly visible with the announced of Law Number 33 of 2014 concerning the guarantee of halal products to ensure the availability of Halal products for the Indonesian peoples. This law regulates the rights and obligations of Business Actors by providing exceptions for Business Actors who produce products from materials derived from prohibited materials with the obligation to explicitly include non-halal information on the product packaging.

Furthermore, Indonesia also provides a Religious Court under the Supreme Court, which has the competence to accept, decide, and resolve disputes in the field of sharia economics. Therefore, The courts within the Religious Courts not only have the authority to resolve disputes in the area of marriage and inheritance but also to resolve disputes between customers and Islamic financial service institutions, which the Financial Services Authority differentiates into Banking, Capital Market, and Non-Bank Financial Industry. Specifically, in Aceh, the absolute competence of the Religious Courts (known as the Sharia Court) was expanded to judge Islamic criminal cases.

2.1.2. Positivization of Islamic Law in Indonesia

The plan to positivization of Islamic law into national law has been debated for a long time, even since the debate at the Investigation Committee for the Preparatory Work for Indonesian Independence [5]. Normative acceptance of Islamic Law began with the enactment of the 1945 Constitution. According to Ismail Sunny, the enactment of the 1945 Constitution and Pancasila as the basis of the state even though does not contain seven words from the Jakarta Charter, makes the *receptive theory* (conflict theory) developed by Snouck Hurgronje loses its legal basis and does not apply. On the other hand, Islamic law is increasingly being recognized constitutionally in Article 29 of the 1945 Constitution. At that time, Islamic Law was accepted as a persuasive source [6].

The acceptance of Islamic law is getting more significant after the implementation of regional autonomy, where regions have started competing to regulate all their regional affairs. Local governments take this opportunity to form Regional Regulations based on regional characteristics [1]. Many areas, especially people, want regional regulations with Islamic nuances based on Sharia principles in accordance with the sociological conditions of their communities. One of the areas that want a Sharia-based regulation is Aceh Province, with a regional rule called *Qanun* [1].

In addition to the *Qanun* in Aceh Province, several State Institutions and other institutions that breathe Islam, for example, the Indonesian Ulema Council, were joined by the establishment of other bodies such as the National Amil Zakat Agency and the Indonesian Waqf Board. The first Indonesian Ulama Council was established by the West Java Ulama Council in 1958. The central Ulama Council was established in 1962, which was then attended by various Ulama Council at the provincial level. In 1975, a new Ulama Council was formed called the Indonesian Ulema Council (MUI) [7]. The Indonesian Ulama Council plays an essential role in ensuring that religious harmony is realized through the fatwas given.

The substance of Islamic law is also one of the raw materials for the formation of laws and regulations through a positivization mechanism. The Islamic law positivization in the development of national law takes two forms, namely: (a) Islamic law cannot be enforced in the national scope due to the plurality of the Indonesian nation, but it can be a source of value in the national law formulation; or (b) Islamic law can become positive law which applies to all citizens through a legal process of legislation such as the field of private law (*mu'amalah*) [8].

The Islamic law positivization has bright prospects because the reform era has a responsive legal character, which is in contrast to the less developed Western legal system [8]. It was supported by the majority of the population who are Muslim and government politics that support the development of Islamic law so that Islamic law becomes one of the common sources in the formation of national law in addition to customary law and Western law [8]. As for the values, principles, and norms of the Islamic law that have the potential to be used as material for statutory regulations, namely in the fields of criminal law (*jinayah*), family law (*munakahat* and *faraidh*), and economic law (*ahkam iqtishadiyyah*) [8].

When Islamic law is positivated, there will likely be a conflict of norms, especially a conflict between the norms of the law and the 1945 Constitution. Therefore, it is not surprising that quite many laws containing Islamic Laws are being tested in the Constitutional Court. The construction of authority and the nature of the decision of the Constitutional Court will affect the implications of the decision on judicial review of the validity of articles in laws that have Islamic legal substance. In a period of approximately 17 years since the Constitutional Court was founded, there have been at least 20 decisions to examine laws related to the substance of Islamic law. However, after further investigation, there are only 6 decisions which in their legal considerations cite Islamic legal theories.

a. Decision Number 12/PUU-V/2007 concerning Judicial Review of Law Number 1 of 1974 concerning Marriage. In this case, the applicant argues that the limitation and the existence of polygamy conditions in the Marriage Law are against the Islamic Marriage Law, thereby reducing the Petitioner's right to freedom of worship and is discriminatory against Muslims. The Court contends that Islamic teachings intend to discipline polygamy gradually, which aims, among other things, so that in its implementation there is no abuse of men and to maintain the dignity of women. Therefore, according to Islamic teachings, the state has the authority to determine the conditions that must be met by its citizens who wish to practice polygamy for the sake of the general benefit, especially in achieving the goal of marriage, which is to form a happy and eternal family based on Almighty God. According to the Constitutional Court, polygamy is included in the *mu'amalah* category which is corresponding the *fiqh qaidah* in the field of *mu'amalah* which states, "basically mu'amalah is permitted unless there is a provision which states explicitly prohibiting it".
b. Decision Number 19/PUU-VI/2008 concerning Judicial Review of Law Number 7 of 1989 concerning the Religious Courts as amended by Law Number 3 of 2006. The applicant argues that the applicant's freedom of religion and worship is limited due to the existence of Article 49 paragraph (1) of Religious Court Law. This provision is considered to limit the scope of validity of Islamic law by excluding criminal (*jinayat*). The provisions of this article also restrict Muslims from enforcing Islamic religious law as a whole (*kaffah*), as instructed by the Holy Qur'an and Hadith as the main source of Islamic teachings. The Court contends that Indonesia is not a religious state based solely on one particular religion and nor is it a secular state that does not pay attention to religion at all and leaves religious affairs completely to individuals and society. If the problem of the application of Islamic law is related to the source of law, it can be said that Islamic law is indeed the source of national law, but Islamic law is not the only source of national law, where apart from Islamic law, customary law and western law as well as other sources of legal traditions, become a source of national law.
c. Decision Number 143/PUU-VII/2009 concerning Judicial Review of Law Number 19 of 2008 concerning State Sharia Securities. The applicant argues that the use of State Property as an underlying asset in State Sharia Securities publication by selling, ensuring or lease them, which is approved by The Minister of Finance after get the approval of the Indonesian House of Representative for and on behalf of the Government, has pledged the state assets as an underlying asset in State Sharia Securities publication bt the government. The Courts has some opinions that there is no *casual verband* between the argued loss and the article petitioned for review, because the article is only in the form of regulating the use of State Property in the context of issuing State Sharia Securities which is an open legal policy, with managing state finances to increase the carrying capacity of the State Budget by using sharia-based financial instruments, which the legislators deemed as having a great

opportunity that has not been optimally utilized to finance national development as a purpose.

d. Decision Number 38/PUU-IX/2011 concerning Judicial Review of Law Number 1 of 1974 concerning Marriage. The applicant argues that the reason "between the husband and wife continously dispute and quarrels" as one of the reasons in divorce, does not guarantee protection, legal certainty and justice for the wife. The applicant said that most wives were sacrificed in domestic disputes and quarrels, even when the husband was the person who caused the dispute and quarrel, for example the husband had an affair with another woman, and then leave the joint residence. Regarding The Pleader's arguement, The Court said that the explanation of Article 39 paragraph (2) letter f of Law Number 1 of 1974 along with the phrase, *"Between the husband and wife continously dispute and quarrels [...]"* actually provides a solution when a marriage is no longer in line with the purpose of marriage as stated in Article 1 of the Marriage Law and does not provide legal certainty and justice as referred to in Article 28D paragraph (1) of the 1945 Constitution.
e. Decision Number 30-74/PUU-XII/2014 concerning Judicial Review of Law Number 1 of 1974 concerning Marriage. In their application, the applicant argues that Article 7 paragraph (1) and (2) of the Marriage Law create legal uncertainty regarding the age limit of marriage in Indonesia, particularly regarding the legal age limit for marriage for women, especially in protecting the children's right. The applicant asked the Constitutional Court to make a decision invalidating the article being tested. Later, the Court argued that the minimum age for marriage was a legislative right (*opened legal policy*), where the Court further stated that if the Court was asked to set a minimum age, this would only limit any attempts to change policies by the state in the future.
f. Decision Number 68/PUU-XII/2014 concerning Judicial Review of Law Number 1 of 1974 concerning Marriage. The applicant argues that article 2 paragraph (1) does not fulfill the right to get an equality before the law because in its implementation, so many interpretation rises up and create some different treatment between one citizen and another. Furthermore the article,causes uncertainty in different religion or belief marriage, at the level of legislation and implementation, and it could be found in various judges' decrees regarding whether or not different religion or belief marrriage can be carried out. In their petitum, The petitioner asked the Constitutional Court to conditionally decides by interpreting the article being tested. Then, the Court said that is case to perform their rights and freedoms, including the rights to do the marriage and form a family, every single citizen has to comply with the e restrictions stipulated by law vide Article 28J paragraph (2) of the 1945 Constitution. The state has role in providing guidelines to ensure legal certainty of life together in the bonds of marriage.

2.1.3. The Nuances of Islamic Law In The Constitutional Court's Legal Considerations

As explained earlier, when a judicial review case nuanced Islamic law, the Constitutional Court Judges will also use the Islamic law approach. In decision Number 12/PUU-V/2007, for example, the Constitutional Court (later: the court) adopted an Islamic approach to its legal considerations. The Constitutional Court shall state:

The doctrine of Islam is aimed at gradually implying polygamy, which is intended, among other things, not to harass men and to preserve the dignity of women. [...]. [9]

In addition, to strengthen consideration above, Constitutional Court quotes several verses of the Holy Qur'an such as Verse 1 An-Nisa, Verse 3 An-Nisa, Verse 129 An-Nisa, and Verse 21 Ar-Ruum, and also based on the opinions of Muslim scholars such as Quraish Shihab and Huzaemah T. Yanggo who were presented before the Court and cited various

principles of fiqh in his consideration. However, the Court ruled that the application was rejected. Even so, this is an interesting fact, because the Court uses a lot of Islamic legal approaches to assess the constitutionality of the articles being tested.

Then there is Decision Number 19/PUU-VI/2008, in which the applicant argues to extend the authority of religious courts, including islamic criminal law *(jinayat).* In this case, the Court has firmly held that the role of the Court is only as a negative legislator and does not have the power to add or extend the content of the rules (*positive legislators*). In addition, the Court also explained the relationship between state and religion in Indonesia, that Indonesia is not a religious country, but also not a secular country. So, the Court also agreed that Islamic Sharia is a material source of law and legal development, among other legal sources. The Constitutional Court states that:

Indonesia is a country that believes in the One True God that protects every adherent of religion from worship according to its religion. With regard to Pancasila philosophy, national law must ensure the ideological unity and territorial integrity of the country, as well as develop a good tolerance and civilized interfaith religion. National law can therefore serve as a factor of integration that becomes a cement and a comparative instrument. [10]

Furthermore, in Decision Number 38/PUU-IX/2011, the applicant argued that the requested norm, as one of the reasons for divorce, did not regulate who caused the dispute so that it violated the guarantee of protection, legal certainty and justice for the wife. The Court then argued in its consideration that Indonesia's marriage paradigm is not only aimed at meeting the needs of life, but also at fulfilling the teachings of the One True God that exists in every religion. In the meantime, the Court has used the approach to religious law to reach a conclusion. This shows how the Court uses an Islamic perspective to explain divorce rates, for example, the purpose of marriage is to create a family of *sakinah*, *mawaddah,* and war*rahmah*. However, unlike Decision Number 12/PUU-V/2007, the Court does not directly cite Islamic legal sources such as the Holy Qur'an, Hadith, or the opinion of Muslim scholars in its decision.

In Decision Number 86/PUU-X/2012, the Constitutional Court emphasized that zakat as part of *religion in externum* forum i.e. manifested or outward-facing shows religion or beliefs that carry religion or practice religion in everyday life using physical media, either in the form of speech, behavior, or other actions, or interaction, so that they have social relationships [11]. In addition, the Court argues that zakat coincides with the goals and foundations of the country, namely promoting the common good and realizing social justice for all Indonesians, so that in this case, The country has a role in realizing the implementation of effective and efficient zakat management and management trust in accordance with the Islamic doctrine, to reach those who are rightful [11].

In Decision Number 30-74/PUU-XII/2014, the Constitutional Court in its consideration uses many perspectives of Islamic law, although it also cites sources from Hindu religious law. This is seen from how the Court cites Islamic sharia sources such as the Qur'an, Hadith, and the opinions of Muslim scholars. Regarding the minimum marriage age limit, the Court confirmed this issue as an *open legal policy* by citing the opinion of Mr. Quraish Shihab, who stated that Islam does not regulate a certain age to marry because it adapts to the development of society and its needs [12]. That is why the Court also uses considerations of various aspects, such as social, economic, and health when making its decision. So, it can be said that the decision makes religious law as a perspective in emphasizing the issue of marriage age limit and at the same time affirms the position of the state as *ulil amri* which has the power to determine policy based on the development and needs of the community.

Later in Decision Number 68/PUU-XII/2014. The Constitutional Court confirms Indonesia as a country based on believing in the One True God. The Court argues that

marriage is an activity closely related to religion. Moreover, the Court explicitly mentions the position of religion as the basis for individual societies in their relationship with the One True God, including in this case how religion determines the validity of a marriage [13]. This decision can be said that it has confirmed the position of religion in the national legal system, in particular with regard to marriage.

Based on the above discussion, it can also be seen that of the six constitutional court decisions which have Islamic legal nuances, more are dominated by judicial review decisions on marriage law (four decisions).

3. CONCLUSION

Based on the above discussion, it can be seen that the Islamic Law as part of the law which lived in Indonesian society since hundreds of years ago turned out to have influenced the pattern of law in Indonesia because the majority of the population in Indonesia adheres to the Islamic religion which allows Islamic Law to become an essential and influential part of the Indonesian legal system. Besides, Islamic law has also brought Islamic nuances to the Constitutional Court decisions regarding the judicial review of statutes that contain Islamic values. In that sense, the Constitutional Court Judges in considering their decisions are not only based on western legal theory, but also use an Islamic legal approach such as by quoting the Holy Qur'an, Hadith, and the opinions of Muslim scholars.

4. SUGGESTION

Based on the recapitulation of judicial review at the Constitutional Court, until the end of 2020, there were at least 20 decisions regarding the judicial review of laws that were of Islamic law. This fact shows that the Court has a role in determining the dynamics of the development of Islamic law in Indonesia. In the future, both the government, the House of Representatives, and the Supreme Court can consider selecting candidates for constitutional judges who have more profound knowledge of Islam. This can be taken from practitioners and academics who are concerned in the field of Islamic law, as well as from religious court judges.

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COMPARATIVE PERSPECTIVE ON THE PRINCIPLE OF LEGALITY: BETWEEN ADMINISTRATIVE LAW, CRIMINAL LAW AND ISLAMIC LAW

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Abstract

The principle of legality is the main principle in government administration. This principle does not only exist in criminal law settings but also in Administrative Law (HAN) and Islamic Law. The principle of legality means that every government action must have a legal basis in a statutory regulation. This research was conducted by examining the comparative perspective of legality principles in the perspective of HAN, Criminal Law, and Islamic Law. The results of this study show that the legality principle in the perspective of HAN, criminal law, and Islamic law refers to different legal bases. Although there are different legal bases, the three do not show any contradiction. The different viewpoints on the legality principle are very likely to be harmonized.

Keywords: Principles of Legality, Administrative Law, Criminal Law, Islamic Law.

I. INTRODUCTION

The principle of legality is upheld in Indonesia. Legality is the main principle in a rule of law. In Indonesia, the legality principle is based on the 1945 Constitution of the Republic of Indonesia, especially Article 1 paragraph (3) which states that "the State of Indonesia is a state of law."

So far, the principle of legality is better known in criminal law, Article 1 paragraph (1) of the Criminal Code stipulates that "No act can be punished except on the basis of criminal provisions according to existing laws than the act itself." According to Sudarto, the provisions of Article 1 paragraph (1) of the Criminal Code contain two things, namely that a criminal act must be formulated / mentioned in a statutory regulation and this statutory regulation must exist before a criminal act occurs [1]. The provisions of Article 1 paragraph (1) of the Criminal Code indicate that an act which fulfills certain requirements to be sentenced to punishment must be regulated in advance in the criminal legislation. Which acts are punishable by punishment and the criminal provisions (or actions) are explicitly stated in legislation.

In fact, the principle of legality does not only exist in criminal law settings but also exists and is known in Administrative Law and Islamic Law.

In terms of Islamic law, the principle of legality has actually existed long ago, namely since the revelation of the Al-Qur'an to the Prophet Muhammad. The Qur'an as the main source of Islamic law implies the existence of a legality principle which is used as a guide in social life. The verses that imply the legality principle in the Qur'an are as follows:

In terms of Islamic law, the principle of legality has actually existed long ago, namely since the revelation of the

a. Surat Al Isra 'verse 15: "Whoever acts according to the guidance of (Allah), then in fact he is doing it for his own (salvation); and whoever is misguided is actually lost for (loss) himself. and a sinner cannot bear the sins of others, and We will not punish until We send an apostle.
b. Surat Al Qashash verse 59:" And your Lord did not destroy the cities, before He sent in that capital an Messenger who recited Our Signs to them; and never (also) We destroy the cities; unless the inhabitants are in a state of doing injustice.
c. Surat Al An'am verse 19: "Say:" Who is the stronger the testimony? " Say: "Allah". He is a witness between me and you. and this Al-Quran was revealed to me so that with Him I will warn you and to those who reach the Quran (to him). Do you actually

admit that there are other gods besides Allah? Say: "I do not confess." Say: "Verily He is God Almighty and Verily I am free from what you associate (with Allah)".

These verses clearly state that there is no punishment or *Jarimah* (criminal act), unless there is already an explanation, and there is no punishment unless there is notification. Based on the provisions of these verses, legal experts formulate a rule which reads:

1. Before the provisions of the text, there was no law for the actions of intelligent people.
2. At the origin all cases and all actions are permitted. [2]

1.2. Research Method

This research is a normative legal research with a statutory approach and an analytical approach. Data collection was carried out through literature study. Secondary data from the research results were analyzed qualitatively. From the research results it is known that the legality principle in administering government in the perspective of administrative law, criminal law, and Islamic law refers to different legal bases. There are different points of view when looking at the legality principle in administering government in the perspective of administrative law, criminal law, and Islamic law.

1.3. Problem Statement

Based on the definition and regulation of legality principles in criminal law, HAN, and Islamic law that have been described, where each has a different touch / effect, this study / analysis is focused on the harmonization of legality principles in governance from the perspective of criminal law, administrative law, and Islamic law. The focus of the problem in this research is formulated as follows: How is the harmonization of the legality of governance principles in the perspective of administrative law, criminal law, and Islamic law?

2. BACKGROUND

Article 1 paragraph (1) of the Criminal Code stipulates that "*No act can be punished, except for the strength of the criminal rules in existing legislation, before the act is committed*". According to Sudarto, the provisions of Article 1 paragraph (1) of the Criminal Code contain two things, namely that a criminal act must be formulated / mentioned in statutory regulations and this statutory regulation must exist before a crime occurs (Sudarto, 2009). These requirements are often associated with the lex certa or bestimmtheitsgebot principle, which requires lawmakers to formulate criminal provisions as carefully or as in detail as possible (Lidya Suryani Widayati, 2011).

Rules must be made before the action is done. The premise that the criminal law should not be retroactive is to guarantee individual freedom against the arbitrariness of the authorities. Crime is a psychological force (psychologische dwang). Criminal laws cannot be retroactive as part of the state's efforts to protect individual rights guaranteed by the constitution. The regulation of acts that can be convicted and the threat of punishment for these acts in the laws and regulations are aimed at ensuring legal certainty and justice for the perpetrators. Justice is a goal to be achieved in making regulations in addition to legal certainty as a guarantee in law enforcement.

The principle of legality in Article 1 paragraph (1) of the Criminal Code, imposes an obligation on judges to give decisions in accordance with law, this shows that the principle of formal legality is adhered to. However, Law Number 48 of 2009 concerning Judicial Power (Law on Judicial Power) provides an opportunity for judges to judge according to values and a sense of justice in society. Article 5 paragraph (1) of the Law on Judicial Powers stipulates (1) Constitutional judges and judges are obliged to explore, follow, and understand

legal values and a sense of justice that lives in society. Legal values in society are customary law values that are still valid in Indonesia and do not conflict with Pancasila and the 1945 Constitution of the Republic of Indonesia. The validity of law that lives in society is guaranteed by the 1945 Constitution of the Republic of Indonesia. Article 18B paragraph (2) which determines "The State recognizes and respects indigenous peoples and their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia, which are regulated in law." The existence of customary law still plays a high and influential role in law enforcement, moreover there is an obligation for judges to explore the values that live in society, even though a criminal act is not formally regulated as the meaning of the legality principle (Sri Rahayu, 2014).

In Islamic law, the principle of the principle of legality is found in several main rules in Islamic teachings. First, the rule which states: Before there was Nas (provision), there was no law for the actions of people with common sense ". That is, the actions of a capable person (bekwaam) cannot possibly be said to be prohibited as long as there is no provision (Nas) that prohibits it, and he has the freedom to do that act or leave it, so there is Nas who prohibits it. (Ahmad D. Hanafi, Ahsin Sakho Muhammad, et.al (eds), in Mokh. Khasan, 2017).

The second basic rule is the rule which states: "Basically all cases and all actions are allowed" (Al-Ashl fi al-asyya 'wa al-af'al al-ibahatu.). (Ahmad Hanafi, in Mokh Khasan, 2017) This means that all actions and all attitudes of non-action are permitted with genuine ability, which is not the ability stated by Nas. So as long as there is no Nas to prohibit, then there will be no demands for all actions and all non-action attitudes. The third fundamental rule is the rule which states: "Only people who can be given imposition (taklif) have the ability to understand the arguments of imposition and to do it, and the work that is imposed is only work that may be carried out and accomplished and known as well so that it can encourage himself to do it. make it up ". These three basic rules are believed to be fundamental elements of the existence of the Principle of Legality in Islamic Criminal Law. (Mokh. Khasan, 2017).

In Islamic law there are sharia rules. Sharia is a legal system as well as a system of morality. Sharia shows people right actions, but it also establishes world penalties for those who transgress. (Nazih N. Ayubi, 2001). The principle of legality is included in the rules of Islamic law.

In state administration, the principle of legality is a constitutional principle. The Islamic constitutional theory states clearly the principle of limiting state power under the rule of law. In sharia there is no room for arbitrary power by an individual or a group of people. The basis for all decisions and actions in Islamic government should not be based on individual arbitrariness, but sharia. (Mohammad Hashim Kamali, in Mokh. Khasan, 2017). This is the reason why the formulation of criminal acts (*Jarimah*) in Islamic Criminal Law is formulated in such a way that there is a very strict separation between God's rights (sharia) in hudud, the rights of victims in qisas-diyat, and the rights of the ruler (state) in *ta ' zir*.

Among the several rights (interests), there is a need for a strong balance. Islamic law carries out the principle of legality, but also protects the interests of the community. It balances the rights of individuals, families and communities through categorization of crimes and their sanctions (Topo Santoso, 2003).

The formation of statutory regulations in the context of harmonizing law towards responsive law, needs to be carried out through a democratic and integrated process that is imbued with Pancasila and is based on the 1945 Constitution of the Republic of Indonesia, in order to produce harmonious legislative products up to the level of implementing

regulations. Establishment of laws and regulations that must pay attention to provisions that fulfill philosophical values that are based on a sense of justice and truth, sociological values in accordance with the cultural values prevailing in society, and juridical values that are in accordance with the provisions of the prevailing laws and regulations. Harmonization of these laws and regulations really needs to be applied in all fields, including the government sector, especially the administration of government.

In accordance with the provisions of Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia that the state of Indonesia is a constitutional state, this means that the system of government administration must be based on the principle of a rule of law. Based on these principles, all forms of government administration decisions and / or actions must be based on law which is a reflection of Pancasila as the state ideology.

Government agencies and / or officials who hold the authority in the administration of government are charged with the task of realizing the goals of the state as mandated in the Preamble to the 1945 Constitution of the Republic of Indonesia. This task is a very broad task and this is certainly correlated with government administration duties. Therefore, in order for the administration of government not to be separated from the objectives stipulated in the constitution, regulations are needed which serve as the basis and guidelines for Government Agencies and / or Officials that direct the administration of that government according to the needs of the community. The foundation and guidelines for the administration of government are contained in Law Number 30 of 2014 concerning Government Administration. This law specifically actualizes the constitutional norms of the relationship between the state and citizens.

Based on the provisions of Article 5 of Law Number 30 of 2014 concerning Government Administration Article 5, the implementation of government administration is based on:

a. legality principle;
b. principles of protection of human rights; and
c. General Principles of Good Governance (AUPB)

Elucidation of Article 5 letter a determines "what is meant by the principle of legality is that the administration of Government Administration prioritizes the legal basis of a Decree and / or Action made by Government Agencies and / or Officials." The elucidation of Article 5 letter a shows that the legal basis is a form of legal certainty as the implementation of the legality principle in state administration. The legality principle explicitly in the Law includes Article 8 paragraph (2) which determines “Government Agencies and / or Officials in using mandatory authority based on:

a. laws and regulations; and
b. General Principles of Good Governance (AUPB).

Furthermore, Article 9 paragraph (1), (2), (3) determines:

(1) Every Decision and / or Action must be based on the provisions of laws and regulations and AUPB.
(2) The laws and regulations as referred to in paragraph (1) include:
    a. laws and regulations which form the basis of authority; and
    b. laws and regulations which are the basis for determining and / or making decisions and / or actions.
(3) In determining and / or implementing Decisions and / or Actions, Government Agencies and / or Actions are required to include or show the provisions of laws and regulations which are the basis of Authority and the basis for determining and / or making decisions and / or actions.

Based on the provisions of Article 9 paragraph (1), (2), (3), in accordance with the principle of legality that the Agency and / or Government Officials in determining and

/ or making decisions and / or obligatory Actions based on the provisions of the legislation and General Principles of Good Governance (AUPB) besides that, it is also required to include or show the provisions of the laws and regulations which are the basis of Authority and the basis for determining and / or making decisions and / or actions. Even so, Article 9 paragraph (4) provides flexibility for Government Agencies and / or Officials to determine and / or carry out Decisions and / or Actions that are unclear or have no legal basis as long as these decisions and / or actions provide benefits and are appropriate. with AUPB. Article 9 paragraph (4) specifies:

(4) The absence or obscurity of the statutory regulations as referred to in paragraph (2) letter b, does not prevent the Agency and / or Government Officials authorized to stipulate and / or carry out Decisions and / or Actions as long as they provide public benefits and are in accordance with AUPB.

The basis for the use of the legality principle in the administration of government is explicitly determined, however, this law also regulates discretion, namely in Article 22 to Article 32.

In government administration, the state has implemented the legality principle in various laws and regulations, including Law Number 30 of 2014 concerning Government Administration. The meaning of Government Administration in Article 1 number 1 of Law Number 30 of 2014 concerning Government Administration is the management of decisions and / or actions by government agencies and / or officials. Furthermore, Article 1 point 3 determines that what is meant by Government Agencies and / or Officials are elements that carry out Government Functions, both within the government and other state administrators. Law Number 28 of 1999 concerning the Administration of a State that is Clean and Free from Corruption, Collusion and Nepotism, Article 1 point 1 stipulates that State Administrators are State Officials who carry out executive, legislative or judicial functions, and other officials whose main functions and duties are relating to state administration in accordance with the provisions of the prevailing laws and regulations. Thus government administration is the management in making decisions and / or actions by elements who carry out government functions either within the government or in an environment that carries out executive, legislative or judicial functions, and other officials whose main functions and duties are related to the administration of the State.

Indonesia as a Muslim majority country does not make Islamic law the basis of its constitution. However, Indonesia is also not a secular state that separates state affairs and religion. The legal constitution in Indonesia does not conflict with Islamic law. Islamic law in the midst of Indonesian society has an important position. Even in making laws and regulations, the government pays attention to the principles in Islamic law. Included in the Government Administration Law.

In connection with the principle of legality in government administration regulated in the Law of the Republic of Indonesia Number 30 of 2014 concerning Government Administration, Article 5, where it states that the administration of government administration is based on: the principle of legality; principles of protection of human rights; and General Principles of Good Governance (AUPB). In the section Elucidation of Article 5 Letter a of Law of the Republic of Indonesia Number 30 of 2014 concerning Government Administration, it is explained that what is meant by "legality principle" is that the administration of Government Administration puts forward the legal basis of a Decree and / or Action made by the Agency and / or Government Officials. The phrase "legal basis" can be interpreted as both written law and unwritten law. The administration of government which is based on the principle of legality means that all government administration must be based on the applicable law. In carrying out their duties, government administrators are required to adhere to the rules that have been made. However, in its implementation, it is

not possible for everything to be resolved by existing regulations. The existing regulations sometimes have weaknesses, are incomplete or do not accommodate all problems. Especially now that social, economic and cultural developments are experiencing very fast. In such situations, the ability of government administrators to take actions or decisions is required if there are no regulations. This is known as discretion.

For every Muslim, all activities he performs in his daily life must be in accordance with Allah SWT's commandments. As a realization of faith in Allah. The rules of Allah SWT can be found in the collection of revelations conveyed through His Prophet (Al-Quran) and the explanations given by the Prophet SAW regarding these revelations (Al-Hadith). However, Allah's commands in the Koran are in the form of commands and prohibitions or other expressions. This standard still needs to be formulated into a legal form. To formulate Allah SWT's commandment into a legal form requires great effort through understanding. This hard work is what in the perspective of ushul fiqh science is known as ijtihad. [3]. The legal basis for using your mind to perform ijtihad is QS An Nissa (4) verse 59: *O you who believe, obey Allah and obey the Prophet (Him) and ulil amri among you. Then if you disagree about something, then return it to Allah (Al Qur'an) and Rasul (Al Hadith), if you really believe in Allah and the day after. This is greater (for you) and better as a result.*

Ijtihad, besides being carried out on matters that have legal provisions in the text (al-Quran and al-Hadith), is also carried out in order to find solutions to new problems for which the answer is not clearly found in the text. The connection with the first, is that laws that have provisions in the text sometimes experience problems in their application when faced with changing social conditions. In this kind of situation, another understanding (ijtihad) is needed which is different from what has been stated in the previous texts (Syarifuddin, 2001: 243). This model of ijtihad is basically the same as discretion. It is said the same because such ijtihad is a decision-making on one's own initiative, it is not fixed on existing provisions or even deviates which are the characteristics of discretion. (Mubarok, 2009).

If discretion is the same as ijtihad, then it is clear that action ijtihad is highly recommended in Islam as narrated in the hadith which means: When the Prophet. sent the Companion of Muadz bin Jabal to Yemen as a judge. The Prophet asked him: "*How do you punish a legal problem?" Muadz replied: I will decide with what is in the book of Allah (al-Quran). The Prophet asked again: "If you don't find it in the Koran?" Muadz replied: With the sunnah of the Prophet. The Prophet asked again: "If you don't find it?" Muadz replied: I will perform ijtihad with my opinion. Then the Prophet said: Praise be to Allah who has helped the Messenger of Allah.* (H.R. Imam al-Tirmidhi). From this hadith, it can be understood that everyone faces a problem that requires resolution. Even though when referring to the Al-Qur'an and sunnah there is no reference. So as Muslims are obliged to perform ijtihad by trying to devote all power of reason to solve the problem. (Damiri Hasan, 2016).

In relation to law enforcement, the principle of legality in Article 1 paragraph (1) of the Criminal Code, imposes an obligation on judges to give decisions in accordance with law, this shows the adherence to the principle of formal legality. However, Law Number 48 of 2009 concerning Judicial Power (Law on Judicial Power) provides an opportunity for judges to judge according to values and a sense of justice in society. Article 5 paragraph (1) of the Law on Judicial Powers stipulates (1) Constitutional judges and judges are obliged to explore, follow, and understand the legal values and the sense of justice that live in society. Legal values in society are customary law values that are still valid in Indonesia and do not conflict with Pancasila and the 1945 Constitution of the Republic of Indonesia. The validity of law that lives in society is guaranteed by the 1945 Constitution of the Republic of Indonesia. Article 18B paragraph (2) which determines *"The State recognizes and respects indigenous peoples and their traditional rights as long as they are still alive and in*

accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia, which are regulated in law."

In criminal law, settlement of criminal cases can be carried out by means of deliberation between related parties and / or through discretion from law enforcement officials. In simple terms, discretion can be understood as "freedom and / or authority to, among other things, interpret existing legal provisions, then make decisions and take legal actions deemed most appropriate". In this case, the authority to do this lies with the interpreter - for example, the investigator - and is carried out wisely and with full consideration. [4].

3. CONCLUSION

Different perspectives on the principle of legality in government administration in the perspective of administrative law, criminal law and Islamic law do not show any contradiction. In this case, it means that the regulation of legality principles in the three legal perspectives is very possible to be harmonized. In the event of deviation from the principles of legality, discretion or dispensation, it appears that there is a harmonious arrangement. These three legal perspectives accommodate the existence of discretion for the benefit of society (maslahat).

4. RECOMMENDATION

In line with the Government's efforts to organize the bureaucracy, which is closely related to governance, it is imperative that legal harmonization be carried out. Harmonization of law must pay attention to philosophical values, sociological values, and juridical values. Besides that, it must also touch on institutional aspects, instrumental aspects, and cultural aspects. The balance and harmony of these three values and aspects will greatly support the realization of the harmonization of legality principles in government administration which in turn can create a good governance structure.

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LEGAL ISSUES IN THE APPLICATION OF PRODUCTIVE WAQF: A COMPARATIVE STUDY ON WAQF IN THE HEALTH SECTOR BETWEEN INDONESIA AND MALAYSIA

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Abstract

Productive waqf as a sharia financing instrument can be used to support the development of health facilities in order to increase access to health services for the community. It meet the Good Health and Well Being, as the 3rd target of Sustainable Development Goals. Laws and policies are key instruments in regulating, directing, and utilizing productive waqf institutions in fulfilling their role as supporter for national development. Productive waqf system, implemented not only in Indonesia but also in Malaysia. In order to maximize the benefits of productive waqf in health sector, researcher wants to compare the implementation of productive waqf in Indonesia and Malaysia in terms of its regulations and implementation to providing community health services in both countries. This research apllied normative juridical research method by document studies, in the forms of books, laws and regulations on waqf in Indonesia and Malaysia, followed with structured observation on health waqf activities and interviews with some experts and govermental authorities of Indonesia Waqf Board and Malaysian experts. This research is expected to provide a solution to be propose to goverment in order to improved the laws and regulations on waqf in health sector in Indonesia. The findings in this research is there are similarities and differences between stipulation on waqf in Indonesia and Malaysia. The similarities between the regulation on waqf in Indonesia and Malaysia include several forms of productive waqf, waqf management, and the relationship between nadzir and the government. The differences on waqf in Indonesia and Malaysia, include the legal basis, several forms of productive waqf, and provisions regarding waqf.Keywords: productive waqf; health; Indonesia

1. INTRODUCTION

Waqf in the fields of healthcare is a promising concepts on the field of waqf study. As an essential needs for the people, fulfilment of healthcare access and facility has been the main focus or agenda of all countries. Especially a developing countries that struggle to meet its society needs of healthcare. For Indonesian government, maintaining a good healthcare access and facility, require a sum of funds that results as financial challenges for the countries.

To help answering the financial challenges of healthcare program, Waqf as a sustainable endowment of charitable funds has render a solution for financing and fulfilling the needs of healthcare access and facility development.

Muslims are brothers and described as one building supporting each other. Waqf is one of the Islamic charity concepts besides infaq, sadaqah, and zakat. Waqf also knows as hubous.[1] Waqf Is an inalienable charitable endowment under Islamic Concept. Unlike infaq, sadaqah, and zakat, which revolves around straight charity, it is intended to help people in need. Waqf emphasizes the sustainable value of its endowment. The endowment can be in the form of charitable financial trust, building, land, and other objects. Which might contain other useful purposes.

Waqf system under Islamic law are defined and ruled under several hadiths. One of the most popular hadith that underline Waqf concept is it said that: "Ibn Umar reported, Umar Ibn al Khattab got land in Khaybar, so he came to the prophet Muhammad and asked him to advise him about it. The Prophet said, 'If you like, make the property inalienable and give the profit from it to charity.'" It goes on to say that Umar gave it away as alms, that the land itself would not be sold, inherited or donated. He gave it away for the poor, the relatives, the slaves, the jihad, the travelers and the guests. And it will not be held against him who administers it if he consumes some of its yield in an appropriate manner or feeds a friend who does not enrich himself by means of it.[2]

According to the terminology waqf also spelled *wakaf* or *awqaf*. It means "confinement and prohibition" or causing it to stop or hold "stand still". *Waqif* is a term for the people who making the grant, and people who received the endowed assets are called *al-mawquf.*

Waqf have three main requirements. First the people who endowing waqf, and its subsequent maintainers should sequester the principal and allocate the proceeds to charity. Secondly the endowment should be legally removed from commodification such that it is no longer on the market. And last its sole purposes must be charitable and the beneficiary group must be named.

With productivity and sustainability as its core value, productive waqf concept in health sector promises a solution in overcoming financial challenge of developing healthcare facility and access. However the only problem which still undermines the enactment of a sustainable and just productive waqf system in healthcare fields are law. In the implementation of productive waqf it lies a dilemma between maintaining a productivity. Which are reflected through the capacity of profit generation. And enabling inclusive access for all people which can be translated thar it will be disrupted by profit making nature of a healthcare. Policy in the form of law plays a pivotal parts in balancing between productivity outcomes and maintaining inclusive access of healthcare, through cheap and free healthcare.

1.2. Research Method

This research apllied normative juridical research method by document studies, in the forms of books, laws and regulations on waqf in Indonesia and Malaysia, followed with structured observation on health waqf activities and interviews with some experts and govermental authorities of Indonesia Waqf Board and Malaysian experts. This research is expected to provide a solution to be propose to goverment in order to improved the laws and regulations on waqf in health sector in Indonesia.

1.3. Paper Structure

To be able to spotlight the legal issues in the application of productive waqf in health sector. Between Indonesia, Malaysia. This paper will breakdown the discussion intro several parts, first this paper will discuss how productive waqf in health sector viewed from the general legal principle perspective, to prove that the concept of productive waqf in health sectors are inline with the constitutional purposes. Secondly this paper discuss on how productive waqf are practiced in Indonesia to map and answer how productive waqf is regulated in Indonesia, after exposing on how productive waqf arranged by the Indonesian law, we will discuss on how productive waqf is regulated in Malaysia, to find the contrast comparison between the two countries.

After briefly describe both regulations, this paper will investigate and form a conclusion to highlights the core differences. Thus important to conclude and taking lesson learned for the implementation of productive waqf in health sector. In order to improve and making a better regulation.

2. BACKGROUND

Discussion

1) Productive Waqf in Health Sector

As discussed before, productive waqf in Health Sector plays a pivotal role in providing financial needs and developing health care facility and access through fostering health facility and giving health benefit for the people. The core principles of healthcare services and facility in Indonesia lies on the Indonesian constitution Undang-Undang Dasar 1945 Pasal 28 H ayat (1) which stipulated that State responsible in enabling inclusive access

for all People. Moreover article 34 of Undang-Undang Dasar 1945 ayat (3) stipulated that states responsible in providing quality healthcare facilities and infrastructure for the people.

The government of Indonesia are obliged in providing both healthcare access and healthcare facility for the people. To fulfill that duties, government act as the policymaker and supervisor for the operation of all health facilities including hospital and medical clinics. Although health facilities are allowed to be operated by the private sector and generates profit, it still compulsory to seek goals in executing its social obligations which is provide a inclusive healthcare services for all. But in reality it is mere a utopic idea of healthcare services standard.

From the waqf perspective, it is stipulated under article 22 Law No. 41 Year 2004 on Waqf that in the purposes of reaching goals and fulfilling functions of waqf, waqf endowment can be invested in the field of worship, educational and healthcare facilities, charity for the poor and orphan, scholarship, society economic development, and public welfare which inline with sharia value.

Healthcare facility are listed as one of the field of waqf endowment target. However, further arrangement on how productive waqf in health sector should be implemented, is not yet regulated. Further regulations on this matter is a staple need not for just creating a productive waqf concept in healthcare but also to maintain a balance between business productivity of healthcare and maintaining its inclusive value, in every aspect of health services.

2) Practice in Indonesia

Indonesia as a country with the largest Muslim population in the world is no stranger to waqf. Waqf has benefits that can be felt globally and comprehensively to create a prosperous and prosperous community life. In Indonesia, the legal basis for the implementation of waqf is Law Number 41 of 2004 concerning Waqf which comes from the primary source of Islamic law, namely the Al-Qur'an, which has then been adjusted to the context by the experts so that it can be understood by the Indonesian people. In addition, there are implementing regulations that regulate the technicalities of waqf, namely Government Regulation Number 42 of 2006 which has been amended to Government Regulation Number 28 of 2018 concerning Implementation of Law Number 41 of 2004 concerning Waqf. The reform of the implementing regulations aims to increase security, effectiveness, efficiency and accountability in the management of waqf asset.[3]

Given the many benefits that people get from waqf, the government has formed an independent institution specifically related to waqf, namely the Indonesian Waqf Board Badan Wakaf Indonesia (BWI). The formation of BWI was based on Law Number 41 of 2004 concerning Waqf.

BWI is here to foster the Indonesian people in managing waqf assets, both movable and immovable objects with the aim of making people's lives prosperous. The wide potential of the use of waqf as a means to improve the standard of life of the people in various aspects that can move the community to practice part of their assets for the benefit of the people.

Waqf in general will provide benefit to the recipient at one time, but there are also waqf that provide sustainable benefits called productive waqf.[4] Defines productive waqf as the process of managing waqf objects to produce maximum goods or services with sufficient capi defines protal.

Jaih Mubarok defines productive waqf as the process of managing waqf objects to produce maximum goods or services with minimum capital. Productive Waqf is a waqf that is given in the form of capital that the recipient can process to get bigger benefits every time. Productive waqf is the empowerment of waqf which is characterized by three main characteristics,[5] namely an integrated management pattern, following the principles of

Nazhir welfare, and the principles of transparency and responsibility. Productive waqf can be implemented in various sectors of community life, including the health sector. In Indonesia, the implementation of productive waqf in the health sector is growing rapidly and the need for its management is quite high, especially for people who are less fortunate but need to get medical care.

There are several examples of the implementation of productive waqf in the health sector. One of the most popular is the use of productive waqf for the management of the Eye Hospital Ahmad Wardi.[6] The hospital was built using waqf funds collected from the community.

In addition to its construction that uses productive waqf, Ahmad Wardi Eye Hospital in Serang City, Banten also uses productive waqf in its operational management. The productive waqf given is in the form of the first series of Cash Waqf Linked Sukuk (CWLS) (SW 001). The results of the CWLS have been used by Nazirs as managers of business activities to build retina centers. CWLS was launched in 2018 in Bali with a fund of 50.8 billion rupiah.

There is another example, namely the development of productive waqf for the formation of health clinics in mosques. The development in the health sector has been initiated by the management of bandha waqf at the Great Mosque of Semarang through a health clinic with management from the Semarang Grand Mosque Management Agency and the Grand Mosque Management Agency of Central Java. The clinic is called Klinikita Masjid Agung Semarang (Klinikita MAS). The clinic is located in a room at the Great Mosque of Semarang gas station. As of today, Klinikita MAS has practical services for general practitioners and dentists[7].

The role of waqf institutions for health services in Indonesia shows a progressive development. This role is not only limited to providing health facilities, but also in the construction of hospital units such as PKU, which was established by Muhammadiyah to the provision of medicines through pharmacies initiated by waqf institutions, especially during the Covid-19 pandemic. The growing participation of waqf institutions indicates the potential of waqf as one of the main pillars of developing the utilization of the people's welfare.

In the midst of the rapid dynamics of the participation of waqf institutions for the community, the development of waqf institutions is not free from obstacles. According to Mustafa E. Nasution, if there are several reasons for the small role of waqf institutions in the economy of a country, namely:[8]

a. The absence of a comprehensive-integral waqf law.
b. People are still tempted by the non-sharia economic system.
c. There are various problems related to the management of waqf institutions.
d. There are various problems related to wakaf fiqh.

This explanation hopes that there will be an evaluation framework for the sustainability of waqf institutions in maximizing existing potential and considering the implications of Indonesia as a country with the largest Muslim population. During its development, waqf in Indonesia shows a potential reflection as evidenced by the data released by the Indonesian Waqf Board in the form of potential waqf assets per year that reach Rp. 2,000 trillion. Furthermore, in order to support this potential, the government can pay attention to the four main obstacles that pose the challenges of waqf, such as (1) limited fundraisers for waqf, (2) low education and community outreach, (3) insufficient promotion of activities / programs and (4) management of institutional management which is still under standard.[9] Therefore, the government should encourage credential factors such as strengthening inclusion, improving waqf management, especially the use in the health sector to the use of technology to provide information to waqf in the use of waqf as well as the

preparation of Technical Guidelines (Juknis) and Implementation Guidelines (Juklak) for regulations related to waqf.

3) Practice in Malaysia

Malaysia is one of the countries which is quite successful in managing its waqf assets. The concept is very useful in improving the welfare of the Malaysian people. The management of waqf between Indonesia and Malaysia is basically similar. The Malaysian government through the State Islamic Religious Council (MAIN), as well as the Indonesian Government through the Indonesian Waqf Board, strives and is fully committed to promoting and developing a variant of productive waqf management.[10] This aims to maximize and expand the use of waqf for the welfare of the ummah and also the entire Malaysian community.

4) Regulation on Waqf in Malaysia

The government form in Malaysia, is a federal kingdom. There are thirteen states and one confederacy territory.[11] The thirteen states in Malaysia, consist of Johor, Kedah, Kelantan, Melaka, Negeri Sembilan, Pahang, Perak, Perlis, Pulau Pinang, Sabah, Serawak, Selangor, dan Terengganu. One confederacy territory in Malaysia, consists of three regions, namely Kuala Lumpur, Labuan, dan Putrajaya. Each state, has an Islamic religious department, named Majlis Agama Islam Negeri (MAIN), which in charge of managing religious affairs in the state. The Central Government has no right to interfe in the implementation of the management of religious affairs by the state government. Each state, all of the thirteen states, can own, regulate, and establihed its own statutory provisions, including regarding waqf.[12]

The provisions of laws and regulations in Malaysia, especially those relating to waqf, are divided into two groups. The first is in the form of an Islamic Law Act which contains general regulations regarding waqf. It is Akta 505 Pentadbiran Undang-Undang Islam (Wilayah-Wilayah Persekutuan) Year 1993. The second is the law on waqf in each state. It named *Enakmen Pentadbiran Agama Islam* of the states.

The first form, does not regulate waqf in detail. It only consist of general regulation on waqf. It regulate, especially regarding the general provisions on waqf according to Islamic Law. This Law, applies to all regions of Malaysia. The second form, regulate waqf in detail. This law is specific regulation, formed by the state MAIN and applies in each states.

The state in Malaysia, which regulates waqf for the first time is Johor. The first provision regarding waqf in Johor is Enakmen Pentadbiran Agama Islam (Negeri Johor) Year 1973. However, Enakmen Pentadbiran Agama Islam (Negeri Selangor) Year 1999, is widely acknowledge as the pioneer of Waqf Law in Malaysia.[13]

The overall regulation on waqf by the state and territory are under Enakmen Pentadbiran Agama Islam and Enakmen Wakaf.

5) Forms of Waqf in Malaysia

The waqf objects in Malaysia, as in Indonesia, are mostly in the form of land. The obstacle that generally arises from the object of waqf in the form of land is that the land is not a productive land.[14]

The forms of waqf assets in Indonesia and Malaysia are generally similar. Both receive, arrange, and manage moving dan immovable objects of waqf assets. However, the use of waqf in Malaysia is more creative, innovative, and the results are economically more productive than in Indonesia.[15]

Once, the form of waqf in Malaysia was broadly divided into two, namely Waqf Am and Waqf Khas.[16]

Wakaf Am is waqf which is aim to charity for the poor and / or fi sabilillah. This waqf fulfills the needs of the community for, among other things, masjid, schools, orphanages, and scientific studies.[17]

According to the provisions of waqf legislation in Malaysia, Waqf Am is a waqf that aims to fulfill charity according to Syarak Law (Islamic Law). This waqf may be used to meet the needs of the public interest and is intended to improve the image of Islam as a religion and Muslims in society. There are no special requirements regarding to waqf assets.[18]

Wakaf Khas is a waqf which is specifically to be use by certain individuals or groups. This waqf is usually intended for wakif families so it is often known as family waqf.[19] Wakif has determine the purpose and allocation of the use of waqf. As an example of Waqf Khas is wakif has specifically allocated the waqf property is can only used as a cemetery or school. Wakif can also determine that waqf assets are intended only for the poor.

Along the time and development in technology, the form of waqf in Malaysia is more variant. It is no longer just Waqf Am and Waqf Khas but has developed into, among other things, a form of cash waqf and stock waqf.[20]

Cash waqf is considered by many parties as a form of waqf that is broader and easier to use. Cash waqf has a high liquid value.[21] The form of stock waqf is also classified as cash waqf by some experts. This waqf is usually associated with certain projects or goals.

The latest development regarding to the form of waqf in Malaysia is corporate waqf.[22] The concept of corporate waqf aims to ensure the benefits of the ownership of the shares which are donated, are used for charities and religious matters. In principle, corporate waqf and share waqf are similar to other forms of waqf. This is of course because waqf is obliged to obey the pillars and provisions of waqf.[23]

Corporate waqf was introduced for the first time in Malaysia by the Johor Corporation Berhad (JCorp). This waqf is believed to be the first waqf that implemented by a business corporate institution, in the world.[24] JCorp. do not sell shares to individuals or organizations as you do in common waqf shares. JCorp. do not selling it shares to individual or organization. JCorp. donating it's own shares. An example of corporate waqf form that has been implemented by JCorp. is to donate his shares which value of RM 200 million, on August 3, 2006, through his 3 subsidiaries company.[25] JCorp corporate waqf., is managed by a subsidiary of JCorp., namely Waqaf An-Nur Corporation Berhad (WANCorp). WANCorp was founded by JCorp. with the aim of managing assets and waqf shares.[26]

MAIN also manages amanah share waqf. The management is operated through a bank. Shares are offered to the public at a certain price. People, who bought shares, will not receive the shares devidend. Profits from share management, will be fully received by the administrator. This profit will then be used by the government to fulfill the public interest. The purpose of MAIN with this share waqf is to assist the government in providing public facillities. This profit will then be reinvested to buy new facilities that will be used as waqf assets. Investments are made, of course, in safe sectors, to reduce the risk of loss or shrinkage of waqf assets.[27] This scheme maintains the sustainable and productivity of waqf assets.

This waqf is managed by a subsidiary corporation of Jcorp, namely Waqaf An-Nur Corporation Berhad (WANCorp). WANCorp was established by Jcorp with the aim of managing waqf assets and shares.

6) Productive Waqf in the Health Sector in Malaysia

In several countries, waqf plays a very significant role in the development and

improvement of health facilities and services. Several health facilities that have been built and managed from waqf funds include clinics, hospitals and ambulances. Some of the supporting facilities for health facilities are also built with waqf funds, such as hotels for families that accompany patient or outpatients who need lodging facilities.

Waqf productive in the health sector in Malaysia, helps the development of health services through build public facilities in the health sector, such as hospitals, health schools, and developing medical research, as well as developing industries in the fields of medicine and chemical. Waqf management in the state of Johor is the best waqf management in Malaysia.[28]

In Johor, besides the corporate waqf scheme, JCorp. also using cash waqf to provide health services. In providing its services, Jcorp. Equates its services to Muslims and non-Muslims patients.

JCorp. established waqf hospitals that charge relatively low cost. Jcorp. established the An-Nur Waqaf Clinic Fund to build An-Nur hospital and clinics. In 2007, Dana Klinik Waqaf An-Nur managed to have five hospitals and clinics. The five are An-Nur Waqf Hospital in Pasir Gudang Johor, An-Nur Kotaraya Waqf Clinic in Johor Bahru, An-Nur Waqf Clinic, Jamek Sultan Ismail Mosque in Batu Pahat Johor, An-Nur Waqf Clinic, Islamic Religion Majlis Negeri Sembilan (MAINS) Seremban, and An-Nur Sungai Buloh Selangor Waqf Clinic.[29]

Another example of waqf management in the health sector in Malaysia is by KASIH Holdings Sdn. Bhd. (KASIH) in Putrajaya, in collaboration with Bank Waqf International, Malaysia.[30] Since 2018, KASIH has managed cash waqf funds which are then invested in gold, named KASIHgold. The reason of gold as form of investment is because the value of gold tends to be stable and even always increases every year. This is different from cash fund, which tend to have inflation.

The yield from KASIHgold's investment, have been successfully managed to be used to establish and operate the Mediviron Clinic in Bandar Baru Bangi, KASIH Cyberjaya Women's & Child Specialist Clinic, and Cyberjaya KASIH Megaklinik Expert. Hospital Pakar Wanita and Kanak-Kanak KASIH Putrajaya, is still in the final stage of construction. Currently, the fund only cover inpatient facilities and its free medicines. In the future, KASIH will expand to health care services, such as surgery.[31]

Health is one of the key factors to support the country's economic development. Easy access to and affordable cost on health services is one of human basic needs. In this context, although the Kingdom and private sectors are providing hospitals and clinics, waqf institutions also have a significant role in providing affordable health facilities and services for the community. The existence and role of waqf institutions in providing affordable health facilities and services for all levels of society, significantly contributes supports to the government and also the community itself. The presence of a waqf hospitals and clinics is very helpful for the underprivileged people to accessing an affordable health services.

The development and strengthening on waqf in the health sector is very important. If society have access to health services and facillities, they can optimaly contribute in the country. A healthy society can put a maximal effort in building and strengthening the economy of their family. This is a very urgent problem that arise today, specially in Muslims.[32]

7) Wakif in Malaysia

The provision of wakif in Malaysia does not required Islam as the religion of the wakif. The consequence is that non-Muslim communities can also become a wakif in Malaysia. MAIN in Negeri Sembilan State and Selangor State, regulates and mentions

specifically that non-Muslim communities can participate in implementing waqf, especially cash waqf.[33]

8) Waqf Management in Malaysia

Basically, all regulatory provisions relating to Islamic religious affairs are under the Malaysian Sultanate through the Islamic Religious Council (MAIN). Each state has its own MAIN. MAIN acts as the sole nazhir in the state concerned. This has the consequence that MAIN is a manager on all waqf assets located in the state where it located. MAIN, as its duties and functions as manager of waqf assets, is assisted by two federal government agencies, namely the *Jabatan Wakaf, Zakat, dan Haji* / Waqf, Hajj, and Zakat Bureau / Department of Awqaf, Zakat, and Hajj (JAWHAR) and *Yayasan Wakaf Malaysia* / Malaysian Waqf Foundation (YWM).[34]

Jabatan Wakaf, Zakat, dan Haji is established in 2004. It directly under authority of the Prime Minister. In principle, JAWHAR's task is to ensure the implementation of waqf regulations in waqf management. JAWHAR also has the duty to ensure the effectiveness of waqf, hajj, and zakat's assets management. The establishment of JAWHAR is an attempt by the Federal Government to set a standardize waqf arrangements in every states.

Yayasan Wakaf Malaysia is an institution that established by JAWHAR. YWM is responsible for handling issues related to waqf in each state. YWM's duties include as follows.[35]

1) Develop Malaysian waqf assets together with MAIN.
2) Utilizing waqf assets in each state to improve the welfare of society, specially Muslims.
3) Generating income from the use of waqf assets.
4) Reducing the imbalance of the socio-economic level in society.
5) Carry out the mandate of responsibility to the wakif.

Overall, nadzhir waqf in Malaysia consists of MAIN, JAWHAR, and YWM.

9) elations between Nadzir and the Government

Yayasan Wakaf Malaysia in carrying out its duties and functions, is responsible to JAWHAR. JAWHAR is responsible to their State Governments. MAIN, as the state manager of waqf, is responsible to the Malaysian Sultanate.[36]

3. CONCLUSION

There are similarities and differences between stipulation on waqf in Indonesia and Malaysia. The similarities between the regulation on waqf in Indonesia and Malaysia include several forms of productive waqf, waqf management, and the relationship between nadzir and the government. The differences on waqf in Indonesia and Malaysia, include the legal basis, several forms of productive waqf, and provisions regarding waqf.

4. RECOMMENDATION

Waqf is potentially significant to build and support Muslim's economy in particular and the welfare of the community in general. The development of productive waqf, such as cash waqf, corporate waqf, and share waqf has developed in Malaysia, is a successful example of optimizing waqf fund for the development of economic and the welfare of society. Indonesia with its largest Muslim population in the world, is have a potential opportunity to also participate in developing productive waqf and improve the optimization of the waqf function in Indonesia.

Indonesian government, through the Indonesian Waqf Board, have to continuing its efforts to socialize productive forms of waqf to Indonesian people, especially Muslims.

Public participation in waqf has a potential to supporting the government duties in fulfilling state obligations to give access and providing health facilities to Indonesian people, based on the Constitution of the Republic of Indonesia, Article 28 H and Article 34 of the 1945 Indonesia Constitution.

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IJARAH MUNTAHIYAH BI AL-TAMLIK AGREEMENT: LEGAL PRACTICE IN INDONESIA SHARIA FINANCING AGENCIES

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Abstract
The ijarah muntahiyah bi al-tamlik contract is one of the relatively new contracts, because it combines several types of contracts, in Islamic Banking. For some of these reasons, the authors are interested in discussing more about the legal aspects of the ijarah muntahiyah bi al-tamlik and how they are practiced in Islamic finance institutions. The research method used is a qualitative method with a type of normative juridical research. The conclusion obtained is that the contract of the ijarah muntahiyah bi al-tamlik which is a lease agreement that ends with ownership is permissible in Islam. This was confirmed by the DSN-MUI fatwa No. 27 / DSN-MUI / III / 2002 concerning the Ijarah muntahiyah bi al-tamlik. Even in practice, there have been several rules from Bank Indonesia and the Financial Services Authority which specifically regulate the implementation of the ijarah muntahiyah bi al-tamlik contract.
Keywords: Islamic Banking, Ijarah Muntahiyah Bi Al-Tamlik Contract.

ANALISIS PRAKTIK AKAD *IJARAH MUNTAHIYAH BI AL-TAMLIK* DALAM LEMBAGA PEMBIAYAAN SYARIAH DI INDONESIA

Abstrak
Kesadaran umat muslim sebagai umat mayoritas dari penduduk Indonesia untuk berprilaku secara Islami merupakan salah satu alasan perkembangan perbankan syariah yang cukup signifikan di Indonesia. Dalam mempertahankan eksistensinya, perbankan syariah terus melakukan inovasi atas produk-produk syariah yang sesuai dengan perkembangan masyarakat, salah satu produk perbankan syariah tersebut adalah akad ijarah muntahiyah bi al-tamlik. Akad ijarah muntahiyah bi al-tamlik merupakan salah satu akad yang tergolong baru, karena menggabungkan beberapa jenis akad dalam suatu kontrak. Atas beberapa alasan tersebut, penulis tertarik untuk membahas lebih lanjut mengenai segi hukum dari akad ijarah muntahiyah bi al-tamlik serta bagaimana praktiknya di lembaga pembiayaan syariah. Metode penelitian yang digunakan adalah metode kualitatif dengan jenis penelitian yuridis normatif. Kesimpulan yang didapatkan adalah bahwa akad ijarah muntahiyah bi al-tamlik yang merupakan akad sewa yang diakhiri dengan kepemilikan diperbolehkan dalam Islam. Hal ini dipertegas dengan adanya fatwa DSN-MUI No. 27/DSN-MUI/III/2002 tentang Ijarah muntahiyah bi al-tamlik. Bahkan dalam praktiknya, telah terdapat beberapa aturan baik dari Bank Indonesia maupun Otoritas Jasa Keuangan yang mengatur secara spesifik mengenai pelaksanaan akad ijarah muntahiyah bi al-tamlik.
Kata kunci: Perbankan Syariah, Akad Ijarah Muntahiyah Bi Al-Tamlik.

I. INTRODUCTION

In several years, the development of Islamic banking in Indonesia has been very significant. In fact, there are several Islamic banks that are converts from established conventional banks. One of the reasons these conventional banks are converting to Islamic banking is because the Indonesian population who is Muslim is accompanied by a growth in their awareness of behaving Islamically. This is the issuance of the MUI fatwa No. 1 of 2004 (Intersat / Fa'idah) which states that the practice of earning money is a form of usury, and riba is haram. Therefore, Muslim customers consciously look for other alternatives that are in accordance with their beliefs. Another reason that causes customers to be more interested in Islamic banking is due to the profit sharing system as a more rational system for managing customers businesses. This is evident when the monetary crisis in Indonesia occurred in 1997, a number of conventional banks were shaken and finally liquidated due to negative spreads.[1] This kind of thing will not happen to Islamic banking because in Islamic banking the profit sharing system is based on the profit margin obtained by the bank.[2] For

[1]*Negative spread* adalah pendapatan bunga negatif, padahal pendapatan bunga merupakan sumber pendapatan terbesar bank (konvensional) yang dalam situasi normal di Indonesia mencakup 65%-80% dari total pendapatan.

[2]https://www.kompasiana.com/ianmursito/keunggulan-sistem-perbankan-syariah-perbandingan-dengan-sistem-konvensional_54f3cdd4745513902b6c7f39 diakses pada 21Mei 2019.

the example of agreement that transaction in Indonesia syaria bank is *ijarah muntahiyah bi al-tamlik.*

The ijarah muntahiyah bi al-tamlik or *ijarah wa al-iqtina* contract is a lease agreement that ends with the ownership of the goods in the hands of the lessee. The lease agreement itself in Islam is known as ijarah, which is the contract of transferring use rights over goods or services through payment of rental wages without being followed by the transfer of ownership of the goods.[1] According to the Islamic economic dictionary, ijarah muntahiyah bi al-tamlik is ijarah with a promise (wa'd) that binds the renting party to make ownership to the tenant.[2] Based on the explanation of Article 19 paragraph (1) letter f of Law no. 21 of 2008 concerning Sharia Banking, what is meant by the ijarah muntahiyah bi at-tamlik contract is an agreement to provide funds in order to transfer the use rights or benefits of a good or service based on a lease transaction with the option of transferring ownership of the goods.[3]

Pada praktiknya, akad *ijarah muntahiyan bi al-tamlik* diberlakukan pada lembaga keuangan syariah baik berupa perbankan syariah maupun lembaga pembiayaan syariah. Di Indonesia, pengaturan mengenai *ijarah muntahiyah bi al-tamlik* diatur dalam UU No. 21 Tahun 2008 tentang Perbankan Syariah, Peraturan Bank Indonesia No. 7/46/PBI/2005 tentang Akad Penghimpunan dan Penyaluran dana bagi Bank yang Melaksanakan Kegiatan Usaha Berdasarkan Prinsip Syariah, Peraturan Bank Indonesia No. 9/19/PBI/2007 tentang Pelaksanaan Prinsip Syariah dalam Kegiatan Penghimpunan Dana dan Penyaluran Dana serta Pelayanan Jasa Bank Syariah, Surat Edaran Otoritas Jasa Keuangan No. 36/SEOJK.03/2015 tentang Produk dan Aktivitas Bank Umum Syariah dan Unit Usaha Syariah, Fatwa DSN-MUI No. 27/DSN-MUI/III/2002 tentang*Ijarah muntahiyah bi al-tamlik*, dan Peraturan Ketua BAPEPAM LK No. PER-04/BL/2007 tentang Akad yang digunakan dalam Kegiatan Pembiayaan Berdasarkan Prinsip Syariah serta Peraturan Ketua BAPEPAM LK No. PER-03/BL/2007 tentang Kegiatan Pembiayaan Berdasarkan Prinsip Syariah. Dari beberapa peraturan di atas, yang secara spesifik menjelaskan mengenai kegiatan usaha *ijarah muntahiyah bi al-tamlik*adalah Fatwa DSN-MUI No. 27/DSN-MUI/III/2002 tentang *Ijarah muntahiyah bi al-tamlik*, Peraturan Bank Indonesia No. 7/46/PBI/2005 tentang Akad Penghimpunan dan Penyaluran dana bagi Bank yang Melaksanakan Kegiatan Usaha Berdasarkan Prinsip Syariah, dan Peraturan Ketua BAPEPAM LK No. PER-04/BL/2007 tentang Akad yang Digunakan dalam Kegiatan Pembiayaan Berdasarkan Prinsip Syariah.

1.2. Metode Penelitian

The research method used is a qualitative method with normative juridical research that focuses on Islamic law and Islamic economic law. The output obtained is that the ijarah muntahiyah bi al-tamlik contract which is a lease terminated with ownership is allowed in Islam. This is confirmed by the existence of the DSN-MUI fatwa No. 27 / DSN-MUI / III / 2002 concerning Ijarah muntahiyah bi al-tamlik. In fact, in practice, there have been several regulations from both Bank Indonesia and the Financial Services Authority that specifically regulate the implementation of the ijarah muntahiyah bi al-tamlik contract.

1.3. Ruang Lingkup

In an effort to improve its function and role in meeting the needs of the community, Islamic banking continues to innovate in banking business activities, which include

[1]Muhammad Syafii Antonio, *Bank Syariah dari Teori ke Praktik* (Jakarta: Gema Insani), 2015, hlm. 117.

[2]Mardani, *Fiqh Ekonomi Syariah* (Jakarta: Prenadamedia Group), 2015, hlm. 253.

[3]Pasal 19 ayat (1) huruf f UU No. 21 Tahun 2008 tentang Perbankan Syariah.

collecting funds from the public, channeling financing and providing services. In fact, innovation in the development of Islamic banking institutions has begun to spread to other business sectors that have also adopted the sharia system in its implementation. For example, Islamic financing institutions, Islamic pawnshops, and so on. One of the innovations in the business activities of various sharia-based financial institutions in meeting the needs of modern society is the implementation of a hybrid contract through business activities to distribute funds in the form of an ijarah muntahiyah bi al-tamlik contract. In particular, this paper will explain and at the same time analyze the ijarah muntahiyah bi al-tamlik contract in practice in Islamic financing institutions in Indonesia.

2. PEMBAHASAN

2.1. About *Ijarah muntahiyah bi al-tamlik* Agreement

The provisions in the contract of Ijarah muntahiyah perform bi al-Tamlik as stated in the DSN-MUI fatwa No. 27 / DSN-MUI / III / 2002 is that the party conducting the contract must first carry out the ijarah contract. The agreement for transfer of ownership, either by sale or purchase or by giving, can only be made after the ijarah period is over. This aims to avoid the existence of two contracts in one transaction which are also prohibited by the syari'at, as narrated from Ibn Mas'ud:[1]

The meanings: *"Rasulullah SAW prohibits two forms of contract at once in one transaction."*

The promise of transfer of ownership agreed at the beginning of the ijarah contract is wa'd, which is not legally binding. If the promise is to be carried out, then there must be an agreement for transfer of ownership to be made after the ijarah period is over. In the Regulation of the Chairman of BAPEPAM LK No. PER-04/BL/BL/2007, the provisions regarding wa'd are mandatory, that is, for finance companies as leasing (mu'ajjir). The wa'd is not binding for the tenant (musta'jir) and if the wa'd is implemented, then at the end of the lease period, an agreement for transfer of ownership must be made. More specifically, in the activities of channeling funds to Islamic banking institutions as regulated in PBI No.7/46/PBI/2005 that the activities of channeling funds in the form of ijarah muntahiyah bi al-tamlik are valid: a. IMBT must be agreed upon when the ijarah contract is signed and the agreement must be stated in the ijarah contract, b. IMBT can only be done after the ijarah contract is fulfilled, c. The bank is obliged to transfer ownership of the leased property to the customer based on a grant, at the end of the lease agreement period, d. The transfer of ownership of the leased property to the lessee is stated in a separate contract after the ijarah period is over.[2]

The legal basis for the implementation of the contract of Ijarah muntahiyah bi al-Tamlik are as follows:[3]

1. Al-Qur'an Surah al-Azukhruf (43:32)
2. The hadith narrated by 'Abd ar-Razzaq from Abu Hurairah and Abu Sa'id al-Khudri, the Prophet SAW said:
   Means:*" Whoever hires workers, tell the wages."*
3. Fiqh:
   Artinya: *"Pada dasarnya, segala bentuk mu'amalat boleh dilakukan kecuali ada dalil yang mengharamkannya."*

[1]Preamble in Fatwa DSN-MUI No. 27/DSN-MUI/III/2002 about *Ijarah muntahiyah bi al-tamlik*.

[2]Pasal 16 ayat (1)Peraturan Bank Indonesia No. 7/46/PBI/2005 tentang Akad Penghimpunan dan Penyaluran Dana Bagi Bank yang Melaksanakan Kegiatan Usaha Berdasarkan Prinsip Syariah.

[3]*Ibid.*

2.2. Rukun dan Syarat Akad *Ijarah muntahiyah bi al-tamlik*

As stated in the general provisions of the DSN-MUI fatwa No. 27/DSN-MUI/III /2002 regarding Ijarah Mutahiyah bi al-Tamlik, all the pillars and conditions that apply to the ijarah contract in the MUI DSN fatwa No. 09/DSN-MUI/IV/2000 also applies to the ijarah muntahiyah bi al-tamlik contract. Thus, the pillars and requirements of ijarah muntahiyah bi al-tamlik are as follows:[1]

1. Sighat ijarah, namely consent and qabul in the form of statements from both parties who contract (contract), either verbally or in other forms.
2. Parties who have contract: consist of lessees / service providers and lessees / service users.
3. The objects of the ijarah contract are:
   a. Goods and rent benefits, or
   b. Service benefits and wages

The provisions of the objectijarah muntahiyah bi al-tamlik are as follows:[2]

1. The object of ijarah is the benefit from the use of goods and/or services;
2. The benefits of the goods or services must be assessable and enforceable in the contract;
3. Benefits of goods or services must be permitted;
4. The ability to meet benefits must be tangible and in accordance with sharia;
5. Benefits must be identified specifically in such a way as to eliminate ignorance which will result in a dispute;
6. Specifications of benefits must be clearly stated, including the duration. Can also be identified by specification or physical identification;
7. A rental or wage is something that is promised and paid by the customer to a Sharia Financial Institution as a benefit payment. Something that can be used as a price in buying and selling can also be used as rent or wages in ijarah;
8. Payment or wages may be in the form of services (other benefits) of the same type as the object of the contract;
9. Provisions (flexibility) in determining rent or wages can be realized in terms of time, place and distance.

Based on the Regulation of the Chairman of BAPEPAM LK No. PER-04 / BL / BL / 2007, the provisions on the object of muntahiyah bi al-Ijara is a form of capital goods Tamlik [3] that meets the following:

1. Is owned by a finance company as the lessee (muajjir);
2. The benefits must be valued in money;
3. Benefits can be submitted to the lessee (musta'jir);
4. The benefits are not prohibited by Islamic law;
5. The benefits must be clearly defined, and;
6. The specifications must be clearly stated, among others through physical identification, feasibility, and utilization period.

In the banking institutions, Ijara contract provision that applies in the contract of Ijarah muntahiyah bi al-Tamlik as stipulated in Bank Indonesia Regulation No.

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[1]Fatwa DSN-MUI No. 09/DSN-MUI/IV/2000 tentang Pembiayaan Ijarah.

[2]*Ibid.*

[3]Barang modal antara lain berupa alat-alat berat *(heavy equipment)*, alat-alat kantor *(office equipment)*, lat alat foto *(photo equipment)*, lat-alat medis *(medical equipment)*, alat-alat printer *(printing equipment)*, mesin-mesin *(machineries)*, alat-alat pengangkutan *(vehicle)*, gedung *(building)*, komputer dan peralatan telekomunikasi atau satelit.

7/46/PBI/2005 concerning the Fund Collection and Distribution Agreement for Banks Conducting Business Activities Based on Sharia Principles are as follows:

1. The bank may finance the procurement of objects for lease in the form of goods already owned by the bank or goods obtained by renting from other parties for the benefit of customers based on an agreement.
2. The objects and benefits of the leased goods must be specifically valued and identified and clearly stated, including the lease payments and the period of time.
3. Banks are required to provide rental goods, ensure the fulfillment of the quality and quantity of rental goods and the timeliness of provision of rental goods according to the agreement.
4. Banks are required to bear the cost of maintaining material and structural leased goods / assets according to the agreement.
5. The bank may represent the customer to find goods to be rented by the customer.
6. Customers are required to pay rent in cash and maintain the integrity of the rental goods, and bear the cost of maintaining the rental goods in accordance with the agreement.
7. The customer is not responsible for damage to rental goods that occurs not due to a breach or negligence of the customer.

2.3. Rights and Obligations of Parties in Akad Ijarah muntahiyah bi al-tamlik

1. The rights of a finance company as a lessee (muajjir) are as follows:
    a. Obtaining rental payments from tenants (musta'jir)
    b. Interesting objects bi al-Ijarah muntahiyah Tamlik if the tenant (musta'jir) are not able to pay the rent as agreed, and
    c. At the end of the lease period, transfer the object of ijarah gagiyah bi al-tamlik to another less capable tenant in the event that the lessee (musta'jir) is completely unable to transfer ownership of the object for the lease period or is looking for a candidate to replace it
2. The obligations of a finance company as a leasing company (mu'jir) include:
    a. Renting out ijarah vomitiyah bi al-tamlik objects for rent
    b. Bear the cost of maintaining the object of ijarah vomitiyah bi al-tamlik unless agreed otherwise, and
    c. Ijarah object muntahiyah guarantee bi al-Tamlik are disabled and can not work properly
3. Tenant rights (musta'jir) include:
    a. Using object-Ijarah muntahiyah bi al-Tamlik in accordance with the agreed requirements
    b. Receive Ijara object muntahiyah bi al-Tamlik, or extend the lease term, or find a successor in terms of not being able to transfer ownership of the object Ijara muntahiyah bi al-Tamlik or extend the lease term, and
    c. Pay the rent as promised
4. Obligations of tenants (musta'jir) include:
    a. Pay the rent as promised
    b. Maintain and use an object muntahiyah bi al-Ijara according the agreed Tamlik
    c. Not sublet object muntahiyah Ijara bi al-Tamlik to other parties, and
    d. Perform minor maintenance (not material) to the object of Ijara muntahiyah bi al-Tamlik

2.4. Analysis of Bi Al-Tamlik's Ijarah Munjukiyah Practices (Study of Bi Al-Tamlik Ijarah Munjukiyah Akad No. 024/IMB /IV/10)

The parties to the Ijarah muntahiyah bi al-tamlik contract No. 024 / IMB / IV / 10 is PT IBF which is a finance institution as a lessee (muajjir) and the second party is GMS, which is a limited liability company as a tenant (musta'jir). Therefore, specifically, the analysis in this paper will be adjusted to the Regulation of the Chairman of BAPEPAM LK No. PER-04 / BL / BL / 2007 concerning contracts used in financing activities based on sharia principles, without prejudice to the DSN-MUI fatwa and Bank Indonesia Regulations related to the ijarah muntahiyah bi al-tamlik contract.

Article 15 Regulation of the Chairman of BAPEPAM LK No. PER-04/BL/BL/ 2007 mentioned that the bi al-Ijarah muntahiyah Tamlik shall include at least the following:

1. Identity of the parties
2. Specifications of the object of ijarah muntahiyah bi al-tamlik (ma'jur)
3. Specifications of the benefits of the object of ijarah muntahiyah bi al-tamlik
4. Acquisition price, financing value, rental price payment (ujrah), guarantee and insurance provisions for the object of ijarah muntahiyah bi al-tamlik
5. Term of the lease
6. At the time of submitting the object of ijarah muntahiyah bi al-tamlik
7. Provisions regarding termination of transactions that are not yet due
8. Provisions regarding costs incurred during the lease period
9. Provisions regarding costs borne by each party if there is damage, loss or malfunction of the object of ijarah muntahiyah bi al-tamlik
10. Rights and responsibilities of each party
11. Provisions regarding the transfer of ownership of the object of ijarah muntahiyan bi al-tamlik by the finance company as the lessee (muajjir) to another party (musta'jir)

Documentation in Ijara muntahiyah bi al-Tamlik by the finance company as lessor (muajjir) at least includes:

1. A letter of application for ijarah muntahiyah bi al-tamlik
2. Offering letter
3. Ijarah muntahiyah bi al-tamlik contract
4. Wa'd document
5. Collateral binding agreement on lease payments
6. Goods receipt, and
7. Transfer of ownership agreement

In connection with some of the provisions above, an analysis of the ijarah muntahiyah bi al-tamlik contract No. 024/IMB/IV/10 are as follows:

1. Identity of the parties
   a. The first party is the IBF, which is a limited liability company domiciled in South Jakarta and operates as a finance institution as a leasing provider (muajir).
   b. The second party is GMS, which is a limited liability company domiciled in Palembang as a tenant (musta'jir).
2. Specifications of the object of ijarah muntahiyah bi al-tamlik (ma'jur)
   Article 1 number 1.2 letter j only states that ma'jur is an object of lease in the form of capital goods belonging to muajirs that are leased by musta'jir. However, in the statement of Article 2 number 2.4.2. that the muajjir is given the power to complete the ma'jur specifications described in attachment I. Musta'jir acknowledges that

attachment I is made prima facie regarding the facts and information contained in this attachment.[1]

3. Specifications of the benefits of the object of ijarah muntahiyah bi al-tamlik
   The specifications for the object of ijarah muntahiyah bi al-tamlik are placed in the attachment of the ijarah muntahiyah bi al-tamlik contract, so that the benefits of the object of ijarah muntahiyah bi al-tamlik cannot be explained.
4. Acquisition price, financing value, rental price payment (ujrah), guarantee and insurance provisions for the object of ijarah muntahiyah bi al-tamlik.
   The specifications regarding the rental price and the method of payment are described in Article 2 point 2.2. that the value of ma'jur financing is 518,144,000, - within a period of 36 months. The total value of the financing along with the profit margin to be paid monthly is 18,455,317, - per month. Regarding the terms of the guarantee, this contract confirms that musta'jir guarantees all permits, approvals and authority as required in the ijarah muntahiyah bi al- contract. In addition, to ensure the payment of the amount owed on time and accordingly, musta'jir promise and bind itself to the muajir to provide a payment guarantee from the bank appointed muajir (Bank Guarantee) amounting to 1,300,000,000, -. If deemed necessary, the muajir has the right to ask for guarantees and / or additional guarantees to musta'jir in an amount that is acceptable to the muajir. In terms of insurance, musta'jir promise to insure ma'jur against the risk of loss, damage, destruction, or loss to third parties, fire, theft, accident or other risks that can be insured during the lease period. If musta'jir neglect to comply with these conditions, then the muajjir has the right of his own choice to insure ma'jur. But musta'jir have to pay back to muajir for ma'jur bills, premiums and other costs associated with this insurance. The amount of insurance money must not be less than the amount of the ma'jur rental price that musta'jir still have to pay. If the insurer denies or opposes a claim against the insurance on the grounds that the musta'jir neglected to fulfill the terms or conditions of insurance, then such claim completely be the responsibility of the musta'jir himself. If insurance uses a leasing clause, then Musta'jir agrees that all payment of the results of insurance claims must be paid to the muajir as the owner of the ma'jur and Musta'jir promises not to make efforts to divert the insurance claim payment process from the insurer. to musta'jir or any third party.
5. Term of the lease
   In article 2 number 2.2. It is stated that the lease term is 36 months, effective from the signing of the Ijarah muntahiyah bi al-tamlik contract no. 024/IMB/IV/10.
6. At the time of submitting the object of ijarah muntahiyah bi al-tamlik
   Submission of ma'jur to musta'jir is carried out by the supplier on the date of submission of ma'jur or taken by musta'jir in accordance with the provisions that have been agreed by muajjir, musta'jir and suppliers as follows:
   a. In placing orders for ma'jur, muajjir and musta'jir have required that the ma'jur be submitted to the location of the ma'jur as stated in the Minutes of Handover (BAST) which is an integral part of this agreement.
   b. Musta'jir as an agent of muajjir is the only one who is responsible for checking the good condition of the ma'jur and in accordance with the orders made by musta'jir to the supplier.
   c. Losses incurred due to the supplier's negligence in fulfilling the agreement between the muajir and musta'jir with the supplier, including the loss of delays in the delivery of the ma'jur are fully borne by the supplier.

[1] *Prima facie* merupakan ungkapan Latin yang merupakan bukti/fakta hukum yang memiliki kekuatan hukum tertentu.

d. Muajjir gives up the rights he can have on the supplier to a special musta'jir for the purpose so that musta'jir can file a claim against irregularities made by the supplier based on an agreement between the muajir and the supplier, for the musta'jir's own rental fee, musta'jir have the right to use the funds obtained from the supplier to correct deviations or omissions by the supplier

7. Provisions regarding termination of transactions that are not yet due

Regarding the terms of termination of transactions that are not yet due, can be interpreted into two things, namely termination of the transaction due to payment before maturity and termination of the transaction due to an event of default by one of the parties. Regarding the event of termination of the transaction due to the settlement of the payment before maturity, the contract of ijarah muntahiyah bi al-tamlik No. 024 / IMB / IV / 10 does not specify. However, because the provisions for terminating transactions that are not yet due due to payment of payment are not the main thing in the provisions of ijarah muntahiyah bi al-tamlik, then if there is payment of payment before maturity, the parties can make further agreements regarding this provision.

Regarding the termination of a transaction due to a breach of contract by one of the parties, it is regulated in Article 6 letter a to letter p. If this happens, then all amounts that must be paid by musta'jir based on this ijarah muntahiyah bi al-tamlik contract, either on or after the date of the default, will fall due immediately and must be paid in full (all amounts owed, including fines. and compensation) without any notification or bill required to musta'jir. Then the muajir promise to sell the ma'jur to musta'jir for the same price as the residual value. In addition, the explorer is entitled to the following legal remedies:

a. Request that musta'jir immediately stop using ma'jur and hand over mastery of ma'jur to muajjir. If the musta'jir do not fulfill this request, the muajjir has the right to enter the ma'jur location and take over the ma'jur without notification, decision, court permission or legal process.
b. With this, musta'jir authorize muajjir to dismantle, leave or unused without moving, avoid using ma'jur by musta'jir, close the building where ma'jur is placed, with or without notification to musta'jir and without causing a responsibility in any way for the jurists, whether criminal or civil.
c. The muajjir can withhold all the amounts paid to him according to this ijarah muntahiyah bi al-tamlik contract not as a fine, but as compensation equal to the entire amount of ma'jur rent that has not been paid as well as a decrease in the value of the ma'jur.
d. At the expense of the musta'jir, the muajjir can repair the ma'jur as necessary, in his own opinion, to then be sold or rented again at an opportunity that the muajir considers good and with the conditions stipulated by the muajir. With this, musta'jir free ma'jur from any and all responsibility, both criminal and civil, to enter these places and carry out transfers and closures, and musta'jir promise to pay fines to muajir and free muajir from claims for compensation. arising out of, resulting from or related to the entry of a manager, re-possession, closure, sale, transfer and transfer in any way whatsoever.
e. If a musta'jir receives a sale or transfer of ma'jur, the proceeds from the sale and transfer must be used to pay back the expenses paid by the muajir in connection with the reinstatement, repair, sale or delivery of the ma'jur, appropriate commissions for the sale, all costs and legal wages, fines and compensation as stipulated in this ijarah muntahiyah bi al-tamlik contract. If there is leftover, it is used to pay the rental price and other amounts that must be paid by musta'jir.

If musta'jir do not pay for the shortfall, then the muajir can sue for that deficiency based on the rights of the muajir according to the ijarah muntahiyah bi al-tamlik contract, existing guarantees and applicable laws and regulations. If all the payment obligations by musta'jir have been carried out and there are still leftovers, then it becomes musta'jir's right.

f. Musta'jir firmly agrees that the muajir does not need to notify or ask for prior approval of the procedures for reinstatement, sale or leasing of ma'jur which may be required in the prevailing laws and regulations, and musta'jir expressly waive all claims and rights. the right to fight against the muajir with regard to a claim, reinstatement, detention, repair of the ma'jur, procedures for selling or leasing the ma'jur.
g. Musta'jir try not to prevent or hinder muajir from exercising their rights.

8. Provisions regarding costs incurred during the lease period
Apart from paying the ma'jur rental price, musta'jir must also agree to pay the following conditions:

a. Musta'jir agrees to pay in full the administrative costs and other fees at the signing of this ijaah vomit bi al-tamlik contract and for this repayment, the muajjir will give the receipt to the musta'jir.
b. Payment of the rental price must be made on or before the date of payment of the ma'jur rental price. The first payment of the rental price is made at the time of signing the ijarah muntahiyah bi al-tamlik contract or 30 days after the date stated on the BAST.
c. If the payment is made by bank transfer, check, bilyet giro, or other securities, then the payment will only be binding if the money is stated in the book-entry document belonging to the forward.
d. Musta'jir are not allowed to change or cancel a payment instrument such as checks, bilyet giro, and other transfer documents that have been submitted to muajirs for payment of the ma'jur rental price without the written consent of the muajir.
e. The obligation of the musta'jir to pay the ma'jur rental price, including the rental price, administrative fees, fines, compensation, and other costs based on this akadijarah muntahiyah bi al-tamlik this is the absolute right of the muajir, and musta'jir are not entitled to take it into account with other matters. whatever and the obligation is interpreted as payment for the use of ma'jur during the lease term. Musta'jir promise to pay the ma'jur rental price on the date of payment of the ma'jur rental price and are not allowed to postpone the payment at any price.
f. If musta'jir commit breach of promise, musta'jir must pay compensation to the muajir in an amount equal to 0.25% per day of the amount owed, starting from the date of negligence until the date of payment accordingly. This compensation must be paid immediately and in full at the request of the traveler.
g. Musta'jir must pay any amount owed to muajir by 10.00 WIB on the date of payment of the ma'jur rental price, without any compensation whatsoever for any claims that musta'jir may have to muajjir.

9. Provisions regarding costs borne by each party if there is damage, loss or malfunction of the object of ijarah muntahiyah bi al-tamlik

a. Musta'jir recognize muajjir as the legal owner and the party who has full rights over ma'jur until muajjir gives up their rights in accordance with this ijarah muntahiyah bi al-tamlik contract.

b. Even though the right or ownership of ma'jur with all the rights arising out of it is held and controlled by the muajir, but the risk of loss or damage to ma'jur due to any cause, or any responsibility and or any burden resulting from the operation and / or ownership of it, hereby transferred by muajir to musta'jir and obliged to be carried by musta'jir during the lease period.
c. Musta'jir is not entitled to make changes, market, sell, guarantee, submit or lease back ma'jur to other parties without the written consent of the muajir.
d. The cost of maintaining, maintaining or repairing ma'jur during the rental period is the obligation of musta'jir to muajir.
e. Musta'jir must return ma'jur according to good conditions according to muajjir considerations.
f. Musta'jir are obliged to provide compensation costs for all payments made by the muajir especially for the benefit of the musta'jir, and for all loss or damage to the ma'jur while in the musta'jir's control, except for ordinary damage due to reasonable use. acceptable to the muajir.
g. Musta'jir is fully responsible and obliged to free muajir from any loss from and against any and all dependents, losses, demands, claims, or court decisions of any kind or nature arising out of, relating to, or resulting from ma'jur and contracts. ijarah muntahiyah bi al-tamlik, including but not limited to losses due to choice, delivery, control, use, operation of ma'jur or return of capital goods to suppliers.

10. Provisions regarding the transfer of ownership of the object of ijarah muntahiyan bi al-tamlik by the finance company as the lessee (muajjir) to another party (musta'jir)
Musta'jir acknowledges that muajjir is the legal owner and the party who has full rights over ma'jur until muajjir gives up their rights over ma'jur to musta'jir based on this ijarah muntahiyah bi al-tamlik agreement.
Article 16 of the ijarah muntahiyah bi al-tamlik contract No. 024/IMB/IV/10 regulates options to purchase and renew, that after the proper settlement and after the end of the ma'jur lease period, musta'jir have the right to exercise the option to buy ma'jur with cash payments at a price equal to the value the remainder is through a sale and purchase agreement. After payment through a sale and purchase agreement, musta'jir acquire ownership of the ma'jur. However, if the musta'jir does not exercise their right to transfer the ownership of the ma'jur within a period of one month from the due date of repayment, then the muajir has the right to take back the ma'jur at the full cost of the musta'jir and sell the ma'jur as desired. muajjir on condition that if muajjir only succeeds in selling or transferring ma'jur below the agreed price as contained in the ijarah mutahiyah bi al-tamlikini contract, then the muajjir has the right to ask for that price deficiency from musta'jir and musta'jir be responsible and obliged. pay the shortfall to the muajir no later than 1 month after being notified in writing by the muajir.
11. Rights and responsibilities of each party
The rights, obligations, and responsibilities of the parties in the ijarah muntahiyah bi al-tamlikNo contract. 024/IMB/IV/10 are as follows:
a. Musta'jir is obliged to carry out and/or bear the cost of maintenance, maintenance and repairs for ma'jur during the lease period.
b. Musta'jir is obliged to undertake and / or bear insurance costs during the term of this ijarah vomit bi al-tamlik contract.

c. Musta'jir are obliged to make a security deposit payment of 20% of the total price of the ma'jur including tax without any obligation for the muajir to pay interest or any compensation for the deposit.
d. Musta'jir is obliged to fulfill all requirements and permits stipulated in the statutory regulations and musta'jir's articles of association (if any), including without limitation the management of STNK, business permits, building construction permits, and other requirements or permits along with amendments and extensions.
e. Musta'jir are obliged to return ma'jur in a condition that is considered good by muajjir.
f. In the event of a monetary crisis or bad economic conditions, so that the fixed rental price is no longer able to cover the musta'jir's losses, the traveler has the right without prior approval to change and or adjust the rental price and determine the amount of the new rental price in accordance with current market conditions. With this, musta'jir declare that they accept and agree to the amount of the rental price to be determined by the muajir.
g. After the end of the ma'jur lease period, musta'jir have the right to exercise the option to buy the ma'jur by cash payment at a price equal to the residual value through a sale and purchase agreement.

Regarding documentation in ijarah muntahiyah bi al-tamlik by finance companies as the lessor (muajjir) which at least includes a letter of application for ijarah muntahiyah bi al-tamlik, an offering letter, an ijarah muntahiyah bi al-tamlik contract, wa 'documents d, the agreement for guaranteeing the payment of lease and receipt of goods and agreement for transfer of ownership, akadijarah muntahiyah bi al-tamlik No. 024 / IMB / IV / 10 has met all of these requirements. In addition to the minimum requirements as mentioned above, akadijarah muntahiyah bi al-tamlik No. 024 / IMB / IV / 10 also includes several clauses in the contract, namely related to force majeure, cross default and cross collateral, as well as choice of law and domicile. In a separate agreement, it also includes the terms of the promises (wa'd) of the parties to sell and buy ma'jur.

Force majeure is an event or incident caused by natural disasters, riots, riots, rebellions, epidemics, sabotage, wars, strikes, government policies or other causes beyond the control of musta'jir and muajir. All problems arising from force majeure will be resolved by musta'jir and muajjir by means of deliberation to reach a consensus. Furthermore, regarding the provisions of cross default[1] and cross collateral [2] or cross guarantee or broken cross promise, it is explained that if there is a breach of promise by musta'jir on the ijarah muntahiyah bi al-tamlikini contract, it must also be interpreted that there has been a breach of promise by musta'jir against other contracts (if any) made by musta'jir and muajjir, or by other parties (cross default). For the purposes of akadijarah muntahiyah bi al-tamlikini by musta'jir, a guarantee has been given to the muajjir, then this guarantee must also apply to other ijarah muntahiyah bi al-tamlik contracts made by musta'jir and muajjir (cross collateral).

Regarding the choice of law and domicile, this ijarah muntahiyah bi al-tamlik contract states that all disputes between the parties that may arise in implementing this ijarah vomit bi al-tamlik contract will be resolved by deliberation and kinship between the parties. However, if the deliberation and kinship method fails to resolve the existing dispute, then

[1]*Cross default* merupakan aturan mengenai tata cara dan hal lain-lain yang berkaitan dengan terjadinya *default* (wanprestasi).

[2]*Cross collateral* adalah perjanjian yang berkaitan dengan jaminan-jaminan pada akad yang kemudian dikaitkan dengan perjanjian penyertaan atas perjanjian asal.

the parties agree and agree to settle the dispute at the secretariat office of the Central Jakarta District Court. Regarding the provisions for choosing a domicile for dispute settlement in the District Court, it is contrary to the provisions of the laws and regulations, namely Law no. 3 of 2006 concerning amendments to Law no. 7 of 1989 concerning Religious Courts. Article 49 of Law no. 3 of 2006 states that the absolute competence of the Religious Courts includes examining, deciding and settling cases between Muslims in the fields of marriage, warta, wills, grants, waqf, zakat, infaq, shadaqah, and sharia economics. Meanwhile, related to the regional decision of the District Court, namely Central Jakarta, it is also not in accordance with the provisions of statutory regulations. In the procedural procedures at the Religious Courts, it has been determined that the filing of a lawsuit for disputes is at the residence of the defendant or the residence of the plaintiff in certain cases. In retrospect, the position of the lessee (muajjir) as the first party is in South Jakarta, while the position of the lessee (musta'jir) as the second party is in Palembang. Thus, the selection of the District Court area, namely Jakarta Pusat, was not based on the law.

Apart from the additional provisions as mentioned above, the provisions regarding the option rights in the ijarah muntahiyah bi al-tamlik contract also need to be criticized. Article 14 Regulation of the Chairman of BAPEPAM LK No. PER-04/BL/BL/2007 the arrangement regarding the price for the option to transfer ownership of objectijarah muntahiyah bi al-tamlik is determined after the end of the lease period. Meanwhile, the ijarah muntahiyah bi al-tamlik contract No. 024 / IMB / IV / 10 includes the parties' promises to sell and buy ma'jur, which includes a purchase price of Rp. 129,536,000, even though it is continued with the sentence "or during the lease period at a price to be determined by muajjir in accordance with the bookkeeping made by musta'jir in connection with the provision of this facility.

3. KESIMPULAN

The ijarah muntaiya bi al-tamlik contract is an agreement for the provision of funds in order to transfer the use rights or benefits of a good or service based on a lease transaction with an option to transfer ownership of the goods. In practice, this contract is not only applied in Islamic banking institutions, but also in Islamic financing institutions as a form of Islamic financial institutions. Apart from the DSN-MUI Fatwa No. 27/DSN-MUI/III / 2002 regarding ijarah muntahiyah bi al-tamlik, a regulation that specifically accommodates the implementation of the ijarah muntahiyah bi al-tamlik contract in Islamic financing institutions is the Chairman of BAPEPAM LK Regulation No. PER-04/BL/ 2007 concerning contracts used in financing activities based on sharia principles and Regulation of the Chairman of BAPEPAM LK No. PER-03/BL /2007 concerning financing activities based on sharia principles.

Overall Ijarah muntahiyah bi al-tamlik contract No. 024/IMB/IV/10 is in accordance with the applicable implementing regulations (Regulation of the Chairman of BAPEPAM LK No. PER-04/BL/2007 concerning contracts used in financing activities based on sharia principles), so it is legal to implement. However, there are a number of things that must be observed and reexamined so that they do not conflict with other applicable laws or cause confusion and even a legal vacuum in the event that things are not desired. First, fixing the purchase price if later the musta'jir choose the option to buy ma'jur which should not be allowed to be stipulated at the beginning of the contract, even though this contract does not deny any adjustments to certain circumstances. Second, determining the judiciary that will be used in the dispute resolution process. Regarding the two notes, the writer hopes that the writing can be one of the considerations so that later the parties involved in transactions related to sharia business law will really pay attention to the applicable laws and regulations

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THE EXISTENCE OF ISLAMIC LAW IN THE CENTRE OF LEGAL GLOBALIZATION (STUDY OF ISLAMIC SHARIA ENFORCEMENT IN ACEH PROVINCE)

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Abstract

The purpose of this study is to determine the interaction process between Acehnese and Islamic law and, how Islamic law survives amid the current of legal globalization. This study is constructed as a prescriptive doctrinal legal study, which used a conceptual approach where arguments are systematically built from the views of experts. The data used are secondary data in the form of primary legal materials, namely regulations and secondary legal materials in the form of scientific paper (journals), books and other written sources, those data then analyzed using descriptive analytic technique. The study result shows that the interaction of the Acehnese with Islamic law had been going on for a very long time, dated back to 700 AD. Back then, the enforced customary law was originated from the Sultan's law, part of Islamic law, and a mixture of indigenous customary and Islamic law. Those composition then persisted until the enactment of Islamic law was legalized in Law Number 18 of 2001 on Special Autonomy for the Special Region Province Aceh as the Province of Nanggroe Aceh Darussalam, which was also marks the beginning of the *Qanuns* making (regional regulations based on Islamic law). The mechanism of how Islamic law should be exercised, so it survives in the middle of legal globalization, among others, could be expressed in four ways, namely: (1) obtaining legitimacy in drafting *Qanuns* (regional regulations based on Islamic law) from the the state's authority. (2) Islamic law should lay in line with the values held by society. According to the theory introduced by Steven Vago, a law making from the perspective of functionalist, is a rearrangement of several customs. (3) *Qanuns* that are made should provide benefits to the community; (4) An effective *Qanun* legal system, could be measured from the decreasing number of violations.

I. INTRODUCTION

Globalization is an unavoidable consequence of international relations. Globalization has encouraged people in the world to remove state and nation barriers. Anthony Giddens characterizes this process as an intensification of worldwide social relations, linking distant localities in such a way that local events are shaped by events occurring thousand miles away and vice versa [1]. Originally, the beginning of globalization goes back to a time where relationship between humans was established in the early days. In this sense, globalization as a dynamic has long accompanied humans, even though its existence has only recently been realized.

Globalization influence is felt in almost all areas of life, including law. As part of a complex social system that exists in legal community, law had had a major impact with the surging of globalization. One of the important aspects of globalization and law is how developed countries use law against developing countries for political purposes [2]. In Indonesia, those aspect can be felt by the emergence of legislations that are motivated to fulfill the political needs of the rulers who subsequently cannot be separated from the influence of developed countries. Law as a social reality should be in accordance with the values adopted in society. In Indonesia, these values are crystallized in Pancasila. Thus, Indonesia's positive law is regarded as a good law, if those law is complying with Pancasila [3]. Attempt to simply transfer laws from one country to another is not the right measure, as was stated by Robert Seidman in the concept of The Law of the Non-transferability of Law. Laws should be born from the values existed in society reflected in the regulations made by the state. Though the clash of cultures in globalization era is 100% inevitable, it does not mean no walls existed between cultures. The field of law, ultimately, is uncertain still whether the laws from developed countries are suitable to be implemented in Indonesia [4].

Indonesian positive law allowed the central government to grant special autonomy to several regional governments, one of which is the Aceh government. At 2001, on the mandate of TAP MPR No. IV / MPR / 1999, Law No. 18 of 2001 on Special Autonomy for the Province of Nanggroe Aceh Darussalam was passed (State Gazette No. 114 of 2001, 9 August 2001). But, 206 the law was replaced by Law No. 11 of 2006 on Aceh Governance

(UUPA). In principle, the new law regulates special authority of the provincial government of Nanggroe Aceh Darussalam which differ from the authority of other regional government as stipulated in Law no. 18 of 2001, Law no. 32 of 2004 and Law no. 33 of 2004 [5]. In order to exercise the law mandates, a special government system was formed in Aceh, including *Qanuns* which basically served as regional regulations that specifically applied in Aceh region only. Among the *Qanuns* that were enacted, were the Aceh *Qanun* Number 8 of 2014 concerning the Principles of Islamic Sharia.

The historical origins of Aceh as a province authorized to implement special autonomy cannot be separated from the fact that the Acehnese have accepted Islamic law as a whole. This fact is reinforced in Van den berg's view that claims Indonesian Muslims have acquiesced Islamic law as a whole and as a unit; *reception in complexu.* [6]

Religion for Acehnese is not only a symbol of struggle and politics, but also the ultimate goal of the struggle itself. The reception process takes place in such a way that it is difficult to distinguish between Islamic law and the customs of the Acehnese. The customs in Acehnese society must not contradict Islamic law which originates from the Koran. Islam has penetrated deeply that it becomes the main guide in carrying out all activities, including governmental activities.

In the context of law and globalization, what is happening to the people of Aceh is interesting to study. Especially with regard to how Islamic law, which has become customary law as well as part of the Acehnese society, is able to survive and strive in the midst of legal globalization, where attempts by developed countries to intervene in law making in developing countries with various efforts and interests are always present. It should be noted, that the ability of Islamic law to survive in the midst of legal globalization is closely related to the effectiveness of the law in society.

1.1 Research Method

This study is constructed as a prescriptive doctrinal legal study, which used a conceptual approach where arguments are systematically built from the views of experts. The data used are secondary data in the form of primary legal materials, namely regulations and secondary legal materials in the form of scientific paper (journals), books and other written sources, those data then analyzed using descriptive analytic technique.

1.2 Paper Structure

This article focuses on discussing the historical approach of interaction process between the Acehnese and Islamic law. The effort to find out the interaction of Islamic law with the Acehnese society is an effort to answer how strong the relationship between Islamic law and Acehnese society is. Apart from that, this paper also discusses how Islamic law can survive in the midst of legal globalization currently sweeping all countries in the world.

II. BACKGROUND

2.1 The Interaction Process between Acehnese and Islamic Law

The people of Aceh are known as people who are devoted in the religion of Islam, which translates that the spirit grows in society at large has carried out the pillars of Islam and has a relatively high power of fanaticism in religion. The population of Aceh occupies an area of 55,390 km2 with the majority (97.3%) being Muslim, while those who are non-Muslim mostly come from outside Aceh, usually are government employees or migrants [7].

The interaction history of the Acehnese with Islamic law began when Islam first came to Aceh. Aceh is the first region in the Indonesian archipelago and Southeast Asia permeated by Islamic teaching around 700 AD. This is due to the strategic position of Aceh region which lies on an important trade route between India and China. The interaction between the natives and Muslim traders from Arabia, Persia and India originally transpire in this trade route [8]. However, the ancient history of Aceh dated back to the first half of

the 13th century AD. According to the Chronicle of the Aceh Kingdom, the Aceh Darusssalam Kingdom was founded on Friday, the first day of Ramadan in 601 H (1205M) by Johan Syah who came from Negeri Atas Angin (Middle East). Along the time, He gradually converted the Acehnese into Muslim and then married a local woman. After the marriage, he lived in the area of Kandjong (Tanjung Batu) [9]. The process of Islamization continued until the 16th and 17th centuries the Sultanate of Aceh became the largest kingdom in Sumatra. In the political realm, the Sultanate of Aceh controls most of the coasts on the island of Sumatra [10].

The discourse surrounding the implementation of Islamic law in Aceh is often faced with the question of whether, along with the entry of Islam in Aceh, Islamic law was also applied during the Sultanate of Aceh. This is interesting to study because when Islam began to be known by the people of Aceh, previously Hindu and Buddhist teachings had also entered into their belief systems. Ayang Utriza Yakin's views that, in general the law practiced in Aceh that time was customary law. The criminal law used back then is also customary law, but with an added nuance of Islamic law. Previously, there are sultans of Aceh who impose penalties for criminals in accordance with the sharia's commends, such as, a thievery which requires the perpetrator arms and legs to be cut. Unfortunately, often the punishment then exceeds limits set by Islamic law and at some point, completely deviated from it. In the 16th and 17th centuries the Aceh Sultanate had previously used and implemented customary law, though what was often applied was the Sultan's law. For example, the Sultanate of Aceh had made a Law consists of 105 articles covering customary law, Islamic law, and a mixture of both laws. Customary law consists of 89 articles (93.45 percent), 15 articles of Islamic law (15.75 percent) and a mixture of both 1 Article (1.05 percent). Based on those Law, it appears that the dominance of customary law is strong [11].

Back then, punishment type which were practiced during the Sultanate of Aceh included cutting off parts of human body such as hands, legs, nose, ears, lips, genitals, gouging eyes, scorched by hot iron, body sawing, body mutilation, neck slaughtering, strangling, beheading, trampling and dragging bodies by elephants, mauled by tigers, burned alive, hanged, penetrated by hot lead, genitals stabbed with bamboo, crucified. This punishment shows at that time, power is the source of law, and the king is the enforcer of law which free of mistake or wrong doing [12].

Later, in the era of Aceh kingdom, the law enacted was a combination of Islamic law and customary law which was considered not against the syara'. At this time, the division of power in the Aceh Darusssalam kingdom consisted of: [13] *a.* executive power or political and customary power governed the sultan or the head of government; *b.* judicial power or law enforcement exercised by the ulama (Islamic cleric); *c.* Legislative power or the power of law-making conducted of Putro hangs. The power was given to him, because Pahang's daughter was the one giving advice to Iskandar Muda to form an institution called the People's Court Council Hall; *d.* Protocols or reusam drafting is in the hands of Admiral or Commander of the Aceh Armed Forces, however it should be noted that under any circumstances, adat (customs), *Qanun* and reusam cannot be separated from the law, as it was defined as Islamic teachings. customs and Islam then form a harmonization bond that cannot be separated from one another.

Therefore, it is established that islamic nuance had been strongly influential in the political choices of the Aceh population in community life. The deep and specific relationship between Islam and Acehnese is a strengthening and adhesive factor for the implementation of Islamic law in the life of the people of the Veranda of Mecca. The implementation of Islamic law in Aceh arose because of the central government political policies in resolving the prolonged conflict in the Aceh region. In the beginning of the birth of the new order era, the DPRD - GR (Regional People's Representative Council - Gotong

royong) drafted a Regional Regulation on the implementation of Islamic sharia elements as the operationalization of Aceh's special status in three special fields, namely religion, education and culture. However, at that time, Regional Regulations for implementing Islamic law cannot be enacted as the Central Government refused to approve it, those action caused a further disappointment in Acehnese.

The disappointment of the Acehnese was originally driven by the existence of the Free Aceh Movement (GAM) established in 1976. In 1978 ten years after the New Order era imposed increasingly repressive political and military policies by placing Aceh as a Military Operation Area (DOM) which caused much suffering to the lives of Acehnese. At this time the issue and agenda for implementing Islamic sharia was completely submerged. Responding tp that, GAM did not remain silent and started arranging forces of guerrilla resistance against the Indonesian government until the end of the new order era in 1998. After the new order are ended, a new reformation era was born. During the early days of reformation, the central government consecutively led by Habibie, Abdurrahman Wahid and Megawati Soekarnoputri, policies that tended to be authoritarian were still lingering around, although it was decreasing in number compared to the New Order era. Despite the change, in the presidency of President Susilo Bambang Yudhoyono, a Civil Emergency provoked by GAM rebellion still occurred, even though Aceh since the reform era had changed from its special economic status to Nangroe Aceh Darussalam with the implementation of Islamic law.

In the reformation era, a change in the political climate has provided pressure and at the same time new space for the people of Aceh to regain their basic rights. In the reform era, the MPR of the Republic of Indonesia, which represented the highest aspirations of the Indonesian people, issued TAP MPR Number 5 of 1999 and Law Number 44 years 1999 regarding the status of Aceh as special autonomy with the application of Islamic law in all aspects of life, education based on Islam and custom that does not conflict with the sharia of Allah SWT [14].

As an effort to dissolve the tension, in the vulnerable period of 1999-2002, when the GAM separatist movement grew stronger, the Central Government in Jakarta, supported by the House of Representatives, made a new breakthrough by enacting Law Number 44 of 1999 concerning the Implementation of the Special Region of Aceh. In 2001 the Central Government even passed Law Number 18 Year 2001 regarding Special Autonomy for the Province of Aceh as the Province of Nanggroe Aceh Darussalam. Following that in 2003, Presidential Decree No. 11 concerning the Sharia Court in the Province of Nangroe Aceh Darussalam was also issued. After the TAP MPR and the two laws for Aceh were enacted, various Regional Regulations (*Qanuns*, Perda) of the Province of Nangroe Aceh Darussalam regarding the implementation of elements of Islamic law (18 *Qanuns* / Perda), and Governor Instruction (11 Instructions) which regulates various aspects of the implementation and application of Islamic law were issued on the Veranda of Mecca [15]. This then, reduced GAM's armed resistance, leading to the Helsinki peace agreement in 2005.

A concrete step of Islamic law implementation in Aceh is the implementation of flogging / whipping in June 2005. 20 perpetrators of gambling, adultery and prostitutes who have been found guilty by the local sharia court were whipped as a punishment in Bireuen District. The implementation of the whiping followed after the signing of Nangroe Aceh Darussalam Governor Decree, Azwar Abubakar, in the Meulaboh area on Friday, June 10, 2005 to ensnare the perpetrators of gambling, adultery and prostitution. According to Azwar Abubakar, the Governor's Decree as a substitute for the Regional Regulation (*Qanun*) is proof of the seriousness of the Regional Government and the people of Nangroe Aceh Darussalam to implement Islamic sharia in *kaffah* [16].

The enforcement of whipping as punishment in Aceh incites various reactions. For some parties, the application of whipping is felt to be insufficient or does not reflect a sense of justice intended and contained by Islamic sharia, because it is only applied to perpetrators with small cases and does not pursue large cases. The 20 people who were sentenced to whipping in Bireueun generally accepted the sentence as obedience to Islamic law, but among them there were also those who requested that whipping and other sharia laws be enforced for gambler and violator of Islamic sharia classified as the upper-class people, thus it does not cause favoritism in the eye of Acehnese.

The Indonesian Mujahidin Council fully supports the notions of applicating whipping law. The punishment then also enforced for higher crime category, even including crime where the law stated that the criminal hands should be cut instead. As an example, a Muslim corruptor who caused national loss equivalent to Rp. 1,000,000 should punished by cutting off one's finger. Progressively, a corruptor causing national loss equivalent to Rp. 10,000,000 should be punished by cutting off ten fingers, while a corruption equivalent or over of 1 billion idr, could be punished by cutting off one's palm. The procession of whipping and cutting hands should be broadcast live on television and reported by all printed and electronic mass media following the live broadcast of whipping in Bireueun Regency.

The extent to which how far should the state (Government of Nangroe Aceh Darussalam/NAD) be involved in the matter implementation or enforcement of Islamic is also a matter to discourse and debate. Does the state (Government of NAD) have to be fully and completely involved in the implementation of Islamic law or only partially involved with a role that does not have to be optimal and comprehensive. There are several developing views justifying the state involvement in general public conduct. First, there are aspects of Islamic sharia that have to be interfered with or managed by the state, for example by including these aspects into the legal system it will be guarded by the state, in this case by courts and other law enforcement officials. Second, there is an aspect of Islamic sharia included in the formal education curriculum and taught to all Muslim students throughout Aceh. Third, there are aspects of Islamic sharia which are taken into account by the State (Government of NAD) when making policies. Fourth, there is an aspect of Islamic sharia whose application is left to the community with the state acting as the provider of facilities such as providing places of worship and others. Fifth, there are aspects of Islamic sharia that are not interfered with and are not facilitated by the state, whose implementation depends on the obedience and awareness of every Muslim, such as in carrying out the obligatory five daily prayers and so on [17].

State intervention is not only eligible for Muslims but also for non-Muslims. Data from the Central Bureau of Statistics show that the total population of non-Muslims Acehnese in 2010 showed the percentage of Protestant Christians at 0.84%, Catholics 0.16%, Buddhists 0.18% and Hindhu 0.02%. Non-Muslims who commit criminal acts (Jarimah) together with Muslims Acehnese, could choose to declare their voluntary submission to *Qanun Jinayah*. Voluntary submission is also known in criminal act of storing and trading liquor (*khamar*).

An example of the case is the submission of L Liu alias YM. A Buddhist resident of the town of Sigli alleged to storing and trading *khamar*. Liu was finally tried at the Sigli Sharia Court. The judge verdict of this case, was [18]:

"Whereas the defendant as a Buddhist, stated that he had voluntarily submitted to the Jinayah law in force in the Province of Nanggroe Aceh Darussalam, therefore the defendant did not object and was willing to be tried at the Sharia Sigli Court". The judge consideration for granting the submission in the case of Syari'ah Sigli Court No. 02 / JN / 2008 / Msy-SGI decision, is as follow:

"Everyone who is not a Muslim who commits Jarimah's actions in Aceh which are not regulated in the Criminal Code or other criminal provisions outside the Criminal Code, but are regulated in Qanun Jinayah." The voluntary submission clause and the enactment of the *Jinayah Qanun* are also expressly stated in Article 129 of Law Number 11 of 2006 concerning Aceh Governance. Article 129 paragraph (1) states:

"In the case of Jinayah actions that are carried out by two or more people together, among whom are non-Muslims, the perpetrators who are not Muslims can choose or voluntarily comply to the Jinayah law".

Furthermore, Article 129 paragraph (2) states: *"Every person who is not Muslim commits Jinayah acts which are not regulated in the Criminal Code or criminal provisions outside the Criminal Code is applicable to Jinayah law"*. Article 126 of Law Number 11 Year 2006 concerning Aceh Government states: (1) Every Muslim in Aceh is obliged to obey and practice Islamic law; (2) Everyone residing or in Aceh is obliged to respect the implementation of Islamic law. Here we can see the implementation of subject (personal) principle and territorial principle of *Qanuns*. The subject (personal) principle applied to anyone who is Muslim; whereas the territorial principle applied to all people living in Aceh. However, there are still mechanisms that are not clearly regulated yet. For instance, the *Qanun* on the *Jinayat* Procedural Law does not clearly regulate how the non-Muslim mechanism states voluntary submission and the voluntary submission stage process.

The application of Islamic law in Aceh is admittedly born from a long, unforgettable struggle in the history of the Indonesian nation as a whole. Historians say that the laws in force in the Aceh kingdom at that time were a combination of laws based on Islam and customs that were deemed appropriate and not contradicting syara' (form of sharia). This combination can be proven in the adage "religion and customs are like substances and characteristics that cannot be separated, and are like black and white eyes". This saying provides a powerful picture of Islamic influence in the society dynamics in Aceh. The complete acceptance of Islamic law seems to replace the old belief system with a new one as stated by Dedi Ismatullah. The movement of Indonesians from old ritual beliefs and practices to Islam where the new religion is no longer seen as a complement to old beliefs and ritual practices, but as a new pattern and system of people's beliefs concerned [19]. Those reality can be seen in the daily lives of the Acehnese people who totally accept the existence of Islamic law without rejection.

2.1.2 How Islamic Law Survives amidst the Legal Globalization

The ability of Islamic law to survive in the midst of legal globalization can be seen from the way Islamic law works in the form of *Qanuns* which include several aspects:

1. Obtaining legitimacy in drafting Qanuns from the the state's authority.

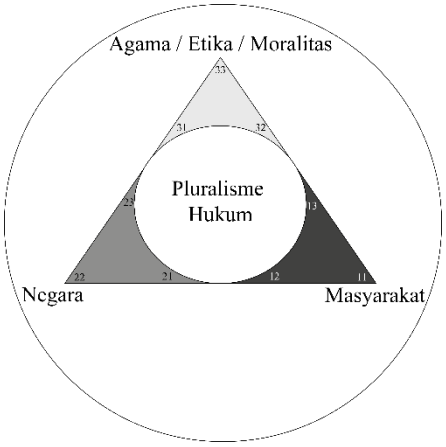
Aceh Government's efforts to implement Islamic law as part of the Indonesian state originally started since post-Indonesian independence then only succeeded after the reform era in 1998. Those movement greatly contributed in changing the centralized system of Indonesian government to a decentralized government system, which then led the granted permission of Aceh Province to implement Islamic Sharia.

In 1999, Law Number 44 concerning the Implementation of the Special Region of Aceh Province was drafted. Subsequently, Law Number 18 of 2001 concerning special autonomy was made for the Province of the Special Region of Aceh as the Province of Nanggroe Aceh Darussalam. To strengthen the application of Islamic law, Law Number 11 of 2006 concerning Aceh Government was made, which then amended and revoked by Law Number 18 of 2001. After the enactment of Law Number 18 of 2001, positive law making based on Islamic law was initiated.

As Indonesia is a country based on rule of law principle, the implementation Islamic law by Aceh local government must also legitimized by the law. Laws made based on Islamic Sharia must be in the form of the state's statutory system, means, it has to be formalized in the form of regional regulations. It is why, Islamic law contained in this Regional Regulation is called *Qanun*.

According to the Kaelan's view, the state is essentially a social institution, thus the state is the society itself. People represent themselves in the country with their dignity and they took in organizing and managing themselves to achieve common prosperity in their lives. In this sense, the state views society not as an object outside of itself, but as a genetic source of itself [20]. Kaelan's view is the foundation of legitimizing the desire of the Acehnese to implement Islamic law, which was later acquised by the state. This also act as a recognition that the Acehnese are genetically part of Indonesian society [21].

Related to that, Werner Menski's view in the triangular concept of legal pluralism, states that the plural nature of law is something that cannot be ignored, and there are many complexities associated with the plural nature of the law. Menski further said that law as a global phenomenon has similarities throughout the world, in the sense that every law consists of ethical values, social norms, and rules made by the state. Therefore, Menski defines the approach of three main types of law, namely laws created by society, laws created by the state, and laws that arise through values and ethics as described in the circle below: [22]



Within the global framework of comparative studies of law and legal systems, it is clear that a narrow approach to law as state law will not produce a correct understanding of non-European societies and cultures, nor will it result in a satisfactory analysis of legal phenomena even in its Eropean manifestations [23]. According to Menski's, legal pluralism in a global context is something that cannot be denied. It must be admitted that in non-European countries, sometimes its not only consists of one single legal concept. This is concluded from the results of study conducted by Menski on the Asian and African legal systems [24].

In reality, there is a legal pluralism that comes from state law that derived from positivism perspective, law made by the community that depart from a socio-legal approach, and religious law that originates from God's law that flows from the school of natural law. The theory put forward by Menski through the triangular concept of legal pluralism is very relevant to the legal system in Indonesia [25]. The legal system in Indonesia recognizes the existence of state law, customary law, and religious law, especially Islam, as part of the national legal system simultaneously. This recognition is found, among others, in the Aceh government which is given special authority to regulate and manage government affairs and

the interests of the local community in accordance with the laws and regulations as stipulated in Article 1 paragraph (2) of Law Number 11 of 2006. Special powers following that, includes the application of Islamic law through *Qanun* (Regional Regulations) made by the local government.

The application of Islamic law in the Aceh regional government as a part of the unitary state of the Republic of Indonesia is also based on basic principle which only applies for Muslim people. Because Islamic Sharia regulates all aspects of life, all aspects of life in Aceh regional government will be based on Islamic Sharia. Not only in the field of law, but other fields including political, economic, social, governmental, and educational aspects. This is confirmed by the Aceh *Qanun* Number 8 of 2014 concerning the Principles of Islamic Sharia. Article 7 paragraph (1) states *"Every Muslim in Aceh is obliged to obey and practice Islamic Sharia"*. This article emphasizes that the Aceh regional government legally requires the Muslim population of Aceh to obey and implement Islamic law. Referred by this article, the local government organs, in this case the civil service units in Aceh called wilayatul Hizbah, can force Muslim residents to implement and obey Islamic law, by taking certain actions such as controlling Muslims to pray and fasting. Ramadan.

The Aceh Regional Government requires Muslim Acehnese to obey and implement Islamic law, because the Aceh regional government been rightfully granted by the constitution based on the willingness and awareness of the Acehnese to implement Islamic law. Thus, the awareness of the population in a certain area to implement Islamic Sharia is a right granted by the Constitution. This is what called as the principle of religious freedom, namely *"The human right to believes that any religion, and performing religious rituals, according to the rules defined by the Law without imposing it on others"* [26]. In Article 29 paragraph (2) of the 1945 Constitution it is stated that *"The state guarantees the freedom of each resident to embrace his or her own religion and to worship according to his religion and belief."*

In Islamic teachings implementing Islamic Sharia is implementing Islam. Therefore, the state not only guarantees its ability, it is even obliged to recognize the awarenessa and willingness of the Muslim community to practice Islamic law. Having Islamic law is implementing what is prescribed by Islam.

In the implementation of Islamic Sharia, the Aceh regional government recognized that Aceh is not a state, but is part of the unitary state of the Republic of Indonesia. Thus, the implementation of Islamic law is carried out proportionally. Therefore, Article 9 of the Aceh *Qanun* Number 8 of 2014 stipulates:

"The Aceh government and district / city governments guarantee freedom, foster harmony, respect religious values adhered to by religious communities and protect fellow religious communities whether to carry out their daily life and worship in accordance with their religion."

This article warns that local governments should not enforce the Islamic law on non-Muslim residents. This principle is what Will Kymlika calls religious tolerance. A thought that emphasizes individual freedom in religion [27]. This means that the application of the Islamic Terms in Aceh is only applied to Muslim Indonesian citizens based on territorial principles. This is what is then used as the principle for the application of the Islamic criminal law in Aceh as stipulated in Article 2 *Qanun* Number 6 of 2014 concerning *Jinayat* law which states that the implementation of *Jinayat* law is based on Islamic principles.

With the legitimacy of the state's power to formulate *Qanuns* (regional regulations) based on Islamic law, the existence of Islamic law in Aceh has received recognition as part of a limited national legal system where its power lies within the boundaries of Aceh region. This recognition is very important because with this legitimacy, there is no power outside the state that may intervene to try to abolish the special authority to form *Qanuns* based on

Islamic law with certain objectives. In this way, some of the Islamic laws applied in Aceh can continue to exist.

2. *Islamic law should lay in line with the values held by society.*

The functionalist view holds that lawmaking is a restatement of some adat (for example, those dealing with economic transactions and contractual relationships, property rights in marriage, or deviant behavior) so that legal institutions can enforce them. This functionalist view suggests that failure in other institutional norms encourages reinstitutionalization of the norm by legal institutions. From a functionalist perspective, laws were passed because they represented the voice of the people. Law is basically the crystallization of habit, from the existing normative order [28].

According to historical studies, the formation of the Aceh Darussalam kingdom brought a deep cultural perception. This is clearly seen in various ancient Aceh proverbs such as the words: "Adat ngon hukom lagee substance ngon sifeut". Which translate to “the relationship between adat and law (Islam) is like a substance with its nature.” The proverb shows that Islam is very influential on the thoughts and actions of the Acehnese [29].

The people of Aceh are people who have inherited a culture that has developed well in the past and are became their pride. They have also inherited a religious life that has become a cultural identity and elevates their dignity. In fact, the struggle of the Acehnese people against pre-independence Western nations was essentially a struggle against the enemies of religion and the state. As an illustration, the Acehnese fighters always referred the Dutch colonial as *"Khape-khape Holland"* (kafir-infidels Netherlands) [30]. It appears in the perceptions of the Acehnese that the influence of Islamic teachings is so strong in coloring their traditions and culture. This way of conduct, is inseparable from the very strong interaction process between Islam and the Acehnese people. A theory then emerged which describes the complete process of acceptance of Islamic law as if it replaced the old belief system with a new one as stated by Dedi Ismatullah. The Indonesians change of beliefs from old ritual beliefs and practices to Islam, where the new religion is no longer a complement to old ritual beliefs and practices, but as a new pattern and system of belief for the person concerned.

The sociological condition of the Acehnese people is in line with the points of thought conveyed by Von Savigny, who argues that the law was found, not made. The growth of the law basically occurs through a process that runs organically and unconsciously [31]. Embarking from Savigny's opinion and the process of Acehnese culture forming , it cannot be denied that the emergence of demands for the application of Islamic law accommodated by the government through Law Number 18 of 2001 concerning Special Autonomy for the Province of Nangroe Aceh Darussalam, in fact was born from a long journey of the Acehnese to find a legal ideal that is in line with Islamic values adhered to by the people of Aceh since the arrival of Islam in 700 AD. It is also historically recognized, where Ayang Utriza Yakin's argues that, during the Sultanate of Aceh most of the laws applied by the Sultan, especially in the field of criminal law, were customary law or in Ayang Utriza Yakin's view, was called Sultan law. However, from the application process, it is found that Islamic law exists, although it is still limited. This indicates that the process of interaction between Islamic law and Acehnese society has been going on for a long time and in continuity.

So it can be concluded, that the application of Islamic law in Aceh is based on the values adopted by the Acehnese people which reflect the identity and culture that has long been embedded in the soul of the Acehnese people. As the old Aceh proverb says *"Adat ngon hukom lagee substance ngon sifeut"* that roughly translated as the relationship between adat and law (Islam) is like a substance with its nature. Other evidence related to the strong

influence of Islam on Acehnese society, can also be found in indigenous Muslim people demographics. While it is true that not all of Aceh resident are Muslim, the non-Muslim Acehnese mostly come from outside Aceh are usually immigrants or government employees [32].

Laws that are derived from the values adopted by society will be widely accepted in practice and tends to give birth to legal effectiveness. Therefore, the birth of the *Qanun* on Islamic law in the context of globalization of law is expected to be able to survive as Savigny's view that laws were found not made. Departing from this viewpoint, the application of Islamic law that was born from the desire of the Acehnese people is an invented law.

3. Qanuns should provide benefits to the community

The purpose of law based on the perspective of the utilitarian's, is solely to provide the maximum benefit or happiness for the whole society. The handling is based on the social philosophy that every member of society seeks happiness and law is one of the tools. Jeremy Bentham argues that the existence of a state and law is solely for the true benefit, namely the happiness of the majority of the people [33]. Jeremy Bentham's measurement of utilities, can be used as a basis for measuring the benefits of implementing Islamic law through *Qanuns* for the people of Aceh. For this reason, legislation must strive to achieve four objectives [34]:

1) to provide subsistence;
2) to provide abundance;
3) to provide security; and
4) to attain equality.

If Jeremy Bentham's mechanism is used in measuring the purpose of benefits created by the application of the Islamic law *Qanun* in Aceh, at least the third and fourth objectives have been achieved. The formation of *Qanuns* in the scope of *Jinayat* (criminal) law is intended to regulate order and provide legal protection to the community, as Steven Vago and Steven E. social. In this perspective, crime is considered socially detrimental [35]. Whereas the application of Islamic law in Aceh aims to provide protection to the entire community, although the *Qanuns* made by the local government are binding on the Muslim community only, the impact of protection can be felt by the entire community.

The protection provided can be seen in Article 126 of Law Number 11 of 2006 concerning Aceh Government, which states: (1) Every Muslim in Aceh is obliged to obey and practice Islamic law; (2) Everyone residing or in Aceh is obliged to respect the implementation of Islamic law. Article 129 paragraph (1) of Law Number 11 of 2006 concerning Aceh Government states:

"In the case of Jinayah actions that are carried out by two or more people together, among whom are non-Muslims, the perpetrators who are not Muslims can choose or voluntarily submit to the Jinayah law." Furthermore, Article 129 paragraph (2) states*: "Every non-Muslim person who commits Jinayah acts which are not regulated in the Criminal Code or criminal provisions outside the Criminal Code is applicable Jinayah law."*

Another benefit associated with Jeremy Bentham's legal goal is to achieve equality. In the context of the enactment of the Sharia *Qanun*, it is intended to provide an equal position before the law. This can be seen in the legal substance in Article 20 of Law Number 11 of 2006 which reads "The implementation of Aceh Government and district / city government is guided by the general principles of governance which consist of:

(a) Islamic principles;
(b) legal certainty principles;

(c) the principle of public interest;
(d) the principle of orderly governance;
(e) transparency principles;
(f) proportionality principles;
(g) principles of professionalism;
(h) accountability principles;
(i) the principle of efficiency;
(j) the principle of effectiveness;
(k) equality principles.

4. An effective Qanun legal system

One indicator that can be used to measure the effectiveness of *Qanun* laws in Aceh is the decrease in violations every year. Based on data obtained from two regions, Aceh Selatan and Aceh Tamiang, there has been a decrease in the number of cases of *Qanun* violations from 2016 to 2018. This data is based on cases submitted to the Syar'iyah Court, it should be mentioned, however, violations of *Jinayat* law sometimes do not reach the Sharia Court. According to the results of the interviews, many cases were resolved at the village level and at the *Wilayatul Hisbah* level, especially cases of *ikhtilath* and *khalwat* as well as other minor cases as described by the table in the end of this article [36]:

Although, those data does not represent the entire region of Aceh, however, from this data at least a description of the effectiveness of the implementation of *Qanuns* applied in that region can be obtained. From this data, it can be seen that there was a decrease in the rate of violations from 2016 to 2018. In the South Aceh region, the decline in the number of violations of *Qanuns* reached an average of 23.33 percent from 2016 to 2018. Whereas in the Aceh Tamiang region the rate of violations against *Qanuns* down an average of about 27.95 percent.

The decrease in the number of violations against *Qanuns* can be understood empirically as an indicator of the level of law compliance in society. As stated by Achmad Ali, legal awareness, law obedience and legal effectiveness are three interrelated elements [36]. With the existence of law obedience, legal effectiveness will be realized.

The decrease in the number of violations that occurred in two districts, namely Aceh Tamiang and Aceh Selatan from 2016 to 2018, at least can be an early indicator of the emergence of public legal awareness which expected to be the birth of legal effectiveness. Although, according to H.C Kelman legal compliance quality is divided into three types: (1) obedience as compliance, where a person only obeys the rules because they are afraid of being penalized; (2) obedience described as identification, where someone obeys a rule simply because they are is afraid that their good relationship with someone will be damaged; (3) obedience as an internalization, where a person really obeys a rule because they feels that the rule is in accordance with the intrinsic values they adhered.

III. CONCLUSION

The process of interaction between the Acehnese and Islamic law began in 700M. The process was initiated due to the strategic position of the Aceh region which lies on an important trade route between India and China. Contact then occurred between the natives (Acehnese) and Muslim traders from Arabia, Persia and India. The process of Islamization then begins and continues until the 16th and 17th centuries when the Aceh Sultanate became the largest kingdom in Sumatra. At that time, customary law practiced was derived from the Sultan's law, some Islamic law, and a mixture of customary law and Islamic law.

Islamic law can survive in the centre of legal globalization in four ways, namely: (1) obtaining legitimacy in drafting *Qanuns* (regional regulations based on Islamic law) from the the state's authority. (2) Islamic law should lay in line with the values held by society. According to the theory introduced by Steven Vago, a law making from the perspective of functionalist, is a rearrangement of several customs. (3) *Qanuns* that are made should provide benefits to the community. In measuring the purpose of the benefits contained in the application of Islamic law *Qanuns* in Aceh the author employs the perspectives of Jeremy Bentham, Steven Vago and Steven E. Barkan; (4) An effective *Qanun* legal system, could be seen from the decrease in the number of violations from 2016 to 2018.

IV. SUGGESTION

In order to be able to continue in surviving amidst the legal globalization current, the implementation of Islamic law in Aceh must be able to run effectively. Further efforts that can be made by the local government includes, increasing community law compliance at the highest level, namely compliance with internalization. In this way, Islamic law will get recognition as a legal system that lives in the midst of society which creates legal compliance based on intrinsic values adhered to by the community. There is a need for a sustainable mechanism to constantly evaluate the application of Islamic law in Aceh to determine the level of community acceptance of Islamic law.

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Appendix

Table. 1 Violations in South Aceh region

	Year		
	2016	2017	2018
Number of cases	12	10	7

Table. 2 Violations in Aceh Tamiang

Recapitulation of the Aceh Tamiang Sharia Court Decision					
No.	Tahun	Maisir	*Khamar*	Ikhtilat	Jumlah
1.	2016	28	3	-	31
2.	2017	21	2	1	24
3.	2018	14	2	-	16
Total Verdicts on *Jinayat* Case at MS Kuala Simpang					71

FAMILY RESILIENCE DURING A PANDEMIC: INTERNALIZATION OF PROPHETIC LAW INTO MARRIAGE LAW IN INDONESIA

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Abstract
During the pandemic, Indonesian society seemed to forget the purpose of married life which idealizes a household that is eternal. The increasing divorce rate during a pandemic seems to confirm this hypothesis regardless of the trigger. Furthermore, legislation products related to marriage and family must be able to maintain family integrity and resilience. Therefore, this article intends to examine transcendental values in a legal rule which play a very significant role in building family resilience through a philosophical and sociological approach, which in the discussion is described by describing and analyzing these legal norms by using the theory of prophetic law. contained in it. Thus, when viewed from the theory of "prophetic law" which departs from Kuntowijoyo's social prophetic theory, it can be concluded that the emphasis of divine values on marriage regulations and family resilience is absolutely necessary in building and maintaining family resilience which is manifested in a household that is *sakinah, mawaddah* and *rahmah.*
Keywords: accentuation, prophetic law, resilience, family, pandemic

1. INTRODUCTION

The spread of the COVID-19 virus in Indonesia is entering its tenth month since the beginning of 2020, sticking to the surface. The virus that was first detected appeared in Wuhan, China in December 2019, continues to increase, where in just three months, the virus has infected more than 118,000 cases and caused 4,291 deaths. (Bavel et al., 2020). This figure continues to increase day by day. The spread of the COVID-19 virus in the global world which is increasing day by day is not only included in the criteria for a global epidemic, but more than that, the World Health Organization (WHO) categorizes it as a pandemic where the spread is evenly distributed in almost all countries in the world with the level of spread. which is very high (Bavel et al., 2020; Spinelli & Pellino, 2020).

The spread of the virus which continues to increase, in the end not only paralyzes the health side, but also combs through other aspects such as economy, socio-politics, law, education and so on (PH, Suwoso, Febrianto, Kushindarto, & Aziz, 2020). This condition will certainly have an impact on the pattern of people's lives, which economically begins to experience a lot of financial turbulence.

As in the economic aspect, the COVID-19 pandemic has also paralyzed the social sector. The social construction of society is slowly being eroded by the spread of various symptoms of social pathology in almost all regions in Indonesia. Increasing rates of crime, violence, poverty have also colored the social conditions of the nation so that it requires state elites to work draining their brains to find solutions to the nation's increasingly deteriorating condition.

In response to these worsening conditions, the government has taken anticipatory steps to reduce the very fast spread of the COVID-19 virus. Since WHO declared COVID-19 as a global pandemic, the Indonesian government has made various efforts in response to the pandemic, such as establishing a public health emergency status, issuing a Government Regulation in Lieu of Law (Perpu) Number 1 of 2020 concerning State Financial Policy and Stability Financial System for Handling Pandemic Corona Virus Disease 2019 (COVID-19) and / or in the Context of Facing Threats that Endanger the National Economy and / or Financial System Stability, and stipulate a Presidential Decree (Keppres) concerning Determination of Non-Natural Disaster for Corona Virus Disease 2019 -19) as a National Disaster (Arsil & Ayuni, 2020). The implementation of social distancing and the recommendation to stay at home as outlined in the Regulation of the Minister of Health Number 9 of 2020 are also encouraged by the government as an effort to suppress positive cases which continue to increase day by day (Sri Sulasih, 2020). As of

November 2020, the government recorded, as quoted from the covid19.go.id page until November 2020, as many as 412,784 confirmed cases of COVID-19, with the distribution of 56,899 active cases, with a cure rate reaching 341,942 and a total death rate of 13,943 cases. A number of regions are still making various efforts, such as Large-Scale Social Restrictions (PSBB) in addition to providing education programs to the public on the importance of maintaining personal health and the environment as a form of community participation in stopping the spread of the virus.

The PSBB program as stated in the Minister of Health Regulation Number 9 of 2020 limits the movement of the community at large by limiting social activities outside the home which are alleged to increase the rate of spread of the virus. The limitation of social activities outside is intensively carried out by closing learning activities at schools, office activities, public places of worship, and other crowded locations (Sri Sulasih, 2020). Finally, the economic sector is increasingly affected in addition to other sectors that are paralyzed as a result of the implementation of this policy.

In a smaller social sphere, the family becomes the smallest structure in social life which is a sub-system of society with its own system and social structure (Anita, 2015). The existence of the family as a pillar of national life is the main parameter in showing a sketch of state life, especially during the pandemic as a social impact that occurs due to the impact of the COVID-19 phenomenon.

The element of family resilience began to take the spotlight when the news about divorce in a number of areas became more massive. The phenomenon of divorce that has been rife recently is strong enough evidence to say that family resilience is fragile due to various factors, ranging from economic, sexual, disputes and domestic violence (KDRT), to other triggers that occur during the pandemic. So, it can be said that the COVID-19 phenomenon has a very serious impact on family resilience.

At a philosophical level, the marriage bond is actually an inner bond between two human beings which is based on the religious beliefs of each husband and wife. (Isnaeni, 2016; Mubarok, 2015). Law Number 1 Year 1974 Article 1 states that a marriage bond should be based on the principle of one and only God. This means that marriage as a strong inner bond should be able to face all the obstacles and tests that stand in your way to continue to strengthen the continuity of marriage as long as it continues to be based on divine values (Prianto, Wulandari, & Rahmawati, 2013). Although in a study it was said that divorce was initially driven by an increase in a culture of acceptance of divorce which was then followed by the development of divorce and marriage laws. (Hiller & Recoules, 2013), but in fact, this cannot deny the philosophical essence of one's godliness in binding oneself in a marriage.

Indonesian marriage law, both as stated in the Marriage Law and KHI is substantively a law that is perceived from religious law where family law is indeed the legal norm that is most strongly influenced by religious law, including in Indonesia (Mubarok, 2015). The state guarantees freedom for its citizens to embrace and practice religious teachings that they believe, including those concerning marriage and family law. This is as stipulated in the 1945 Constitution of the Republic of Indonesia Article 29 paragraph (2) which states that "The State guarantees the freedom of every citizen to embrace his or her own religion and to worship according to his religion and belief".

As it is believed that Indonesia is not a religious state which is not based on one particular religion, but the state is obliged to protect all its citizens to carry out their respective religious teachings (Mahfud MD, 2016). That is why, Indonesia is also said to be not a secular country considering that divine values are embedded in the Indonesian state system which are manifested in the Pancasila ideology (Safa'at, 2018).

Given that the marriage law is one of the many regulations adopted from religious law, it is only fitting that the legal norms must truly represent religious values both explicitly and implicitly (Mahmood, 1972). As with other legal products such as fatwas or the like, under certain conditions and opportunities it can be integrated into a positive legal product (Hallaq, 2004). Religious values must be fully embodied in the structure of the building and the foundation of marriage law as an effort to maintain the sacredness of the inner bond between husband and wife. The sacredness of marriage by itself will strengthen the relationship and bond that exists between husband and wife so that it is not easy to be separated for any reason.

If this conception of marriage is related to the discourse of prophetic social science initiated by Prof. Kuntowijoyo will show at least three main pillars that must be maintained, namely humanization, liberation and transcendence (Briando, 2017; Supriyadi, 2020). These three pillars are the pillars of the prophet's *nubuwwah* (prophecy) so that they are able to maintain the sacredness of the marriage bond. The three of them are expected to be able to underlie the foundation of a marriage building that is intact and solid so that it can lead to a happy and eternal family life.

In line with the conception to be built, several researchers have already conducted research related to prophetic law and its relation to handling COVID-19. For example, research conducted by Briando (2017) entitled *Prophetical Law: Membangun Hukum yang Berkeadilan Dengan Kedamaian* where he tries to offer law building with a new prophetic spirit. Especially for handling COVID-19 from a prophetic legal perspective, Supriyadi (2020) wrote down a number of steps taken by the government in handling COVID-19 in terms of prophetic law. Related to divorce cases, research conducted by Jay L. Lebow (2020) focuses on the phenomenon of divorce from a psychological perspective. He also tries to offer the concept of family therapy under the shadow of COVID-19 which is increasingly spreading.

Of the many studies that have been done, the author wants to enter into the normative aspects of law in maintaining family resilience based on legal prophetic values. This study aims to look at the prophetic aspects contained in the marriage law regulations in Indonesia, both those contained in the Marriage Law and the Islamic Law Compilation (KHI). These prophetic principles will then be elaborated to find the relevance of the prophetic value of marriage law and family resilience, especially during a pandemic.

2. RESEARCH METHODS

This research belongs to the type of juridical normative research using a philosophical approach and statute approach. In elaborating on the substance of the discussion to be achieved, the researcher rests on the theory of social prophetic science associated with the spirit of family resilience as set out in Indonesian legislation. The data used in this research comes from secondary data in the form of primary, secondary and tertiary legal materials which are collected through library research. Furthermore, the data that has been collected will be analyzed descriptively and analytically (content analysis) in uncovering the philosophical prophetic sides contained in family law regulations.

3. DISCUSSION

a. Prophetic Philosophical Principles

The term prophetic refers to knowledge that is derived from the Qur'an and Hadiths by demonstrating scientific principles and rules in order to connect normative orders and empirical elements that occur in the field. So that later normative religious dogmas will appear more operational at an empirical level in the field (Kuntowijoyo, 2007). The term

prophetic here is also attributed to the spirit of a prophet's *nubuwwah* (prophecy) where the universal prophetic spirit is internalized holistically into a teaching or norm.

Kuntowijoyo's paradigm and views regarding prophetic values in social scientific disciplines are actually in line with universal prophetic principles embodied in prophetic treatises brought by the previous prophets. (Thontowi, 2012). These universal values include honest personality (*shiddiq*), habits to maintain trust (*amanah*), ability and willingness to convey (*tabligh*), and intelligent and critical reasoning power (*fathonah*) (Ahimsa-Putra, 2016).

A philosophical review relating to prophetic principles was introduced by Kuntowijoyo in a social science theory which he called the social science prophetic theory. Among these prophetic principles, are (Kuntowijoyo, 2007):

a. Humanist

   Humanization efforts are fundamentally defined by Shidarta as an effort to humanize humans (Sidharta, 2020). Law as a means of control and cultural construction should be applied by prioritizing the principle of humanity in accordance with the capacity and nature of human beings. Prophetic law (prophetical law) is a form of law narration based on the al-Qur'an and Hadith which certainly protects humans and humanity. Therefore it is said that prophetic law is more historical in nature (Briando, 2017) where the law that is built is in the dimension of human culture itself while still based on two sources of authoritative Islamic law.

b. Emancipatory

   The emancipatory principle means that prophetic theory must be able to make significant changes with the aim of emancipating it. So, it is hoped that the human mindset is no longer shackled to something small but has broad and universal thoughts.

c. Transcendental

   Transcendental values are divine values taught in the teachings of Islam. This is intended so that all human behavior and behavior are in the corridor of life that is more meaningful and valuable. Later, these divine values will lead people to noble and dignified values in society.

The principles mentioned above actually project themselves to the moral-religious values which these noble values have long been grounded in Indonesian society. Deliar Noer, as quoted by Nurul Hakim and Sumawaty (2018) once stated that the noble values that have long been imprinted in the heart of the Indonesian nation are values colored by Islamic teachings.

Prophetic Values: Reading Against Marriage Regulations in Indonesia

Islamic law in the regulatory system in Indonesia, which is a law derived from and part of the Islamic religion, has undergone various developments to date. According to experts, Islamic law can be interpreted between two models: (1) the theory of legal normativity, which believes that Islamic law is a complete divine law, so there is no need for modifications and adjustments here and there. (2) the adaptability theory of Islamic law, which states that Islamic law was sent down to earth as rules that can be adapted to human needs (Fuad, 2013).

Islamic law as a religious law is always oriented to divine values as a manifestation of a servant's *ubudiyyah*. Philosophically, prophetic values have been internalized and converged in a rule of Islamic law both in the public and private sphere. This is because the purpose of Islamic law cannot be separated from the purpose of human life itself, namely to serve Allah SWT. Law according to Islam only functions to regulate human life both personally and in social relationships in accordance with the will of Allah (Arifin, 1996).

Prophetic values and divine spirit must be a philosophical basis in every applicable legal rule. Even though the 1945 Constitution (UUD) mandates in article 1 paragraph (3) that Indonesia is a rule of law, never rule out that in the preamble to the Constitution it is stated that Indonesia is a devout state (Mahfud MD, 2016). The basic conception of divinity which became the first principle of Pancasila indicates that the divine spirit in the state must underlie other spirits, such as humanity, unity, democracy and social justice (Kaelan, 2004).

Prophetic is defined as transcendent values that have the potential to lead the perpetrator to moral improvement as a manifestation of religious teachings. Prophetic values as described in the person of the prophet must really be able to be realized in everyday social life. Not only that, prophetic values must also be able to be described in a legal norm as a reference for society's behavior. Roscoe Pound (1978) in his theory of law as a tool of social engineering also believes that law as a written rule must be able to construct the social life of society.

Regulations concerning marriage in Indonesia can at least be seen in several regulations such as Law Number 1 of 1974 concerning Marriage (Marriage Law), Government Regulation Number 9 of 1975 concerning the Implementation of Law Number 1 of 1974 concerning Marriage and Compilation of Islamic Law of Book I.

Among the rules of marriage law that lead to humanist values can be seen in the arrangement of the marriage and the giving of a dowry from a prospective husband to a prospective wife. The marriage is the first step towards matchmaking between a man and a woman (Rofiq, 2013). The application for the KHI has four provisions; first, the proposal can be done in two events: (1) directly by the person concerned, (2) through an intermediary (representative) who can be trusted. Second, women who are haram in marriage are: (1) women whose husbands bully who are still in the *iddah raj'i* period; and (2) women who are under the proposal of others. Third, the proposal can be broken because of a statement of termination of the proposal or secretly, the man who proposed to marry has moved away from and left the woman who has been proposed. Fourth, the marriage does not have legal consequences so that each party is free to terminate the marriage in a good manner in accordance with religious guidance and local customs (Mubarok, 2015).

Provisions regarding marriage are one of the many legal provisions that strongly position humans as legal subjects who are free to desire to take legal actions. The signs shown by the al-Qur'an in surah al-Baqarah verse 235 regarding the marriage show that it is a tradition commonly carried out before marriage as a moral message and manners to initiate plans to build a household that wants to realize happiness (Rofiq, 2013). The tradition of maintaining good relationships with fellow humans makes the relationships that are built really colored with civilized human culture.

The emancipatory principle can also be seen in the process of accepting men and women who want to marry. Article 6 paragraph (1) of the Marriage Law states that marriage must be based on the consent of the two prospective brides. The agreement referred must be the real agreement of the respective parties freely and independently to determine their position. Even though legally this is the case, the community culture that requires the consent of both parents also cannot be ignored, given that parental consent can lead to marital happiness.

Furthermore, in the transcendental dimension, it can be seen in article 1 of the Marriage Law which states that marriage is an inner bond between a man and a woman as a married couple with the aim of forming a happy and eternal family based on Almighty God. This article forms the first philosophical foundation in building a household. The divine principle is used as the most basic foundation in a bond between two people. That is why marriage in the Islamic dimension is categorized as a solid agreement (*mitsaq ghalizh*) (Rofiq, 2013).

Furthermore, Article 2 regulates the legality of a marriage which is stated in paragraph (1) that "Marriage is valid if it is carried out according to the law of each religion and belief". Once again it can be seen that the element of religion has never been released even in terms of its validation. This provision, aside from referring to legal normativity, also targets transcendent values which are very strong.

This provision is further explained in more detail in the Compilation of Islamic Law (KHI) which even uses Qur'anic terms such as *mitsaqan ghalizhan*, *ibadah*, *sakinah, mawaddah and rahmah*. (Rofiq, 2013). With the use of an editorial that is more specific to characterize Islamic teachings, it is as if he wants to emphasize that marriage cannot be separated from religious teachings.

If examined further, it can be ascertained that almost all arrangements relating to marriage are a form of reception of religious teachings. Take, for example, the prohibition of marriage which in religious language is commonly known as mahram. Either a ban that is eternal (*muabbad*) or a ban within a certain time (*muaqqat*) as regulated in article 39 KHI (Rofiq, 2013). The provisions of this article are also reduced from the word of Allah swt surah an-Nisaa' verses 22-23 which reads: “And do not marry women who have been married by your father, except in the past. Indeed, that action is very abominable and hated by Allah and is as bad as the path (taken) ".

The overall values that are perceived from the teachings of the Islamic religion mentioned above are prophetic values which will form a completer and more moral human person.

Prophetic Law and Family Resilience in Pandemic Times

The COVID-19 pandemic in real terms has also resulted in fragile family resilience. The very weak aspect of economic growth also adds to the household breakdown that occurs in society. The high rate of divorce during the pandemic shows the fragility of guarding against family resilience in Indonesia.

As is well known, divorce is one of the things that is rigidly regulated in the marriage regulations in Indonesia. The Marriage Law is also in line with normative Islamic law (*fiqh*) which makes divorce difficult (Sakirman, 2016). The principle of complicating divorce is a conception that is reduced from the hadith of the Prophet which states that divorce, even though it is legal, is hated.

The permission to divorce a husband and wife should be interpreted first as a form of prohibition in the first phase, as in cases of continuous disputes between husband and wife (*syiqaq*). The command of Allah swt in Surah an-Nisaa 'verse 35 to present a hakam (mediator) suggests that even if the two have agreed to divorce, they should invite a third party to reconcile between them. This effort to reconcile is what is interpreted as a form of safeguarding the integrity of the family.

The high rate of divorce with economic factors as the trigger, especially during the pandemic, has attracted the attention of observers to explore more deeply. Couples who are about to separate, should be reminded of the sacredness of a marriage bond. Marriage in the legal dimension is categorized as an agreement. However, when viewed in the transcendental dimension, marriage is more directed towards a solid agreement (*mitsaq ghalizh*) where marriage has divine elements in it.

Emphasis on the divine principle contained in article 1 of the Marriage Law must be truly internalized in a family relationship that can be seen from everyday life. Real marriage must be directed at marriage that is eternal and eternal within the framework of a *sakinah* household, *mawaddah wa rahmah*. In other words, the spirit to devote oneself to God in a marriage bond is one breath with the provisions of marriage law in Indonesia.

Emphasis on the prophetic aspects of the law should be presented in the reading and meaning of the Marriage Law and KHI in maintaining a household. The absence of a figure capable of embodying these values has indirectly contributed to the collapse of the household. The difficulties faced by the community during a pandemic, especially from an economic standpoint, must be balanced with the strengthening of prophetic values in the household. As a result, public awareness to be able to build, foster and maintain households will continue to go hand in hand with the difficulties faced by communities during the pandemic.

Furthermore, if further investigated, that a legal marriage is when a marriage bond is carried out based on the religious teachings of each party. The validity of marriage, seen from the religious aspect, reassures that marriage is not only based on a formal agreement, but there is a form of self-servitude and *ubudiyyah* in implementing religious teachings. Therefore, a marriage that is about to be released can be interpreted as a form of desecration of the nobility and sanctity of religious teachings. Even though in one condition there are times when divorce is actually the best solution for couples who are about to divorce.

The pandemic period which globally and massively destroys the foundations of the nation's economy must really be accompanied by strengthening of prophetic values, especially for couples who wish to marry during the pandemic. Efforts that can be made include the revitalization of pre-marital education for male and female couples who want to get married, strengthening and enriching *fiqh* material and marriage philosophy to get to know more about the sacredness of a marriage bond.

4. CONCLUSION

The COVID-19 pandemic has indirectly contributed to the collapse of family resilience in several regions in Indonesia. Apart from the factors that cause divorce between married couples, it can be said that the essential spirit which underlies a marriage bond has been separated from the heart of the couple who is about to divorce. As a result, many rights are ignored legally, especially affecting the children of their descendants.

Prophetic values internalized in the legal regulations of marriage in Indonesia, both those contained in the Marriage Law and KHI must be accentuated towards human beings who are aware of the law. Strengthening the orientation that leads to the prophetic of marriage law must be carried out through various government efforts such as pre-marriage education to be able to maintain the continuity and resilience of families, especially in a pandemic like this time.

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REGULATION OF THE CONVERSION SHARIA BANKING AND ITS LEGAL ISSUES IN INDONESIA

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Abstract
The objective of this study was to analyze regulations on the conversion of conventional banks into sharia banks according to positive law. The method of this study was normative legal research with primary, secondary, and tertiary legal materials which are collected through documents and literature study, then a descriptive qualitative analysis was carry out through the legal interpretation method to build prespective legal arguments ini order to obtain deductive conclusion. The findings showed that the conversion of conventional into sharia banks was regulated by the Act No. 10/1998 on the Amendment of Act No. 7/1992 on Banking, Act No. 21/2008 on Sharia Banking, and OJK Regulation No 64/POJK.03/2016 on the Conversion of Business Activities from Conventional into Sharia Banks. Legal issues were uncovered in the conversion of conventional banks into sharia banks as there was an absence of government regulation regarding to the conversion of conventional into sharia banks. In particular, a solid legal basis for the conversion of a conventional into a sharia bank was lacking, and there were issues in obtaining permission from the Financial Services Authority and a change of legal status from conventional to sharia bank. The research results encouraged banks authority as well as the government to pay more attention to legal issues regarding to conversion from conventional banks to sharia banks.
Keywords: Sharia banks, conversion, legal issues.

1. INTRODUCTION

The Act No. 21/2008 on Sharia Banking and the Act No. 10/1998 on the Amendment of the Act No. 7/1992 on Banking allow Indonesian banks to apply dual banking systems, and conventional banks have started launching sharia business units to meet the demand of the market, particularly from their Moeslem customers. The fast contribution and growth of sharia banking in the last twenty years have shown that sharia banking meets the current demands of society.

The Indonesian government, the Bank of Indonesia, the Financial Services Authority, and sharia banks have made efforts to accelerate the development of sharia banks[1]. These efforts have been viewed positively by society, and conventional banks are now interested in changing their business into sharia banks. Conversion of business activities from a conventional bank into a sharia bank is legal, but the conversion of business activities from a sharia bank into a conventional bank is illegal.

A new trend that started in 2008 was the establishment of sharia banks through the acquisition and conversion of conventional banks into sharia banks. Three approaches have been used for these conversions. First, conventional commercial banks that have already had Shariah Unit Bussines (SUB) acquired smaller banks, converted them into sharia banks, and combined both of their Shariah Unit Bussines. In the second approach, conventional banks that did not have any SUB acquired smaller banks and converted these banks into sharia banks. In the third approach, conventional banks created independent companies (spin-off) and established their own sharia public banks[2].

After the establishment of government regulation on sharia banking, both converted and non-converted sharia banks developed significantly. Currently, there are 14 public Islamic banks in Indonesia; nine of them were the result of the conversion from conventional public banks, two were SUB spin-off, two were the result of converting conventional public banks that were then combined with SUB spin-off, and one was sharia bank since it was established:[3], [4].

Examples of SUB spin-off public Islamic banks are Bank Jabar Banten Shariah and BNI Shariah, while examples of acquired public Islamic banks are Bank Shariah Mandiri (acquired from Bank Susila Bakti), Bank Mega Shariah (acquired from Bank Umum Tugu),

and BCA Shariah (acquired from Bank Jasa Artha). Other sharia banks are Bank Shariah Bukopin. BRI Shariah (acquired from Bank Jasa Artha), Bank Victoria (acquired from Bank Swaguna), and Maybank Shariah (acquired from Maybank Indocorp).

These data showed that the conversion of a conventional bank into a sharia bank in Indonesia was pretty significant due to a strong legal basis. Conversions would increased as the due date gets closer for the Act No. 21/2018 spin-off obligations for business units which have established an independent sharia business unit, separated from the conventional bank.

The spin-off route was a requirement when a conventional bank has SUB with a value of at least 50% of the total value of the parent bank. This also works for all SUB, 15 years after the Act No. 21/2008 was established[5]. The requirements of Article 68 showed that sharia business units that still have a conventional parent company could become an independent business unit. The business performance of sharia business units, for instance, financial performance, management, human resources, and networking, is an indicator of their readiness to become independent business units. These will influence the development of sharia banks. The focus of this study was the regulation and legal basis for the conversion of conventional banks into sharia banks based on positive law.

2. RESEARCH METHOD

This study was a doctrinal or normative legal study that perceived law as a set of normative rules in books. This study focused on the regulations and legal issues for the conversion of conventional banks to sharia banks based on positive law. Two approaches were used, a statute approach, and a conceptual approach[6]. This study used secondary data, namely references and primary, secondary and tertiary legal documents, and written documents obtained from statutory regulations, court rulings, academic studies, and Islamic sources, findings of academic studies, official documents, archives, and dictionary and encyclopedia entries on banking and sharia banking. Once the library research and documentation had been conducted, the data were classified and analyzed using descriptive qualitative analysis through authentic and grammatical legal interpretation to develop legal arguments and then to draw deductive conclusions[7].

3. RESULT AND DISCUSSION

1. Regulation of the Conversion of Conventional Banks to Sharia Banks

The Great Dictionary of the Indonesian Language defines conversion as “change from one knowledge system to another.” Other meanings of conversion are the change of ownership of an object or piece of land; a change of form (for example appearance);[8] or change from a previous concept to a current one. In banking terminology, conversion means a change in the legal status of a bank or financial institution into another. Conversion is the change of a particular system or instrument into another system or instrument and has been defined as:[9] “…Change of legal status of a bank or financial institution into another form of legal entity.” Therefore, conversion is the change in business activities and the legal status of a bank. However, the Financial Services Authority only regulates the conversion of a conventional bank into a sharia bank and not the opposite, and it does not change the legal status of the bank.

The conversion of a conventional bank into a sharia bank was described in the Act No. 21/2018 on Sharia Banking. The implementation were given in the Regulation of the Bank of Indonesia, which was later replaced by the Financial Services Authority Regulation No. 64/POJK.03/2016 on the Conversion of Business Activities of Conventional Banks into Sharia Banks. The implementation of the Act governing the Financial Services Authority transferred some parts of the authority to supervise and monitor Indonesian banks from the

Bank of Indonesia to the Financial Services Authority. The Financial Services Authority has the authority to control and supervise financial services in the banking sector.

Article 2 of the Financial Services Authority Regulation No. 64/POJK.03/2016 explains that:[10]. (1) A conventional bank can change its business into a sharia bank; (2) The conversion of a conventional bank into a sharia bank can change (a) a conventional bank into sharia bank, and (b) a rural bank into sharia rural bank. An example of the legal basis of the conversion of a conventional bank into sharia bank was Article 5 paragraph (6) of the Act No. 21/2008 on Sharia Banking that explains "Conventional Banks can only change their business based on the principles of sharia with permission from the Bank of Indonesia." Furthermore, Article 4 paragraph (1) of the Financial Services Authority Regulation No. 64/POJK.03/2016 states that "Conversion of business activities from a conventional bank into a sharia bank can only be conducted with permission from the Financial Services Authority."

Article 7 of the Act No. 21/2011on the Services Authority states that: "In order to carry out their control and supervisory function in the banking sector as stated in Article 6a, Financial Services Authority is authorized to: control and supervise banks, which involves:[11].

1) licenses for the establishment of banks, opening bank offices, Company Basic Regulation, work plans, ownership, management, and human resources, merger, consolidation and bank acquisition, revocation of bank business licenses; and
2) business activities of the bank, such as the sources of funding, hybrid products, and services."

Consideration of the terms permitted for the conversion of the business activities of conventional banks into sharia banks stated in Article 5 paragraph (6) of the Act No. 21/2008 on Sharia Banking[12], the terms described in Article 7 of the Act No. 21/2011 on Financial Services Authority, and Article 4 Paragraph (1) of the Financial Services Authority Regulation No. 64/POJK.03/2016 on the Conversion of Business Activities of Conventional Banks into Sharia Banks, it could be concluded that legal norms on the conversion of conventional banks into sharia banks was included a conflict of norm. Furthermore, Article 55 paragraph (2) of the Act No. 21/2011 on Financial Services Authority states that "starting from December 31, 2013, the function, task and authority for controlling and supervising activities in the banking sector are transferred from the Bank of Indonesia into the Financial Services Authority."

To overcome these conflicts, an analysis was required, which used legal basis instruments such as the principle of lex specialis derogate lex genaralis, or specific regulation overrides general regulation. In this context, the Bank of Indonesia Act was no longer valid with the establishment of the Financial Services Authority Act. Furthermore, Article 55 paragraph (2) of the Act No. 21/2011 on Financial Services Authority reiterated the conflict between the Act No. 21/ 2008 on Sharia Banking and the Act No. 21/2011 on the Financial Services Authority on permits for the conversion of the business activities of conventional banks into sharia banks.

a. **Requirements for the Conversion of Business Activities from a Conventional Bank into a Sharia Bank**

Conventional banks that want to change their business activities into sharia banks should include their new business plan in the conventional bank business plan, as stipulated in Article 5 of the Financial Services Authority Regulation No. 64/POJK.03/2016, which states: "A Plan to conversion the business plan from a conventional bank into a sharia bank should be fullfil in the conventional bank business plan."

Furthermore, Article 6 states: "A conventional bank that will change its business activities into a sharia bank should do the following: (a). Adjust its Company Basic Norm, (b). Meet capital requirements, (c). Meet the requirements for the Director and Board of Commissioners, (c). Establish Sharia Supervisory Board. (d). Make a preliminary financial report as a sharia bank."

A conventional bank that wants to convert into a sharia bank needs to meet these five requirements and submit them to the Financial Services Authority to obtain a sharia bank permit. Adjustment to the articles of association was governed by the Act on Sharia Banking, the Act on Limited Liability Companies, Statutory Regulations on Sharia Public Banks, and BPRS. To meet the provisions regarding sharia commercial bank capital, both the minimum capital and the minimum core capital requirements for sharia commercial banks must fullfil.

Article 9 of the Financial Services Authority Regulation No. 64/POJK.03/2016 states: "The Director and Board of Commissioners of a sharia bank should meet the Act and regulations on Sharia Banks." The requirements, number, function, authority, and responsibility, as well as other affairs related to the Board of Commissioners, and Director of a sharia bank, is stated in the articles of association of the sharia bank and in the provisions of the applicable regulations. And the Article 10 of the Financial Services Authority Regulation requires that: (1). A conventional bank that will convertion its business activities into a sharia bank should establish a Sharia Supervisory Board; (2). Prospective members of the Sharia Supervisory Board should meet the requirements of the Sharia Supervisory Board as regulated in the requirements for sharia banks stated in paragraph (1).

The Sharia Supervisory Board is responsible for giving advice and recommendations and supervising activities of the sharia bank. The Sharia Supervisory Board is also responsible for conducting internal supervision of sharia banking products in collecting funds from society and distributing the funds to society. The Sharia Supervisory Board has the rights and responsibility to decide whether or not a sharia banking product or service is marketable and whether sharia bank activities have matched the principle of sharia profit-sharing. Thus, Sharia Supervisory Board members should have an in-depth knowledge of sharia. In carrying out its function, the Sharia Supervisory Board can conduct consultation with Indonesian Ulema Council[13].

The function of the Sharia Supervisory Board in a bank that was based on the principles of profit-sharing was different from the function of the Board of Commissioners, Board of Trustees, and bank supervisors, which are also part of a sharia bank. The function of the Sharia Supervisory Board is limited to researching and determining whether a product, service, or business activities carried out by the sharia bank is in accordance with the principles of sharia. In contrast, the Board of Commissioners, Board of Trustees, and bank supervisors were responsible for ensuring that all operational and management activities of the bank meet the principle of profit-sharing.

2. Legal Issues in the Conversion of a Conventional Bank into a Sharia Banks

Several legal issues could be summerized from the regulations and their implementations conversion of a conventional banks into sharia banks, were as followed:

An absence of specific government regulations, the legal basis for the conversion should be concerned with the banking and sharia banking sectors, but it should also take account of the Act on Limited Liability Companies, the Act of the Bank of Indonesia, the Act of the Financial Services Authority, the Act of the Regional Government and its implementing regulation, and the act on dispute resolution, and a strong and clear legal basis for the conversion of a regional government-owned conventional bank is lacking, and thus, legal issues may potentially appear in the future.

The conversion of regional government-owned conventional banks requires approval from the shareholders (Governor and Regent/Mayor) through shareholder's meeting (RUPS) or extra ordinary shareholder's meeting (RUPS-LB), as well as the Regional House of Representatives, through amendment of regional government regulation[14].

Before submitting their proposal to the Financial Services Authority, a conventional bank should change its statutes and by laws, and changes to the organizational structure of a sharia bank require approval from the Sharia Supervisory Board. The Sharia Supervisory Board should obtain a recommendation from the National Sharia Board of the Indonesian Ulema Council and conduct the Financial Services Authority fit and proper test.

After the conversion, the sharia bank should attach the word sharia to their name, both at the head office and branch offices, as stated in Article 16 of Financial Services Authority Regulation No. 64/2014: "A conventional bank that has been granted a license to change their business into a sharia bank should clearly state the word "Sharia" on its brand and iB logo, on its registration forms, products, office, and sharia bank network.[15].

The absence of regulation on the legal status of conventional bank customers after the conversion. That was whether or not these customers have the same legal status as conventional bank customers, including legal options for these customers or other interested parties, and lack of regulation on the conversion of credit agreements to *aqad* since *aqad* has its own distinctive characteristics and legal consequences.

Legal issues in the implementation of conversion namely; the bank depends on interest or another system similar to bank interest in its credit agreements (*murabahah* financing) and the corporate culture of the sharia bank, while profit-sharing in *mudharabah* and *musharakah* financing is different from conventional bank interest, and the absence of regulations on dispute settlement between banks and non-Moeslem customers after the conversion.

Conflicts arising in the licensing and conversion of conventional banks into sharia banks. These conflicts arise between the Act No. 21/2008 on Sharia Banking (in which bank licenses are obtained from the Bank of Indonesia) and the Financial Services Authority Regulation, which also grants sharia bank licenses.

Specific arrangements for the conversion of foreign-owned or non-Moeslem-owned conventional banks in order to avoid violation of the principles of sharia and Islamic law. The Act No. 21/2008 on Sharia Banking attributes authority to the Bank of Indonesia for the sharia banking sector, but this conflicts with the Financial Services Authority Act.

Consideration of the information presented in this study led to the conclusion that the government should consider various legal issues resulting from the conversion of conventional banks into sharia banks and establish law and regulations on the conversion to avoid legal issues [16],[17],[18],[19]. Legal experts consider a good law to be one reflecting philosophical, juridical, and sociological aspects. And good law in a democracy is responsive law to the demands and needs of society.

Lawrence Friedman's theory[20] states that law and legislation should pay attention to three aspect characteristics, namely [21] the legal structure, the legal substance and the legal culture in which the legislation is applied in order to run effectively or be marketability among the society. Clear legislation would minimize future legal issues on the conversion of conventional banks to sharia banks. In other words, legislation will provide justice and legal certainty for the public as bank customers.

4. CONCLUSION

The conversion of conventional banks to sharia banks was stated in the following regulations: the Act No. 10/1998 on the Amendment of the Act No. 7/1992 on Banking,

the Act No. 21/2008 on Sharia Banking, Financial Services Authority Regulation No. 64/POJK.03/2016 on Conversion of Business Activities from Conventional to Sharia Banks, the Act on the Financial Services Authority, the Bank of Indonesia, and the Act No. 40/2007 on Limited Liability Companies. Legal issues in the conversion of conventional banks to sharia banks included an absence of regulation that specifically discussed the conversion of conventional banks to sharia banks and the absence of a legal basis for the conversion of conventional banks to sharia banks.

5. RECOMMENDATION

The government should establish regulations that specifically discuss the conversion of conventional banks to sharia banks as implementation for the Act No. 21/2008 on Sharia Banking. Financial Services Authority Regulation on the conversion of conventional banks to sharia banks should state clearly the legal status of bank customers after the conversion.

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PRE-MARRIAGE EDUCATION; EFFORTS TO PRESERVE MARRIAGE AND PREVENTION OF DIVORCE (*MAQASID SHARIAH* PERSPECTIVE)

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Abstract
Divorce in Indonesia is a social phenomenon that needs attention. The number of divorces continues to increase from year to year, divorce also leaves some negative impacts such as causing hostility to family members, disrupting children's mental development, and divorce triggers delinquency and crime among teenagers. Divorce factors are influenced by the level of husband and wife' understanding of the purpose and nature of marriage, so that pre-marriage education programs and similar programs are very important given to prospective husband and wife as provisions to foster a happy family and minimize the occurrence of household cracks. This study discusses pre-marriage education as an effort to preserve marriages and minimize the potential for divorce from the perspective of maqasid shariah . The results of this study explain that (1) pre-marriage education is the Maqasid Tab'iyah (follower's goal) which strengthens and supports the realization of Maqasid Asliyah (original purpose) in the shari'a of marriage namely hifz an-nasl and hifz al- 'ird (guarding offspring and honor). (2) Pre-marriage education is a wasilah (intermediary) to realize the maqsud (goal) of marriage, which is to provide knowledge about preserving offspring and maintaining family honor.(3) Pre-marriage education is a wasilah (intermediary) to realize the maqsud (goal) to reject the potential of damages and the danger caused by divorce.
Keywords: pre-marriage education, marriage ties, divorce, maqasid shariah , maslahat

1. INTRODUCTION

Marriage is a physical and mental bond between a man and a woman as husband and wife which aims to fulfill one of the basic human needs, namely the need to obtain physical and spiritual happiness through the household.[37] But in fact, it is not easy to realize this happiness because of the many challenges and problems that occur in the household.

Problems in the family are a necessity that will be faced by married couples, to overcome this problem requires maturity, communication skills, conflict management, and knowledge of the rights and obligations of husband and wife.

The rapid development of information-technology and the increasing demands of a lifestyle adds to the complexity of family problems, if you don't respond wisely to them, it can lead to conflict, continuous feuds, and can lead to divorce.

In Indonesia, divorce is a social phenomenon that needs attention. The fact is the number of divorces from year to year is increasing, on the other hand, people's understanding of the sacredness of marriage has also decreased. Even for some people, divorce seems to be a lifestyle or social trend, especially in the lives of artists,[38] where marriage and divorce are sometimes a way to increase popularity.

Another side that needs serious attention is the consequences of divorce, including the birth of hostility from family members, disrupting children's mental development which causes feelings of inferiority, anger, resentment, hatred, and unstable emotions,[39] even divorce can cause children to become illegal, juvenile delinquency and crime incidents.[40]

Nobody wants their family to be destroyed through divorce, unless divorce is the best option and the last option. Seeing the consequences of this divorce, efforts to preserve the marital bond are very important, both by islah (reconciling) between fighting spouses, mediation of trials for divorce cases, guidance for family counseling, even provision or education on family life for prospective married couples.

Preparations or pre-marriage education in practice have been widely implemented, either by the government through Kantor Urusan Agama (KUA) and Badan Penasihatan Pembinaan dan Pelestarian Perkawinan (BP4) or private institutions through religious or social institutions. However, the implementation still faces many obstacles and is not yet optimal.

So far, quite a lot of studies have been carried out on the implementation of pre-

marriage education. Mahmudin (2016) who concluded that pre-marriage education is very important for prospective married couples to provide knowledge and preparation for fostering a family.[41] Lili Purnamasari, (2018) examines Kursus Calon Pengantin (marriage education) in Fostering Domestic Harmony in East Metro District, she concludes that pre-marriage education has a positive influence on family harmony.[42]

Putu Yunita Widhayanti, and Febiola Hendrati (2011) examined the relationship between a person's maturity in a marriage relationship and a husband's infidelity. Both concluded that the maturity of a person in marriage is very influential on family harmony, whether this maturity is seen from the maturity of age, emotional maturity, education level, and economic maturity.[43]

Zulfahmi (2020) examines the urgency of organizing pre-marriage courses and its relevance to the essence of marriage (maqasid shariah perspective), he concludes that pre-marriage courses have urgency because they contain maslahah (benefits) that supports and strengthens the realization of hifz an-nasl in the sharia of marriage. Meanwhile, the pre-marriage course curriculum has relevance to aspects of education, aspects of religion and worship, economic aspects, sociological aspects, and biological aspects.[44]

As far as the author's observation, there has been no study that discusses pre-marriage education as an effort to preserve marriage and minimize divorce through the maqasid shariah approach. So this research has the aim of knowing philosophically the essence of pre-marriage education as an effort to preserve marriage and minimize the potential for divorce from the maqasid shariah perspective.

a. Research Method and Benefit

This type of research is a qualitative literature research with analytic descriptive, analyzed using the maqasid shariah approach. The primary material in this research is Peraturan Dirjen Bimas Islam No. DJ.491/11 tahun 2009 tentang Kursus Calon Pengantin, Peraturan Dirjen Bimas Islam No.DJ.II/542 tahun 2013 tentang Pedoman Penyelenggaraan Kursus Pra Nikah, dan Peraturan Dirjen Bimas Islam No 373 tahun 2017 tentang Petunjuk Teknis Bimbingan Perkawinan Bagi Calon Pengantin. The secondary materials in this study are books, previous research, and documents related to pre-marriage education, as well as other related sources.

The data obtained were then clarified and analyzed with existing concepts and references, while the data analysis method carried out was through three stages; data reduction, data presentation, and drawing conclusions.

The purpose of this research is to understand philosophically about the essence of pre-marital education as an effort to preserve marriage and minimize the potential for divorce using the maqâṣid syarî'ah approach.

b. Paper Structure

This research begins by explaining the facts of divorce that continues to increase in Indonesia, the urgency of pre-marriage education, the problems with the implementation of pre-marriage education, and the analysis of maqasid sharia theory of pre-marital education programs in marriage. To clarify the study, this research only tries to answer the question, how is the essence of pre-marriage education as an effort to preserve marriage and minimize the potential for divorce according to maqâṣid syarî'ah?

2. DISCUSSION

a. The Divorce Phenomenon in Indonesia

The number of divorces that occur in Indonesia is quite a lot, and continues to increase from year to year.

Table 1. Number of Marriages, Divorces and Remarried in Indonesia

Years	Marriage	Divorce	Remarried
2012	2,289,648	346,480	11
2013	2,210,046	324,247	4
2014	2,110,776	344,237	63
2015	1,958,394	353,843	6
2016	1,837,185	365,654	1
2017	1,936,934	374,516	3
Total	12,342,983	2,108,977	88

Source: BPS 2015 and 2018.[45]

From these data, we can see that there are millions of couples who get married every year, but the relative number has decreased from year to year. While the divorce rate has always increased from year to year with an average increase of 3.68% per year.

The average number of divorces that occur from the number of marriages each year is 17.24%, or it can be said that in 100 marriages, there are 17 divorces. The data above also shows that incidents of reconciliation (re-establishing a marriage bond after a divorce) occur very little and do not reach 1% of the hundreds of thousands of divorces. Divorce when viewed from all cases submitted to the Religious Courts, divorce cases (both divorce talak and divorce suit), are the cases most frequently heard in court, as much as 72.5% of the total number of cases in Pengadilan Agama, while the rest are other cases. which becomes the authority of Pengadilan Agama.[46] Divorce viewed from the party filing with the Religious Court, then divorce is dominated by divorce suits by wives with an average annual percentage of 72% and the remainder is a divorce application submitted by the husband as much as 28%.

The factors that cause divorce in Indonesia based on data from 29 High Religious Courts throughout Indonesia in 2017, in general there are 5 main factors, namely (1) due to ongoing disputes and quarrels; (2) because of economic problems, (3) because they are not responsible for their spouse and family, (4) because of domestic violence, (5) because one of the parties is sentenced to prison (5 years and over).[47]

b. Pre-marriage Education

Education in the Indonesian Dictionary comes from the word educate which means to maintain and provide training (teachings, leadership) regarding morals and intelligence, while education is related to things or ways to educate.[48] Djumarsih defines education as a human effort to cultivate and develop innate potentials, both physically and spiritually, in accordance with the values that exist in society and culture.[49]

Helmawati interpreted George F. Kneller's opinion about education in a broad sense as an act and experience of a person that can influence the development of mental, physical and character abilities. Education in a narrow sense is a process of changing (transforming) knowledge, values, and skills from one generation to the next which is passed down by the community through formal and non-formal educational institutions, such as schools, colleges and so on.[50]

The word "pre-marriage" is composed of two words, namely "pre" and "marriage", the word "pre" is a prefix which means "before".[51] Meanwhile, the word "marriage" in Indonesian is a marriage bond or agreement (contract) between a man and a woman which is carried out in accordance with the provisions of state law and religion.[52] The Director

General of Islamic Guidance at the Ministry of Religion of the Republic of Indonesia defines the Pre-marriage course as providing knowledge, understanding, skills and raising awareness to teenagers of marriage age about household and family life.[53]

From the above understanding, it can be understood that pre-marriage education is a process or an effort to provide a change or transformation of knowledge, values and better skills about marriage, before marriage occurs. This pre-marriage education is important for everyone to learn in order to equip themselves with the problems of marriage and family in order to be able to live family ties in harmony.[54]

c. Pre-Marriage Education Regulations

In practice, pre-marital education is carried out in different terms, depending on who is the implementer, such as bride and groom courses, pre-marriage courses, marriage guidance, pre-marriage schools, and pre-marriage counseling. However, in this paper, it will be described based on regulations from the government.

Pre-marriage education or pre-marriage courses have been carried out by many government agencies (Kantor urusan Agama and Badan Penasihatan Pembinaan dan Pelestarian Perkawinan), these programs are also carried out by private institutions through social institutions.

The guidelines for implementing pre-marital education as of this writing are as follows, (1) Peraturan Dirjen Bimas Islam No. DJ.491/11 tahun 2009 tentang Kursus Calon Pengantin, (2) Peraturan Dirjen Bimas Islam No.DJ.II/542 tahun 2013 tentang Pedoman Penyelenggaraan Kursus Pra Nikah. (3) Peraturan Dirjen Bimas Islam No 373 tahun 2017 tentang Petunjuk Teknis Bimbingan Perkawinan Bagi Calon Pengantin.

The three regulations generally have the same mechanism. As for the implementation of the pre-marriage course, it is conducted for 24 hours of lessons / for 3 (three) days or made in several meetings. For the learning model, it is carried out in two models, (1) classical guidance, (2) independent guidance, this is done if the bride and groom cannot follow the guidance on a scheduled basis.

Participants who have attended pre-marriage education will get a certificate of activity. The use of certificates for the three types of regulations has the same purpose, namely as a condition for marriage registration. However, in practice, the certificate is not an important requirement, because even though the couple does not have a certificate, they can still register their marriage.

d. Pre-Marriage Educational Materials

The basic material, which consists of: (1) Ministry of Religion Policy on Fostering Sakinah Families and Implementation of Pre-Marriage Education, (2) Legislation concerning marriage and family development in Indonesia (3) Islamic marriage law, and (4) Marriage procedures.

The core material, includes (1) the implementation of family functions (religious functions, reproduction, affection and affection, protection, education and socialization of values, economy, and socio-cultural functions), (2) caring for love and affection in the family, (3) conflict management in the family, and (4) marriage and family psychology. And The support material, including the andragogical approach, pre-test-post-test, and action plans.

The implementation of pre-marital education is financed by APBN and / or APBD. The organizers of the activity are carried out by the KUA or certain institutions that have received accreditation for the provision of pre-marriage education by the Islamic Community Guidance of the Ministry of Religion of the Republic of Indonesia.

e. The Urgency of Pre-Marriage Education

Amir Syarifuddin explained that the purpose of pre-marital education, among others, is to equip prospective husband and wife to achieve a family that is peaceful, serene, happy, and always filled with affection. Happy families can be realized more easily if they are accustomed to getting education or good habits starting from within the family itself. Therefore, it is very important for family members to be aware of the educational process that is in accordance with the shari'ah, so that the process of transforming the behavior and attitudes of family members will be reflected in a good personality in accordance with religious guidance.[55]

Robert F. Stahmann explains the benefits of pre-marriage education as follows:

"Typical goals of the various approaches to marital preparation include: (a) easing the transition from single to married life, (b) increasing couple stability and satisfaction for short and long term, (c) enhancing the communications skills of the couple, (d)) increasing friendship and commitment to the relationship, (e) increasing couple intimacy, (f) enhancing problem-solving and decisions-making skills in such areas as marital roles and finances".[56]

The quote above explains that marriage preparation has benefits, including; (a) facilitate the transition of the transition period from single to married life, (b) increase the stability and satisfaction of partners in the short and long term, (c) improve communication skills between partners, (d) increase commitment to relationships, (e) increase partner intimacy, (f) improve skills in problem solving and decision making such as in the realm of finance, conflict management, and so on.

Pasal 3 Peraturan Dirjen Bimas Islam No.DJ.II/542 tahun 2013 tentang Pedoman Penyelenggaraan Kursus Pra Nikah concerning Guidelines for Conducting Pre-Marriage Courses explains that the purpose of pre-marriage courses is to increase understanding and knowledge of household / family life in realizing sakinah (blessfull) family, mawaddah warahmah and reducing the number of disputes, divorce, and domestic violence.

The existence of pre-marriage education guidelines and the government's discourse to oblige the program show the urgency of pre-marriage education in the community. So far, there have been many studies on the urgency of pre-marital education. The results of these studies concluded that pre-marriage education is very important for prospective married couples to provide knowledge and preparation for building a family.[57] Pre-marriage education is proven to have a positive effect on household harmony, including (1) in maintaining safe interactions and commitment of husband and wife, by teaching good communication and emotional control, (2) maintaining the closeness of the relationship between parents and children by providing knowledge educating children and being good parents, (3) Increase family resilience from conflict and divorce by providing knowledge about family functions.[58]

The maturity of a person in the marriage bond greatly influences family harmony, whether this maturity is seen from the maturity of age, emotional maturity, educational level, and economic maturity.[59] With this maturity, a person tends to be able to know the responsibilities of a married couple and can manage communication well and can manage conflicts in the family.[60] Conversely, someone who does not have this maturity tends to lack understanding of the rights and obligations of family members, poor communication patterns, not wise to control emotions and ego, so that small conflicts in the family that are not handled wisely often affect the decision to divorce and ignore the long consequences of divorce.[61]

In other countries, efforts such as pre-marriage education have been made and it has become increasingly difficult to register marriage. For example, Singapore requires that prospective brides take part in pre-marriage education which they call the Domestic

Guidance Education. Upon completion, the bride and groom will get a Sijil (certificate) issued by the Local Islamic Marriage Office. In Europe, the pre-marriage counseling program for couples intending to marry is carried out by the government which is equivalent to one semester of study.[62]

f. Problematic Implementation of PreMarriage Education

The lack of information and knowledge about family before marriage is one of the obstacles that is often faced by prospective married couples, even married couples. On the other hand, there have not been many pre-marriage education programs, pre-marriage courses, pre-marriage counseling or similar programs, even if they do exist, they are still very limited.[63]

Existing pre-marriage education is usually carried out by the Ministry of Religion's office at the district level, while at the sub-district level it is carried out by KUA and BP4. According to the former Minister of Religion of the Republic of Indonesia (2014-2019), Lukman Hakim Saifuddin, " Pendidikan pra nikah sudah dilaksanakan di 16 provinsi di Indonesia ",[64] but it is still limited due to the very minimal budget.

For example in Purworejo, pre-marriage education was only carried out in 2017 by the Ministry of Religion Purworejo with 822 participants out of the total 6,593 marriage registrants, or only about 12% of all marriage registrants. For 2018, the implementation of pre-marriage education in Purworejo has not yet been scheduled and there is no certainty about the budget for its implementation.[65]

Most of the obstacles encountered in the implementation of Pre-marriage Education are due to several reasons, (1) ***regulatory issues***; Currently pre-marriage education is only recommended in Indonesia based on Peraturan Dirjen Bimas Islam Kemenag RI tentang pedoman penyelenggaraan kursus Pra Nikah. So that the basis for obliging pre-marriage education is one of the requirements for marriage registration that does not yet have a firm legal force like the law (Undang-undang).

The government is still preparing plans related to legal and budget regulations for the program. And in 2020 the government will plan a marriage certification program as a condition for marriage for couples who want to get married carried out by Menteri Koordinator Bidang Pembangunan Manusia dan Kebudayaan (PMK), Muhadjir Effendy and Menteri Agama RI, Fachrul Razi.[66]

In its implementation, Peraturan Dirjen Bimas Islam No.DJ.II/542 tahun 2013 tentang Pedoman Penyelenggaraan Kursus Pra Nikah has not been implemented optimally, the accreditation process for institutions or organizations that provide pre-marriage education has not been implemented.

(2) Budget problem, the budget for implementing pre-marriage education is very limited, so the implementation of pre-marriage education by the Ministry of Religion or KUA is only implemented if there is a budget. In practice, the KUA also experiences a dilemma, on the one hand, it is important to carry out pre-marriage education but there is no budget, on the other hand, when the program is implemented at the expense of the participants it is included in illegal levies (Pungutan Liar) and burdens the participants.

(3) Dalil or istimbath of islamic law. There is no dalil or istimbat of Islamic law that explicitly indicates the obligation of pre-marital education. So that Muslims, either through the government, social institutions, or the private sector, are not motivated to carry out the prpgram. Unlike the case with Catholicism, which in its canonical states the obligation of the church to give spiritual message to the family to the prospective bride and groom who is about to marry.

g. Maqasid Shariah in Marriage

1) Understanding Maqasid Shariah

Etymologically, Maqasid Syarî'ah is a term from two words; *maqasid* and shariah. *Maqasid* is the plural form of *maqshad*, which is a derivation of the verb *qasada yaqsidu* with various meanings such as to a direction, goal, middle, fair and not transgress, straight, middle - middle between exaggeration and deficiency.[67]

Meanwhile, etymologically shariah means the path to the water spring,[68] in fiqh terminology it means the laws of Allah that bind or surround the mukallaf, both deeds, words, and their trust as a whole are contained therein.[69]

In terms of terminology, Maqasid shariah experiences development in meaning, such as legal objectives, legal meanings, reaching benefits and rejecting disadvantage. Ibn 'Asyur as a bearer of Maqasid shariah as an independent branch of knowledge defines Maqasid shariah as meanings and wisdoms that are considered and maintained by shari'a in every form of determining His law.[70]

Jasser Auda defines Maqasid shariah as the values and meanings that the maker of the Sharia (Allah SWT) aims to achieve behind the making of sharia and law, which the mujtahids scrutinize from the sharia texts.[71]

From these definitions indicate the close relationship of Maqasid shariah with hikmah, 'illat, purpose or intention, and benefit. Meanwhile, according to Satria Effendi, Maqasid shariah means the purpose of Allah and His Messenger in formulating Islamic laws, these objectives can be obtained from the verses of the Qur'an and the Sunnah of the apostle as a logical reason for law-oriented formulation. benefit of the people.[72]

2) The division of Maqasid shariah

Maqasid scholars do many classifications of maqasid with various different points of view, this classification is very important because it will help in the process of identifying maqasid for a legal practitioner in understanding and applying it in the process of legal dig (istinbath). One of the barometers of the division of Maqasid shariah is the classification in terms of subjectivity, originality, universality, and urgency. However, in this paper, all of the divisions will not be described, and only some of the Maqasid divisions will be used as a theoretical framework in discussing the problems of this paper.

When viewed from the side of the originality of Maqasid shariah, according to Syatibi, it is divided into two: (1) *al Maqasid al-Asliyah*, namely the goal that does not pay attention to the interests of servants, (no consideration of lust, tendencies and human nature), such as the goal of obedience. in the obligations of prayer and zakat. And the purpose of marriage is to nurture and save offspring.

(2) *Al Maqasid Al-Tabʿiyah*, namely the goal that pays attention to lust, tendencies and human nature. Such as the purpose of marriage to facilitate special needs' as part of human biological needs.[73]

In terms of urgency, Maqasid shariah is divided into three:[74] (1) Daruriyat, The benefits needed by all mankind, if not fulfilled, will greatly affect the order of life, can have fatal consequences. According to the scholars' there are five things that fall into this category, namely maintaining religion, caring for the soul, maintaining wealth, maintaining reason, maintaining offspring. Some scholars add to maintaining honor in this category. It is to maintain these six points that Islamic Sharia was revealed.[75]

Preservation of religion is a basic human need for human survival, especially for the afterlife. Conservation of souls is a basic human need, so efforts to prevent loss of life must be carried out through legal regulations, prevention and treatment of disease. The survival of human beings will also be threatened if the ownership of their property is threatened either by theft, corruption, usury and others. Human life is also threatened

if their intellect is disturbed, therefore Islam strictly prohibits khamr, drugs and the like. Likewise, the preservation of offspring and human honor must also be maintained through the prohibition of adultery, laws on educating children, maintaining family integrity, and the law of child neglect.[76]

(2) Hajiyat, the purpose in the category is not a basic need for humans, but for convenience and comfort in living life, such as marriage, trade, means of transportation and others.

(3) Tahsiniyat, Complementary purposes, beautify life, such as wearing perfume, attractive clothes, beautiful homes and so on. The preservation of this tahsiniyat should not neglect the preservation of daruriyat and hajiyat, but sometimes there are relationships and attachments between the three categories, for example, such as marriage and trade having benefits related to the preservation of offspring and property included in daruriyat.[77]

The barometer of subjectivity, originality, universality and urgency is the result of the ijtihad of the Maqasid scholars. Ibn 'Asyur adds to the discussion of Maqasid in the field of muamalah by distinguishing between Maqasid (goal) and Wasail/Wasilah (intermediary) in the field of muamalah;[78]

Maqasid is the first level in the determination of the Shari'a either in the form of stipulation, in the form of prohibiting or eliminating something. Maqasid is something that has masalih and mafasid in it.

Like the purpose of marriage, it is to save the offspring and maintain one's honor or dignity from adultery which can disrupt the offspring in the order of human life.[79]

Wasail is something that follows other circumstances. And wasail is the path that leads to Maqasid. So wasilah based on the best maqsud is the best wasilah. And wasilah based on the hated maqsud is the worst wasilah.[80]

For example, witnessing a marriage contract and announcing a marriage contract are not the true intentions of marriage, but both are required to be wasīlah to keep the impression of marriage away from adultery and social defects.[81]

Jasser Auda describes maqasid as a way to differentiate between the ends and the means in Islamic law. For example,[82] Yusuf Qardawi and Faisal Mawlawi applied the concept of goals and means in the rukyat month of Ramadan, he both saw rukyat as "just" a means to determine the start of the fasting month, and not as an end in the practice of rukyat itself. Yusuf Qardawi also applies the same concept to the wearing of the headscarf by women as a means of attaining the goal of modesty.[83]

3) Maqasid Shariah in Islamic Marriage

Maqasid shariah in marriage is to save offspring and maintain one's honor or dignity from acts of adultery which can disrupt the offspring in the order of human life.[84]

The wisdom of marriage syari'at is to protect a person and his partner from haram (such as adultery, and other bodily immorality), keep the lineage (descent), maintain human honor through a noble contract, uphold a household that is part of the social order. By getting married, it can also help to help between husband and wife and strengthen family ties. With these various wisdoms, getting married is a means to create and maintain benefit.[85]

Al-Ghazali views that marriage has 5 main benefits, namely: (1) maintaining offspring; (2) maintaining lust; (3) calm the soul; (4) focusing on worship; (5) multiply the reward.[86] Furthermore, Nuruddin Abu Lihyah considered the opinions of Al-Ghazali and Al-Sarkhasi, concluding that Maqasid shariah from the existence of marriage is (1) keeping humans from falling into immorality; (2) respect for women; (3) forming a family.[87]

Marriage is an Islamic way to stabilize the family system, Islam requires the marriage

contract as an effort to achieve virtue and holiness in the heart of a partner and human perspective and not always related to lust.[88]

The marriage contract (akad nikah) describes the desire to realize the willingness of a woman and her family, and to realize a man's intention to preserve relationships and pure love. The marriage contract emphasizes the willingness of a guardian and his family to be owned by another man through marriage, where the female guardian will not give this blessing to his child when committing immoral or adultery.[89]

Marriage is enforced in Islam to be broadcast to the public in order to be a sign of an important event that men and women are bound in the marriage contract. It also stipulates the honor of a woman after marriage who must be respected that she has belonged to someone in an honorable way. Meanwhile, the secrecy of marriage according to the scholars is close to adultery. Because in the secrecy of marriage there is an attempt to hide family and hereditary relationships. The relationship between lineage and kinship born from the marriage contract becomes clear. While adultery makes the bond between the two unclear. This relationship gives birth to rights and obligations that must be maintained and fulfilled. So when the marriage bond between husband and wife is severed, it will greatly affect the lineage and kinship relationship.[90]

Marriage is seen from the Maqasid shariah side, it can be explained as follows;

(a) Maqasid Aṣliyah and Maqasid Tabʿiyah in Marriage

Prof. Hasan al-Sayid Hamid Khithab, Professor of the Taibah University of Madinah divides the Maqasid shariah marriage into two categories, namely Maqasid Asliyah and Maqasid Tab`iyah. He considered that maintaining lust and caring for offspring was the most important Maqasid Asliyah.[91]

In the perspective of Maqasid Asliyah, the main purpose of marriage is to maintain and save the offspring from adultery that can confuse the offspring for the sake of human survival with regeneration, maintaining one's lineage and honor or dignity.[92]

Meanwhile, Maqasid Tab`iyah in syari'atan marriage is like facilitating the biological needs of humans as living beings in a noble way such as the special desire 'between men and women, this is the goal that follows the original goal of maintaining and saving offspring. Allah made this goal natural in humans, as a driving force for them to realize maqshud al-ashli (the main goal).[93]

(b) Maqasid and Wasīlah in Marriage

As explained above, the Maqasid of marriage is saving offspring and maintaining one's self-respect. In the marriage law, there are benefits in the form of happiness, peace of husband and wife, and the comfort of family life. So all actions that can fulfill the purpose of marriage are wasīlah for marriage. As testimony to the marriage contract and announcing the marriage contract are not the intention (goal) of marriage, but both are required to act as wasīlah to keep the impression of marriage away from adultery and social defects.[94] Knowledge of marriage law, family law, child education, family and reproductive health education, as well as knowledge of conflict management and finances in the family become wasīlah in realizing the purpose of marriage.

4) Maqasid shariah in Divorce

The separation of the marital relationship occurred partly because of divorce (divorce from the husband's side, divorce from the judge, fasakh, khulu , and rafa). The meaning of syara in renouncing the marriage bond is an effort to take the slightest danger in the difficulty of maintaining the relationship between husband and wife, and worrying about increasing household chaos. So the divorce is carried out is to break the marriage

bond.[95] That is, in divorce there is indeed disadvantage or danger to the maintenance of offspring and human dignity (divorced family members), but if the divorce is not carried out, it may result in disadvantage or greater danger, therefore divorce is permitted.

Divorce is used as a solution to situations such as domestic violence, abusive behavior, and family disharmony. Sometimes divorce is also carried out in a hurry because it follows the impulses of a moment's lust.[96]

The law of divorce varies according to the conditions and circumstances.97 The law of divorce (from husband side) becomes permissible (mbah), if the husband needs it, because of the wife's bad morals, which can bring danger to the family he is cultivating, or vice versa. Because with conditions like this, we will not be able to achieve the true goal of marriage, especially if the marriage is maintained.

Divorce can be makruh if it is not needed. For example, the husband and wife's condition is in a stable condition and there is no worrying change. Even some scholars' forbid divorce under these conditions, considering the disadvantage and the dangers of divorce that affect mainly children or offspring both from a biological, psychological and social perspective.[98]

Divorce can become sunnah if it is really needed, such as if maintaining the marriage can cause harm to the husband or wife relationship. Such as household conflicts that occur continuously and there is domestic violence that contains dangers, especially for wives.

Divorce becomes obligatory (wajib) for husbands to pass it on to their wives if the wives are not committed to carrying out religious orders. For example, a wife often leaves the prayer while she can no longer be advised and can no longer maintain her honor, so the husband is obliged to divorce his wife.[99]

Ibn Taymiyyah argues that if the husband finds his wife committing adultery, it is no longer possible for the husband to keep such a wife.[100] Divorce is haraam by the husband if the wife is in a menstrual or puerperal state.[101] Likewise, husbands are prohibited from dropping three divorces at one time.

In general, we can know that the breakdown of marriage and divorce is caused by a danger that threatens the husband, wife or other family members, or that marriage falls into a state that is not desired by the aims of the law in marriage.[102] Therefore divorce in Islam is a matter that is allowed but hated by Allah, as explained in the hadith:

“From Ibn Umar R.A. that Rasulullah SAW said: "The halal thing that Allah hates the most is divorce (talak)". (Abu Dawud).[103]

5) Pre-Marriage Education in The Perspective of Maqasid shariah

Basically pre-marriage education is not regulated in Islamic law, either in the Al-Quran and Hadith or positive law in effect in Indonesia. In pre-marriage education, or in similar activities such as marriage guidance, bride and groom courses, there are materials that are relevant in equipping the prospective bride and groom with various knowledge to realize the goal of marriage, namely to get happiness through the sakinah family and equip knowledge in preventing family conflicts that lead to divorce.

Among the Maqasid shariah reviews in pre-marriage education are as follows:

(a) Benefits (Maslahat) in Pre-Marriage Education

Pre-marriage education has urgency because it contains maslahat (benefits), namely: (1) Providing knowledge to the prospective bride to create benefits in marriage. Such as how to realize happiness through the Sakinah family with knowledge of family law, the rights and obligations of husband and wife, the law of educating children, knowledge of reproduction, law on domestic violence, and so on.

(2) providing provide knowledge to prevent potential damage and harm in the marriage bond. Such knowledge includes conflict management, financial management, reproductive management, communication management, conflict resolution procedures (syiqaq) and resolution (islah) of husband and wife, and efforts to avoid divorce. This knowledge becomes an important and practical provision in dealing with family problems, which according to the research results, one of the problems is due to the lack of knowledge in family.

(b) Pre-Marriage Education as Maqasid Tab'iyah
The benefit of pre-marriage education is as Maqasid Tab'iyah (goal of followers) which strengthens and supports the realization of hifz an-nasl and hifz al-'ird (maintaining descent and honor) as Maqasid Asliyah (original goal) in the marriage law.

(c) Pre-Marriage Education is Wasīlah (intermediary)
Pre-marriage education is a wasilah (intermediary) to realize the Mqasid (goal) of preserving offspring and family honor which can be realized through harmonious and undivided family ties. Pre-marital education is also a means of resisting the potential harms and dangers caused by divorce.

(d) The Relevance of Pre-Marriage Education with Hifz an-Nasl and Hifz al-'Ird
Pre-marriage education has relevance to hifz an-nasl (protection of offspring) and hifz al-'ird (protection of honor) which can be realized by the existence of marriage which refers to the purpose of marriage,[104] and it (protection of dignity) can be fulfilled if couples understand the true meaning and nature of marriage by attending pre-marriage education.[105]

(e) Curriculum Relevance of Pre-Marriage Education
The pre-marriage education curriculum has relevance to educational aspects, religious and religious aspects, economic aspects, sociological aspects, and biological aspects.[106]

3. CONCLUSION

Based on the discussion, pre-marriage education has relevance and urgency to the preservation of marriage and to minimize the potential for divorce. In the perspective of maqâṣid syarî'ah, pre-marital education contains Maqâṣid Tab'iyah (follower goals) which strengthen and support the realization of Maqâṣid Aṣliyah (original goal) in the syari'at of marriage, namely hifẓ an-nasl and hifẓ al-'ird (maintaining descendants and honor). Pre-marriage education is also a wasīlah (intermediary) to realize the maqsud (goal) of marriage, which is to provide knowledge to preserve offspring and maintain family honor. Pre-marriage education is also wasīlah (intermediry) to deny potential mafsadat and the dangers that arise from divorce.

The future bride are also given knowledge to prevent and overcome potential mafsadat and dangers in the marriage bond, such as knowledge of conflict management, financial management, reproductive management, communication management, conflict resolution procedures (syiqaq) and resolution (islah) of husband and wife, and efforts to avoid divorce. This knowledge becomes an important and practical provision in solving family problems.

4. RECOMMENDATION

a. It is necessary to formulate regulations at the level of ministerial regulations or government regulations regarding pre-marriage education, so that they have strong regulations and have compelling power in their implementation.
b. Provision of a budget for the implementation of pre-marriage education in the

government budget.

c. The government can give the authority to implement the pre-marriage education program to non-governmental organizations, such as universities or to community social institutions with an accreditation system for the implementing agency for the program.
d. Pre-marriage education also needs to be applied to middle school and high school age adolescents, in addition to ideal marriage preparation as well as an effort to prevent child marriage in Indonesia.

ISLAMIC MARRIAGE DURING CORONA VIRUS-19 LOCKDOWN

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Abstract
The pandemic state of Covid-19 had been hampering various human activities, including the provisions of the Islamic marriage law in Indonesia. The rule of new normal life established by the Government has led to some adaptation in a marriage ceremony to be still held. The development of sophisticated technology has become an intermediary. One of them is conducting an online marriage agreement through a video call. This new case raises several pros and cons among Islamic scholars regarding its validity. However, there is a sharp dispute between them. In addition to an online marriage agreement, a new problem arises next is about organizing the walimah (wedding ceremony). In some areas, the police have dismissed the walimah event because it is considered a new virus transmission cluster. This problem made some people worried because they cannot carry out routine marriage traditions, so they must found a concrete solution. Based on these problems, this research aims to answer the validity of organizing online marriage agreements and organizing walimah in the pandemic period. Besides, this study discussed solutions to online marriage agreement problems and managing walimah during the pandemic. The research will be conducted with a normative approach. This research aims to answer the validity of online marriage agreements, primarily through video calls and the solution so that the walimah can still be held.
Keywords: marriage agreement, online, walimah, pandemic

1. INTRODUCTION

The pandemic that hit the whole world in 2020, has had a significant impact on various lifelines in society, including the provisions of the Islamic marriage law in Indonesia. The establishment of Large-Scale Social Restrictions, physical distancing, and various health protocols resulted in difficulties in implementing Islamic marriage law provisions. Due to these conditions, legal issues arose about the validity of online marriage contracts and the implementation of *walimah* during the pandemic and the solution to the problems of online marriage agreement and the performance of *walimah* during the pandemic. This happened to the prospective bride and groom, they held an online marriage contract on 25 March 2020, starting with the prospective groom being detained at the port of Bajoe, Bone Regency, South Sulawesi, to undergo a series of health quarantines anticipate the spread of the Covid-19 virus.

Meanwhile, the prospective bride is in Kolaka Regency, Southeast Sulawesi. They are about 700 km apart if they travel overland. The groom must undergo a health quarantine protocol for 14 days because he has just arrived from Surabaya, East Java, which has been designated a red area affected by Covid-19. In order to carry out the marriage agreement, both parties agree to do the online marriage agreement. In another place, there are several *walimah* events or receptions dismissed by officers to prevent crowds. This action was carried out in order to avoid the massive spread of the covid-19 virus among residents.

On 19 March 2020, the Directorate General of Islamic Community Guidance of the Ministry of Religious Affairs issuing policy Circular Letter Number: P-002/dj.III/Hk.00.7/03/2020 concerning the Appeal and Implementation of Protocol for Handling Covid-19 in Public Areas within the Directorate General of Islamic Community Guidance (hereinafter abbreviated to as Circular Letter Number 2 of 2020) in provisions section E number 1 alphabet d stated "Postpone mass gathering activities such as wedding receptions and religious events to avoid crowds." Then on 2 April 2020, the Directorate General of Islamic Community Guidance of the Ministry of Religious Affairs more issuing policy Circular Letter Number 3 of 2020 concerning the Amendment of Circular Letter Number 2 of 2020 in the provision section I point a number 7 stated "The implementation of the marriage contract online either by telephone, video call, or the use of other web-based applications is not permitted." With the birth of the two rules above, the discussion regarding the implementation of the marriage contract and *walimah* during a pandemic deserves to be discussed.

1.2. Research Method and Benefit

The research used normative legal research, which was sourced from Indonesia legal regulations related to Islamic marriage and health protocols during a pandemic. It is hoped that this research can answer the problems of society in implementing marriage agreement and walimah for Muslims during a pandemic.

1.3. Paper Structure

This research focuses on analyzing the marriage agreements via online in Islam and the implementation of walimah during a pandemic. To set a clear border of research limitations, this research only tries to answer a question concerning the validity of online marriage agreements and the implementation of walimah during the pandemic.

2. BACKGROUND

2.1. The Validity of Islamic Marriage Agreement

The validity of marriage in Indonesia is regulated in Article 2 of Law Number 1 of 1974 (hereinafter abbreviated to as the Marriage Law) concerning Marriage. It stated, "Marriage is legal if it is carried out according to the law of each religion and belief." For prospective bride and groom who are Muslim, it is based not only on the Marriage Law but also on marriage provisions in the Islamic Law Compilation. A marriage contract can be declared valid if it has fulfilled the pillars stipulated in Article 14 of the Islamic Law Compilation. The pillars of marriage or marriage are; a. Groom; b. Bride; c. Marriage Guardian/ *Wali* Nikah; d. Two witnesses; e. Marriage Consent/ *Ijab Qabul*.

The details of the pillars are in line with the Madzhab Syafi'i, as stated in *al-Yaqut al-Nafis*, i.e. a) Husband, b) Wife, c) Wali, d) Two witnesses, & e) *Sighat* (ijab and qabul). [1] Each of these pillars has conditions. The first requirement regarding the age of the prospective bride is regulated in Article 15 of the Islamic Law Compilation stated, "For the benefit of the family and household, a marriage may only be performed by a prospective bride and groom who has reached the age stipulated in Article 7 of Law Number 1 of 1974 specifically the future husband is at least 19 years old, and the future wife is at least 16 years old." However, it has been revised in Article 1 paragraph (1) of Law Number 16 of 2019 concerning Amendment of Law Number 1 of 1974 concerning Marriage, which stated, “Marriage is only permitted if the man and woman have reached the age of 19 (nineteen) years old.” The second condition is regulated in Article 16 paragraph (1) of the Islamic Law Compilation that state, "Marriage is based on the approval of the prospective groom and bride." The third requirement that the prospective groom and bride do not have marital barriers as regulated in Article 18 of the Islamic Law Compilation which stated, "For future husband and future wife who will enter into marriage there is no marriage obstacle as regulated in chapter VI." The marital obstructions in Chapter VI are meant by lineage affinity, an affinity for marriage, and affinity for milk.

Then the legal requirements of a marriage guardian or *wali nikah* are regulated in Article 20 paragraph (1) of the Islamic Law Compilation, which stated, "The one who acts as a guardian of marriage is a man who meet requirements in Islamic law, *aqil baligh*." Then classified in Article 20 paragraph (2), "The guardian of marriage consists of a. Marriage Guardian by the *Nasab*, b. Judge of Marriage Guardian."

The legal requirements for marriage witnesses are regulated in Article 25 of Islamic Law Compilation, which states, "One who can be appointed as a witness in the marriage contract is a Muslim man who already *aqil baligh*, not memory impaired, and not deaf." Also regulated in Article 26 stated, "Witnesses must be present and witness the marriage

agreement directly and sign the Marriage Certificate at the time and the place where marriage contract takes place."

Regarding the terms of marriage consent or mutual agreement (*ijab qabul*), it is regulated in Article 27 of the Islamic Law Compilation, which stated, "*Ijab* and *qabul* between the guardian and the prospective groom must be clear in sequence and not intermittent." Then it is also regulated in Article 29 paragraph (1) - (3), which stated, (1) Those who have the right to say *qabul* are the prospective grooms personally; (2) In some instances, the told of *qabul nikah* can be represented by another man provided that the prospective groom gives assertive authorization in writing that the acceptance of the representative of the marriage contract is for the groom; (3) If the future bride or the marriage guardian objection if another man represents the prospective groom, the marriage contract may not be executed.

All of the pillars and conditions above must be fulfilled to be valid in order for the marriage contract, and the groom and bride will officially become husband and wife. However, the development of telecommunication technology supported by the internet network has led to creativity in implementing the marriage contract, but the distance is hindered. It is difficult for both of them to attend the same assembly because of economic constraints, activities, and jobs that cannot be left behind. The creativity referred to using the assistance of an internet-based video call application in the process of marriage consent or mutual agreement to implement one of the marriage contract pillars.

Referring to the Islamic Law Compilation, the real solution to the problem can be resolved by referring to the provisions of Article 29 paragraph (2) as mentioned above, which is the prospective groom assertive authorization in writing to another man that the acceptance of the representative of the marriage contract is for the groom. This method is called *tawkil.* [2]

It is just that due to the development of telecommunication technology, this method is not adopted because it is considered that the problem of distance separation has been overcome by increasingly widespread video call applications, easily accessible even at no cost and can directly connect the marriage guardian to the prospective groom to carry out marriage consent at real-time.

Unlike the case with the old marriage contract by telephone between Drs. Ario Sutarto with the guardian of marriage on behalf of Prof. Dr. H. Baharuddin Harahap, as legalized by the South Jakarta Religious Court in Determination Number 1751/P/ 1989.

The marriage contract through the telephone line is still hazardous for doubt or even fraud. The stipulation invited a counter-reaction from ulamas and scholars because it was considered that telephone lines were still unable to meet the prospective groom's presence as one of the marriage pillars. Whereas in the marriage contract via video call, the pros and cons are more visible. The argument from those who are pro or view the marriage contract as valid through a video call stated, the law of the marriage contract via video call according to the Marriage Law and the Islamic Law Compilation in Indonesia that the implementation of the marriage consent through video call in its performance has met the requirements and pillars of marriage and does not conflict with the Islamic Law Compilation, so the marriage is legal. This is confirmed by the provisions of Articles 27 to 29 of the Islamic Law Compilation, among others, not intermittent and spoken directly by the groom through a video call. All aspects of marriage are fulfilled, including pillars, legal requirements, conditions of marriage. [3]

There is also a pro argument from the www.islamqa.info website managed by Shaykh Muhammad Shalih al-Munajjid, which stated, “Hence the correct view concerning this matter is that it is permissible to make the marriage contract over the phone or internet

if there is no danger of tampering, the identity of the husband and *wali* is proven, and the two witnesses can hear the proposal and acceptance." [4]

As for the counter-argument, there is a fatwa from *Majma 'al-Fiqh al Islami* (Islamic Fiqh Council) which is based in the city of Mecca, Kingdom of Saudi Arabia, which stated, "The guidelines mentioned above [that is permissible to make contracts via modern means of communication] do not apply to the marriage contract, because of a stipulation that witnesses be present in that case." [4]

Then, the fatwa from the *Bahtsul Masail* Nahdlatul Ulama Institute, which states, the marriage contract [via the internet] is not valid. It has been based on various considerations because marriage through electronic devices cannot directly make the marriage contract. Directly referred to is the involvement of the guardian and the groom. Second, the witness did not see and hear the voice directly in the contract's implementation, and the witness was present in the assembly. In the marriage contract, exact and precise words are required. Marriage through electronic devices is classified (vague). [3]

Based on the pro and contra arguments above, there are different views regarding *ittihad majelis* (unified assemblies) implementing the marriage contract. The pro argument views that what is meant by *ittihad majelis* is that the marriage consent or *ijab qabul* must have continuity, which means that no other deeds or words should appear between *ijab qabul*, and parties have a contract are not required to have in one place. Whereas the counter argument holds that the marriage contract must be carried out by physically uniting assemblies in the same place, not only to ensure the continuity of *ijab qabul* but closely related to the duties of two witnesses who must see with their eyes directly that *ijab qabul* are indeed spoken by both people who did. [5]

Concerning the issue of the *ittihad majelis*, the principle of certainty must be put forward. Marriage in Islam contains the value of legal certainty, which means that the marriage must be carried out by fulfilling several specific requirements concerning both parties and those related to the marriage itself. *Ijab qabul* through video calls, which are practically carried out between the marriage guardian and the prospective groom, cannot be done because such methods still create legal uncertainty or disguise. Several provisions and problems were caused by this uncertainty, i.e.:

1. Marriage is a matter of worship;
2. *al-Mu'ayanah* requirement;
3. Opportunity for manipulation;
4. Inequality of connectivity;
5. The provision from the Government that have a degree like a *qanun*;
6. The *fiqh* principle of *Al-Maisur La Yasquthu bi Al-Ma'sur* (the easy one cannot fall with the difficult).

Here is the explanation. First, marriage is a matter of worship. Marriage is a form of worship, so its implementation must be following the guidance of the Qur'an and the Sunnah of the Prophet Muhammad SAW, based on the rule of "the law of origin of worship is haram, so there are arguments or dalil." The marriage contract in the condition of the guardian of marriage with the prospective groom who is far apart had occurred during the Prophet Muhammad SAW when he married Umm Habibah whose real name is Ramlah bint Abu Sufyan bin Harb. At that time, the Prophet Muhammad SAW in Medina was separated from Umm Habibah as the prospective bride in Habasyah. Therefore, Rasulullah SAW performed *tawkil* or carried out a *wakalah* contract with King Habasyah named Najasyi by sending Amr bin Umaiyyah Adh-Dhamri a letter of request for representation to Najasyi. The message's contents were a request to Najasyi to represent Rasulullah SAW as a prospective groom in front of a marriage guardian carried by a friend named Khalid bin Sa'id bin al-Ash. [6]

Second, the *al-Mu'ayanah* requirement. The meaning is that it can be seen with eyes. The need to unite the assembly is related to maintaining the continuity between *ijab qabul* and closely related to two witnesses' duty to witness firsthand the marriage contract process. That way, the two witnesses can minimize all potential uncertainties. Moreover, the concept of a witness is someone who has experienced an event directly, such as the provisions of Article 26 of the Compilation of Islamic Law, which reads: "Witnesses must be present and witness the marriage contract firsthand and sign the marriage certificate at the time and the place where the marriage contract takes place."

Third, opportunity for manipulation. The development of technology is very rapid, such as technology in facial manipulation called "*deep fakes*." [7] This software-based technology can engineer a person's face to turn into the face of the other person he wants. This technology can be done in real-time even in its development when communicating using teleconferencing applications or internet-based video calls. This sophistication can make the interlocutor realize that the interlocutor is different from what he thinks or has another face than previously known, as can be done using Looksery [8] and Avatarify. [9] Manipulation can be more difficult to notice if the actor also has voice imitation abilities. Such sophistication can open up the potential for fraud or other crimes if the marriage guardian makes a marriage contract with the prospective groom through a video call. Two witnesses who also watched through the gadgets screens or projector screens could not detect the potential for manipulation and imitation of these deep fakes.

Fourth, inequality of connectivity. There is still an imbalance in connectivity between regions in Indonesia, leading to unstable signal interference when the marriage ceremony is done online. If this happens, the continuity of *ijab qabul* will be challenging to implement, so the marriage contract process has to be postponed, or there is an opportunity to reduce the pillar of marriage from the parties concerned so that the marriage contract can be carried out and declared valid.

Fifth, the provision from the Government that have a degree like a *qanun.* The provision section I point a number 7 Circular Letter Number 3 of 2020 issuing by the Directorate General of Islamic Community Guidance of the Ministry of Religious Affairs stated, "The implementation of the marriage contract online either by telephone, video call, or the use of other web-based applications is not permitted." These provisions have the same degree or nature as *qanun* in the realm of Islamic legislation, i.e., "A collection of provisions that become law or regulate individual behavior in society, where these provisions force individuals to comply with force when stipulated." [10]

Sixth, the *fiqh* principle of *Al-Maisur La Yasquthu bi Al-Ma'sur.* These rules are listed in several books that contain Islamic legal principles from the scholars, such as in *I'anatu ath-Thalibin* by as-Sayyid al-Bakri, *Ghiyatsu al-Umam fi Iltiyats azh-Zhulam* by al-Juwaini, *al-Wasith's* by al-Ghazali, and *Tuhfatu al-Muhtaj* by al-Haitami. In terms of *ushul fiqih*, this rule means, an order is obligatory, if it cannot be carried out correctly, that is, it can only be carried out partially due to weakness/ incapacity, then the obligation does not become wholly nullified. The part capable of being done is still obliged to be carried out, while the part that is not capable of being done is not obliged to be carried out, aka the obligation to carry it out, is null and void. [11]

Based on these principles, online marriage contracts cannot be implemented. This is because physically uniting the assemblies does not mean that they are eliminated because of the difficulty of being separated from long distances. It cannot be directly circumvented by redefining the meaning of united assembly or *ittihad majelis* in the context of a marriage contract, which is said to be realized online via video calls. Moreover, one of the conditions that reinforce this rule is that if there is *badal* (substitute), practice cannot be abandoned or

changed. [11] In this case, *badal* means a substitute or person who can represent the prospective groom.

Based on some of the descriptions above, the authors tend to support the view of counter-marriage contracts online because they are more in line with the principle of certainty and prudence.

2.2. Walimah/ Wedding Party in Pandemic

The term *walimah* means: "... the food served to describe the joy of the wedding and the transfer of ownership. The purpose of transfer of ownership is the transfer of a woman's responsibilities from her guardian to her husband" [12] The wedding party or *walimah* is one of the new clusters of covid-19 transmission. Like the case that happened in Semarang City on 16 June 2020. [13] It happened because the residents were reckless to organize it during a pandemic and were exacerbated by a lack of awareness to comply with health protocols. The *mafsadat* that arose, in the end, was more significant than the *maslahat* to be grasped. The original law of performing a walimah is not mandatory, but *sunnah mu'akkad* is highly recommended. The consequence is that although it is highly recommended to be held, it is not sinful if the *walimah* is decided to be eliminated, especially if there is an emergency such as a pandemic. The reason the majority of scholars state *walimah* to the degree of sunnah cause *walimah* come up after the marriage contract, while the marriage contract itself is not obligatory. So the *walimah*, which is part of the marriage itself is not obligatory. Even if the marriage is compulsory, the level will be stated as in the levels of *zakat* and *kafarat*. Moreover, when someone has difficulty in doing it, there will be *badal* or a substitute. Like *kafarat*, which can be replaced by fasting when feel difficulties. [12]

It is also necessary to practice the basic *fiqh* principle of *adh-Dhararu yuzalu* (danger must be eliminated). The broader definition is "Harm should be avoided as much as possible before it occurs, because "preventing" is better than "cure." There must be an effort to avoid the harm as much as possible as a whole if it is possible and if not entirely, then to the extent that is possible." [14]

The implementation of the above rules is in line with the Circular Letter Number 2 of 2020 of the Directorate General of Islamic Community Guidance of the Ministry of Religious Affairs concerning the Appeal and Implementation of Protocol for Handling Covid-19 in Public Areas within the Directorate General of Islamic Community Guidance in section E number 1 alphabet d stated that stated "Postpone mass gathering activities such as wedding receptions and religious events to avoid crowds."

3. CONCLUSION

An online marriage contract using an internet-based video call application cannot be permitted due to the physical obligation of the assembly or *ittihad majelis*. Meanwhile, the expansion of the meaning of *ittihad majelis*, which is said to be realized online, contains a considerable risk of weaknesses because of many factors, i.e., marriage is worship, the requirements of *al-Mu'ayanah*, opportunities for manipulation, inequality in connectivity, there are government regulations that have degrees like *qanun*, and Islamic *fiqh* principle *Maisur La Yasquthu bi Al-Ma'sur* (easy ones cannot fall with difficult ones).

The law of performing a walimah is *sunnah mu'akkad*, so it does not matter if it is not held, especially during a pandemic, which must avoid crowds of people. Therefore, it should be postponed first by paying attention to the principles of *fiqh adh-Dhararu yuzalu* and the request for postponement from the Ministry of Religious Affairs.

4. ADVICE

The solution to the problematic implementation of a marriage contract in a pandemic period for prospective groom and bride who are separated and the marriage guardian is also in the place of the prospective bride is to seek *tawkil* by the prospective groom to someone who is trusted to represent him in carrying out the marriage contract with the guardian of marriage. Meanwhile, the performing of a *walimah* or wedding party can be postponed in advance because it is not a pillar of marriage, and it is not obligatory, *sunnah mua'akkad*. There are no consequences of damage to the marriage contract, or the sins received for not carrying it out, or the *walimah* can be replaced by sending food dishes only to neighbors and those in need.

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INHERITANCE SHARING BY *NGESTHI KASAMPURNAN* BELIEVERS AS VIEWED FROM IMAM ASY-SYATIBI'S *MAQASHID AL-SYARIAH*

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Abstract

The key issue in this research is the practice of inheritance sharing by *Ngesthi Kasampurnan* believers when viewed in the perspective of Imam Asy-Syatibi's *Maqashid al-Syariah*. The aforesaid key issue is then broken down into several sub-issues or research statements that aim to prove the view of Imam Asy-Syatibi's *Maqashid al-Syariah* on the concept of inheritance sharing by *Ngesthi Kasampurnan* believers, and the practice of inheritance sharing according to the customary law of *Ngesthi Kasampurnan* believers when viewed by Imam Asy-Syatibi's *Maqashid al-Syariah.* This research is field research classified as qualitative, with the research approaches used are Syariah, formal legality, and sociology. Sources of research data are the community and leaders of the *Ngesthi Kasampurnan* believers in Magelang regency. The data collection methods used are observation, interview, and documentation. Data processing and analysis techniques are carried out using three methods, namely: deductive, inductive, and comparative techniques. The results of this study indicate that the inheritance sharing system for *Ngesthi Kasampurnan* believers uses the customary law system as stated in the Book of Agung Pandom Suci. The book explains in detail the system of inheritance sharing where the system is divided equally and proportionally among the heirs. Based on the heirs and the aforesaid sharing system, it conflicts with Al-Qur'an and Hadith when viewed from the perspective of Islamic Inheritance Law (faraid). However, it does not conflict with the essence of Imam Asy-Syatibi's *Maqashid al-Syariah*. It is because the essence of *Maqashid al-Syariah* is to bring *maslahat* (goodness) and at the same time reject *mafsadat* (badness).
Keywords: Inheritance, Ngesthi Kasampurnan, Maqashid Al-Syariah

1. INTRODUCTION

The practice of inheritance sharing in Islam has been detailed in the Al-Quran. In detail, Al-Quran explains the laws related to rights of inheritance without neglecting the rights of any whomsoever. The sharing of each heir, either male or female, has been stipulated in the law of inheritance in Islam by the nash (text) in the Al-Quran surah An-Nisa verse 11-12. For Muslims, implementing the law of inheritance based on the Al-Qur'an and Hadith is an obligation. It is a form of faith and piety (*soleh*) to Allah and His Messenger.

Article 171 (a) Islamic Law Compilation explains the definition of inheritance law, which is a law that regulates the transfer of ownership rights to the inheritance (*tirkah*) of the inheritor, determines who has the right to become the heirs, and the amount of sharing of each heirs. On the other hand, in Article 183, it is stated that: "*the heirs may concur to make peace in the sharing of inheritance after each realizes their share.*"[1]

The inheritance sharing carried out by the *Ngesthi Kasampunan* believers is guided by the Book of Agung Pandom Suci. This book was compiled by Darmo Wasito and issued by the Pan-Soeh Religious Council. The method of the inheritance sharing is explained in *Perangan VI (Kaenem) of Dalil Anguwasani/Amengkoni Raja Darbe, Donya Brana Sarta Pembagene Amal-Waris*, pages 398-404 number 5 A-S, that *Panutan* (Role Model) often says that an asset is only a small part of life when compared to a lasting life in the afterlife.[2]

The purpose of the inheritance sharing either according to Islamic Law or the law of *Ngesthi Kasampunan* believers is to get justice, benefit, and togetherness. Allah SWT creates laws and rules with a specific purpose and objective. He does not create aimless laws and rules. Ibn Qayyim al-Jauziyah, as quoted by [3], stated that the goal of *Syariah* is for the benefit of Muslims in the world and afterlife. All Syariah is fair, contains mercy, and contains wisdom. Any problem that deviates from justice, mercy, benefit, and wisdom does not belong to a provision of the S*yariah*.

Therefore, knowledge of the theory of Islamic legal studies is a necessity. The study of Islamic Law is named *Maqashid al-Syariah*. The purpose of establishing the law or what

is often known as *Maqashid al-Syariah* is one of the important concepts in the study of Islamic Law. Because of the importance of this *Maqashid al-Syariah*, legal theorists have made it as something that must be understood by *mujtahid* who carry out *ijtihad*. The essence of the theory of *Maqashid al-Syariah* is to create the goodness or to give benefit and, at the same time, to avoid and reject *madharat* (badness).[4]

Maqashid al-Syariah constitutes an important aspect of the development of Islamic Law. At the same time, this becomes an answer that Islamic Law is able and very likely to adapt with social changes that occurs in society. The adaptation carried out is still based on strong and solid foundations and within the scope of universal *Syariah*. It also proves that Islam always conforms to every era and every place.

Based on the abovementioned background the author was interested in researching with a focus on a comparative study of the division of *tirkah* (inheritance) according to Islamic Law and customary law of *Ngesthi Kasampurnan* believers using *Maqashid Al-Syariah* analysis. This study is entitled "*The Practice of Inheritance Sharing by Ngesthi Kasampurnan Believers Viewed in the Perspective of Imam Asy-Syatibi's Maqashid Al-Syariah*."

1.2. Research Method

This research is field research with a qualitative approach. This research places more emphasis on the process aspect and involves fieldwork. Data collection used is observation, interviews, and documentation. The stages of data analysis are through data collection, data reduction, data presentation, and conclusion or verification.

This research is descriptive research. According to Lexi J Moleong [5], descriptive research is a research that tries to reveal a problem and situation as it is. As a result, researchers are limited to expressing facts but not using hypotheses. Descriptive research aims to describe the individual characteristics and social conditions that arises in society appropriately to serve as research objects.

The stages in this research are: (1) Pre-research/preliminary study, (2) Formulating and limiting problems, (3) Conducting literature studies, (4) Determining research designs and methods, (5) Collecting and analyzing data, (6) Present results and draw conclusions.

The results of data analysis are displayed in tables, profiles, and so on. Subsequently, the researcher concludes the results of the study as an interpretation of the research findings. Furthermore, the researcher provides suggestions to the parties concerned based on the results of the research.

This research was conducted to *Ngesthi Kasampurnan* believers, Jagalan sub-village, Muntilan village, and Ngelampu sub-village, Pucanganom village, Muntilan subdistrict, Magelang regency. While the research focus in this research is a comparative study to the division of *tirkah* according to Islamic Law and the customary law of *Ngesthi Kasampurnan* believers in the analysis of *Maqashid al-Syariah*. It makes easier for the author to analyze the results of the study.

1.3. Paper Structure

The focus of this research is to discuss how inheritance sharing of the *Ngesthi Kasampurnan* believers from Imam Ash-Syatibi's *Maqashid Al-Syariah* perspective. The initial problem that arises and will be examined through this research is the perception of inheritance sharing by the followers of *Ngesthi Kasampurnan* believers whether it is appropriate or not appropriate from Imam Ash-Syatibi's *Maqashid Al-Syariah* perspective. To give limitations of this study, it tries to answer the question: How is inheritance sharing of the *Ngesthi Kasampurnan* believers viewed from Imam Ash-Syatibi's *Maqashid Al-Syariah* perspective? The subject matter is then broken down into several sub-problems or

research formulations that aimed to prove: 1). What is the view of Imam Ash-Syatibi's *Maqashid Al-Syariah* about the concept of inheritance sharing of the *Ngesthi Kasampurnan* believers? 2) How was the practice of assets sharing according to the customary law of *Ngesthi Kasampurnan* believers community viewed by Imam Ash-Syatibi's *Maqashid Al-Syariah*?

2. BACKGROUND

2.1.1. The Practice of Inheritance Sharing by Believers of Ngesthi Kasampurnan

Based on the interviews with the *Ngesthi Kasampurnan* indigenous people and based on the customary law stated in the Book of Agung Pandom Suci, the calculation of the inheritance sharing of *Ngesthi Kasampurnan* believers is as follows: [6]

a. Biological Child, Father, and Mother

All children born from the marriage of their father and mother are called biological children. The child is a legitimate biological child when the marriage is legal. But when the marriage is not legally valid, then the child becomes an illegitimate biological child.

Based on the customary law of *Ngesthi Kasampurnan* believers, the heirs of biological children, father, and mother receive equal shares according to the Book of Agung Pandom Suci letter f page 400.

Property rights between men and women and between father and mother are equal. The rights and authorities between children are also equal, regardless, the differences between men and women, the oldest and youngest children, and so on.

b. Child in the Womb

Based on the Book of Agung Pandom Suci letter g page 400, property rights between men and women are equal. Thus equal rights and authority of children regardless of the differences between boys and girls, the oldest and youngest children, and so on. Likewise, the rights of children who are still in the womb are equal as the rights of other children.

c. Step-children

Step-children are biological children brought in by a husband or a wife to their marriage. The non biological parent who married with the one who has a child from previous marriage calls the child as a step-child. Therefore, step-children are innate children in marriage.

Based on the Book of Agung Pandom Suci letter i page 400 as customary law of Ngesthi Kasampurnan believers, the position of step-children in inheritance are not allowed to interfere or have the rights to the assets of the step-parent (step-father or step-mother). However, step-father or step-mother are obliged to love and care for their step-children as much as possible adopted children who will later have the same rights as children (half-siblings).

d. Other Children or Adopted Siblings

Based on the Book of Agung Pandom Suci letter h page 400, the position of other children or adopted brothers in inheritance is as follows:

Legitimate adopted children also have the same rights as other children or adopted children. However, adoption or child endorsement must be witnessed by the government, religious leaders, and as far as possible by representatives approved by the adopted child.

Therefore, legally adopted children also have the same rights as other children or adopted children. However, adoption or child endorsement must be witnessed by the government, religious leaders, and as far as possible by representatives approved by the adopted child.

2.1.2. The Practice of Inheritance Sharing in Al-Quran

Meanwhile, Al-Qur'an explains how to distribute wealth through Islamic Law in an equitable way. Allah says in the Al-Qur'an regarding inheritance sharing for heirs and people who are not entitled to receive the inheritance distribution in Q.S. An-Nisa' verse 11-12 as follows:

يُوصِيكُمُ اللَّهُ فِي أَوْلادِكُمْ لِلذَّكَرِ مِثْلُ حَظِّ الأُنْثَيَيْنِ فَإِنْ كُنَّ نِسَاءً فَوْقَ اثْنَتَيْنِ فَلَهُنَّ ثُلُثَا مَا تَرَكَ وَإِنْ كَانَتْ وَاحِدَةً فَلَهَا النِّصْفُ وَلأَبَوَيْهِ لِكُلِّ وَاحِدٍ مِنْهُمَا السُّدُسُ مِمَّا تَرَكَ إِنْ كَانَ لَهُ وَلَدٌ فَإِنْ لَمْ يَكُنْ لَهُ وَلَدٌ وَوَرِثَهُ أَبَوَاهُ فَلأُمِّهِ الثُّلُثُ فَإِنْ كَانَ لَهُ إِخْوَةٌ فَلأُمِّهِ السُّدُسُ مِنْ بَعْدِ وَصِيَّةٍ يُوصِي بِهَا أَوْ دَيْنٍ آبَاؤُكُمْ وَأَبْنَاؤُكُمْ لا تَدْرُونَ أَيُّهُمْ أَقْرَبُ لَكُمْ نَفْعًا فَرِيضَةً مِنَ اللَّهِ إِنَّ اللَّهَ كَانَ عَلِيمًا حَكِيمًا (١١) وَلَكُمْ نِصْفُ مَا تَرَكَ أَزْوَاجُكُمْ إِنْ لَمْ يَكُنْ لَهُنَّ وَلَدٌ فَإِنْ كَانَ لَهُنَّ وَلَدٌ فَلَكُمُ الرُّبُعُ مِمَّا تَرَكْنَ مِنْ بَعْدِ وَصِيَّةٍ يُوصِينَ بِهَا أَوْ دَيْنٍ وَلَهُنَّ الرُّبُعُ مِمَّا تَرَكْتُمْ إِنْ لَمْ يَكُنْ لَكُمْ وَلَدٌ فَإِنْ كَانَ لَكُمْ وَلَدٌ فَلَهُنَّ الثُّمُنُ مِمَّا تَرَكْتُمْ مِنْ بَعْدِ وَصِيَّةٍ تُوصُونَ بِهَا أَوْ دَيْنٍ وَإِنْ كَانَ رَجُلٌ يُورَثُ كَلالَةً أَوِ امْرَأَةٌ وَلَهُ أَخٌ أَوْ أُخْتٌ فَلِكُلِّ وَاحِدٍ مِنْهُمَا السُّدُسُ فَإِنْ كَانُوا أَكْثَرَ مِنْ ذَلِكَ فَهُمْ شُرَكَاءُ فِي الثُّلُثِ مِنْ بَعْدِ وَصِيَّةٍ يُوصَى بِهَا أَوْ دَيْنٍ غَيْرَ مُضَارٍّ وَصِيَّةً مِنَ اللَّهِ وَاللَّهُ عَلِيمٌ حَلِيمٌ (١٢)

11. Allah instructs you concerning your children: for the male, what is equal to the share of two females. But if there are [only] daughters, two or more, for them is two-thirds of one's estate. And if there is only one, for her is half. And for one's parents, to each one of them is a sixth of his estate if he left children. But if he had no children and the parents [alone] inherit from him, then for his mother is one third. And if he had brothers [or sisters], for his mother is a sixth, after any bequest he [may have] made or debt. Your parents or your children - you know not which of them are nearest to you in benefit. [These shares are] an obligation [imposed] by Allah. Indeed, Allah is ever Knowing and Wise.

12. And for you is half of what your wives leave if they have no child. But if they have a child, for you is one fourth of what they leave, after any bequest they [may have] made or debt. And for the wives is one fourth if you leave no child. But if you leave a child, then for them is an eighth of what you leave, after any bequest you [may have] made or debt. And if a man or woman leaves neither ascendants nor descendants but has a brother or a sister, then for each one of them is a sixth. But if they are more than two, they share a third, after any bequest which was made or debt, as long as there is no detriment [caused]. [This is] an ordinance from Allah, and Allah is Knowing and Forbearing. [7]

From the paragraph above, it is clearly shown that the rights of girls and boys in inheritance sharing are 2:1. It also regulates : 1) The acquisition of widowers using two legal lines, the will, and the debt, 2) The acquisition of a widow with two legal lines, the will, and the debt, 3) The acquisition of relatives in the case of two legal lines, the will and the debt.[8]

Therefore, if it is seen based on the arguments of the Al-Qur'an, the system of inheritance sharing in customary law used by *Ngesthi Kasampurnan* believers with the system of inheritance sharing in Islamic Law has very significant differences. It is because in Islamic Law, there is clear provision regarding the parts of each heir. While customary law of *Ngesthi Kasampurnan* believers uses the laws listed in the Book of Agung Pandom Suci.

2.1.3. The Comparison of Inheritance Sharing Between Ngesthi Kasampurnan Believers and Islamic Law

The inheritance sharing based on customary law of *Ngesthi Kasampurnan* believers must meet several conditions that is required for the heirs. As explained by Haris Sindiwidakdo; "*The first is the existence of the inheritor who leaves his/her property for the rightful people; the second is the heir, who will receive the inheritance; and the third is the property to be inherited*." [9]

Similar to Haris Sindiwidakdo's statement, Mr. Suradi explains: "*The conditions in the sharing of inheritance are, first, there is the inheritor; second there are heirs, and third is that there is property to be shared.*" [10]

Vise versa, Islamic inheritance laws have several conditions and principles that must be required in the inheritance sharing. There are three terms and conditions in the Islamic inheritance sharing, which are: "*(1) Al-Muwarrist, who inherited his/her property or the deceased who left his/her property; (2). Al-Warits or the heirs, who has family ties, either related by blood or related by marriage or as the result of freeing a slave; and (3) Al-Mauruts or Al-Mirats, namely the inheritance of the deceased after deducted by the costs of caring for the body, paying off debts, and executing a will."* [11]

It shows that there are similarities between the requirements for inheritance sharing in Islamic Law and in the community of *Ngesthi Kasampurnan* believers. Both requires conditions such as people who inherit, the heirs, and the inherited assets.

The obstacles of receiving an inheritance in Islamic Syariah can cause the loss of the right of an heir to inherit. The obstacles are:

a. Murder.
b. Different Religion
c. Slavery [12]

On the other hand, there is no obstacle to receive the inheritance for *Ngesthi Kasampurnan* believers. Mr. Haris Sindiwidakdo explained as follows: "One Mighty God of Ngesthi Kasampurnan do not regulate any obstacle to inherit for as long they have the right as the heirs." [13]

Furthermore, Pak Suradi explained that: *"For the One Mighty God Believers of Ngesthi Kasampurnan, they do not recognize any obstacle to be inherited inheritance. If the person entitled to the inheritance commits a murder, then the inheritance remains as long as the other members of the heir agree to inherit the inheritance. And so do people of different religions who given a title to inherit."*[14]

Considering the above explanations, there are many differences in the concept of obstacles in obtaining inheritance between the concept of Islamic inheritance law and the existing concepts in *Ngesthi Kasampurnan* believers' customary law. In the community of *Ngesthi Kasampurnan* believers, all heirs have the right to inherit, whether it has a different religion or committing murder as long as the other members of the heirs agree to inherit the inheritance.

The practice of inheritance sharing carried out by *Ngesthi Kasampurnan* believers contains the values of *Maqashid al Syariah*. This can be seen from the realization of justice values and the creation of harmony between the heirs. The equal system division of inheritance sharing among the heirs is ancestral teaching received from RPS Sastrosoewignjo and stated in the Book of Agung Pandom Suci. The book is a source of guidelines for life, rules, and order of life. It contains the values that govern social life in order to avoid conflicts, including dispute in the inheritance sharing. The values are well implemented so the settlement of dispute in inheritance sharing can be resolved in civilized manner, which can avoid *mafsadat* (badness).

An example of inheritance sharing practice among the adhering community of *Ngesthi Kasampurnan* believers, starting from RPS Sastrosoewignjo taken from 1958-2017 is as follows:

Case I:

The inheritance sharing system in the community of *Ngesthi Kasampurnan* believers occurred to RPS Sastrosoewignjo's family, with the inheritor and heirs as follows:

1. RPS. Sastrosoewignjo (the Inheritor)
2. Bu Sastro (widow/the Inheritor's wife)

3. Dwijo Subroto (the Inheritor's son)
4. Haris Sindiwidakdo (the Inheritor's son)
5. Abdul Yasir (the Inheritor's son)
6. Wening Asmoro (the Inheritor's daughter)
7. Wenang Atmodiprojo (Inheritor's son)
8. Rohayatun (the Inheritor's daughter)

The property inherited was a plot land with building located in Jagalan sub-village, Muntilan village. The inheritance assets in the form of land and building are divided based on the customary law with equal sharing.

Case II:

The inheritance sharing system in the community of *Ngesthi Kasampurnan* believers occurs to the family of Wenang Atmo Diprojo with the following inheritor and heirs:

1. Wenang Atmo Diprojo (the Inheritor)
2. Lis Wenang Atmo Diprojo (Widow/the Inheritor's wife)
3. Wisnu Wicaksono (the Inheritor's son)
4. Rena Redata (the Inheritor's daughter)
5. Condro Candroso (the Inheritor's son)

The property inherited was a plot land with building located in Jagalan sub-village, Muntilan village. Inheritance assets in the form of land and building are divided according to customary law with equal sharing

Case III:

The inheritance sharing system in the community of *Ngesthi Kasampurnan* believers occurs to the family of Nomo Suwito with the inheritor and heirs as follows:

1. Nariyah (the Inheritor)
2. Nomo Suwito (Widower/the Inheritor's husband)
3. Juweni (First Child)
4. Jumalin (Second Child)
5. Sarti (Third Child)
6. Supinah (Fourth Child)
7. Rumli (Fifth Child)
8. Partinah (Sixth Child)
9. Rubisah (Seventh Child)
10. Wagimin (Eighth Child)

The property inherited was a plot of land with building located in Pakis village. Inheritance assets in the form of land and building are divided according to customary law with equal sharing.

From three cases above, the inheritance sharing system in the community of *Ngesthi Kasampurnan* believers is totally different to the verse of Q.S. Al-Nisa verse 11-12. If the case is divided according to the Islamic inheritance system, all the heirs will get their share in accordance with Al-Qur'an and the Compilation of Islamic Law.

The comparison of inheritance sharing system for the cases are as follows:

Case I

1. RPS. Sastrosoewignjo (the Inheritor)
2. Bu Sastro (Widow/the Inheritor's wife)
3. Dwijo Subroto (the Inheritor's son)
4. Haris Sindiwidakdo (the Inheritor's son)
5. Abdul Yasir (the Inheritor's son)
6. Wening Asmoro (the Inheritor's daughter)
7. Wenang Atmodiprojo (the Inheritor's son)
8. Rohayatun (the Inheritor's daughter)

Inheritance or property inherited was in the form of a plot of land and its building. The price of the land and its building was IDR. 150,000,000.00. If the inheritance used customary inheritance law, each heir will receive an inheritance worth as follows: IDR 150,000,000.00:7 = IDR 21,428,571.4. Therefore, each heir gets a share of IDR. 21,428,571.4.

However, if it used with Islamic heirs, each heir will get the following results:

Case I

Tirkah: IDR 150,000,000.00.
The Heirs: 1 wife, 4 sons, and 2 daughters
Inheritance share:
1. 1 Wife: 1/8
2. 4 Sons: ABN (4x2=8)
3. 2 Daughters: ABG (2x1=2)

*total share ashobah=8+2=10
Received inheritance share:
1 Wife: 1/8 x 150,000,000.00: 18,750,000.00
Ashobah: 150,000,000.00-18,750,000.00=131.250,000.00/10= 13,125,000.00.
*therefore, each son's share will be = 13,125,000.00x2=26,250,000.00
*each daughter's share will be = 13,125,000.00 x 1= 13,125,000.00.
Therefore, there are differences and comparisons between the heirs using Islamic inheritance law and *Ngesti Kasampurnan* believers' customary inheritance law. If the inheritance sharing uses *Ngesti Kasampurnan* believers' customary inheritance law, each heir will receive a share of IDR. 21,428,571.40. On the other hand, if it used Islamic inheritance law, the mother gets a share of IDR. 18,750,000.00 each son gets a share of IDR. 26,250,000.00, and each daughter gets a share of IDR. 13,125,000.00.

Case II

The Inheritor Wenang Atmo Diprojo, with the following heirs:
1. Wenang Atmo Diprojo (Inheritor)
2. Lis Wenang Atmo Diprojo (Widow/Inheritor's wife)
3. Wisnu Wicaksono (Inheritor's son)
4. Rena Redata (Inheritor's daughter)
5. Condro Candroso (Inheritor's son)

Inheritance or property inherited is land with building. The price of the land and its building is Rp. 1,500,000,000.00. If the inheritance uses *Ngesti Kasampurnan* believers' customary inheritance law, then each heir will receive an inheritance worth as follows: IDR. 1,500,000,000.00 : 4 = IDR. 375,000,000.00. Therefore, each heir gets a share of IDR. 375,000,000.00.
However, if it uses Islamic inheritance law, each heir will get the following share:

Case II

Tirkah: 1.500.000.000
The heirs:
1 husband
2 sons
1 daughter
Inheritance Share :
1 husband : 1/4
2 sons : ABN (2x2=4)
1 daughter : ABG (1x1=1)
*total share ashobah= 4+1=5

Inheritance received
1 husband : ¼ x 1,500,000,000.00= 375,000,000.00.
Ashobah: 1,500,000,000.00 - 375,000,000.00 = 1,125,000,000.00/5= 225,000,000.00.
*therefore, each son's share will be = 225,000,000x2= 450,000,000.00.
*each daughter's share = 225,000,000.00 x 1= 225,000,000.00.
Therefore, it can be seen the differences and comparisons between the heirs if divided by Islamic inheritance law and *Ngesti Kasampurnan* believers' customary inheritance law. If divided by the *Ngesti Kasampurnan* believers' customary inheritance law, each heir will receive a share of IDR. 375,000,000.00. Meanwhile, when it is divided by Islamic inheritance law, the husband gets a share of IDR. 375,000,000.00, each son gets a share of IDR. 450,000,000.00, and each daughter gets a share of IDR. 225,000,000.00.

Case III
The inheritor Nariyah, with the heirs as follows:
1. Nariyah (Inheritor)
2. Nomo Suwito Nariyah (Widow/ Inheritor's husband)
3. Juweni (Inheritor's son)
4. Jumalin (Inheritor's son)
5. Sarti (Inheritor's daughter)
6. Supinah (Inheritor's daughter)
7. Rumli (Inheritor's son)
8. Partinah (Inheritor's daughter)
9. Rubisah (Inheritor's daughter)
10. Wagimin (Inheritor's son)

Inheritance or property inherited is in the form of land with buildings located in Pakis village. The value of *tirkah* in this case is Rp. 1,200,000,000.00. If the inheritance is divided by *Ngesti Kasampurnan* believers' customary inheritance law, each heir will receive as follows: IDR 1,200,000,000.00:9 = IDR 133,333,333.00. Therefore, each heir gets a share of IDR. 133,333,333.00.
However, if it uses with Islamic inheritance law, each heir will get the following share:
Tirkah: 1,200,000,000.00.
The heirs:
1. 1 wife,
2. 4 sons and
3. 4 daughters

Inheritance Share:
1 Wife: 1/8
4 Sons: ABN (4x2=8)
4 Daughters: ABG (4x1=4)
*Total share ashobah=8+4=12
Received inheritance
1 Wife: 1/8 x 1,200,000,000.00: 150,000,000.00
Ashobah:1,200,000,000.00 - 150,000,000.00 = 1,050,000,000.00 / 12 = 87,500,000.00.
*therefore, each son's share will be = 87,500,000.00 x 2 = 175,000,000.00.
*each daughter's share = 87,500,000.00 x 1 = 87,500,000.00.
Therefore, there are differences and comparisons between the heirs using Islamic inheritance law and *Ngesti Kasampurnan* believers' customary inheritance law. If the inheritance uses *Ngesti Kasampurnan* believers' customary inheritance law, each heir will receive a share of IDR. 133,333,333.00. If it uses Islamic inheritance law, the husband gets a share of IDR. 175,000,000.00, each son gets a share of IDR. 450,000,000.00 and each daughter gets a

share of IDR. 87,500,000.00.

Based on the case among the Ngesthi Kasampurnan believers above, it seems that it contradicts to the verse of Al-Qur'an. However, equal inheritance distribution system used by Ngesthi Kasampurnan believers community can be one alternative approach to justice, *maslahat* (goodness), and avoiding *mafsadat* (badness). It will not contradict to *Maqashid al Syariah* since the essence of equal inheritance sharing system is similar to the context of *Maqashid al Syariah*. It is a manifestation of justice values and to create harmony between heirs.

In conclusion, in the view of Islamic Law regarding inheritance sharing to *Ngesthi Kasampurnan* believers is in accordance to *Maqashid al Syariah* because the essence of inheritance sharing in Islamic Law is a manifestation of justice. And also, the heirs are satisfied with the results of sharing. There is no dispute between experts' inheritance.

2.1.4. Ngesthi Kasampurnan Believers Inheritance System As Viewed From Imam Asy-Syatibi's Maqashid Al-Syariah

Inheritance sharing carried out by *Ngesthi Kasampurnan* believers is not contradicttory and under the values of *Maqashid Asy-Syariah*. When viewed from the practice of inheritance sharing by Ngesthi Kasampurnan believers that divide the inheritance equally among the heirs, the main objective is to create benefits and avoid losses among the heirs, as stated in the Book of Agung Pandom Suci.

Imam Ahmad Mawardi states that in simple terms, the inheritance sharing based on the needs of the heirs seen from the level of economic welfare is not a concept that originates from the Islamic Law. The application of this concept is under the spirit of Islamic Law, which is to create benefits and avoid harms, as the *Maqashid al Syariah* rule says. [15]

وضع الشرائع انما هو لمصالح العباد في العاجل و الالجل معا

The stipulations of Islamic Laws aim to realize the benefit of Muslims, both for worldly and ukhrawi contexts.

According to Asy-Syatibi, the determination of *Maqhasid al-Syariah* confirms that the main purpose of the syariah commandment is to take the *mashlahat* (goodness), whether in the world, hereafter, or both. On the other hand, the basic purpose of the prohibition is to reject *mafsadah* (badness) and danger. [16]

The inheritance sharing of *Ngesthi Kasampurnan* believers, women's rights are equal to men's rights. Therefore, inheritance sharing between men and women divided equally. It will create justice among the heirs. The justice concept of *Ngesthi Kasampurnan* believers refers to proportional distributive justice instead of cumulative justice. Proportional distributive justice means the sharing of inheritance based on the level of equity among the heirs.

The realization of such inheritance sharing concept will create more purposeful mutual help and inheritance utilization as desired justice. Moreover, it will also maintain the spirit of the values in Al-Qur'an that always suggest helping others as stated in Surah Al-Maidah verse 2, and keeping up the brotherhood as stated in Surah Al-Hujuraat verse 10.

With that concept, it can uphold the values of justice in its application. As mentioned by Motahhari, that fair means to create equilibrium by fulfilling rights and obligations, eliminating excess and gaps in all spheres of life. [17]

According to As-Syatibi, in general, the objectives of law is classified into three broad categories: [18]

a. God's purpose to establish Islamic Law is to protect the benefit of humans (both

worldly and religiously associated) as long and acknowledged and under the principles of dlaruriyyat, hajiyyat, tahsiniyyat.

b. God intends that Syariah can be easily understood by ordinary people and not for certain people. Therefore, the goal is to make people who believe in God will be able to know the law. When people do not understand the language used by the law, it will create ignorance of the law itself.

c. God's intention in creating Syariah was for Muslims to obey its rules comprehensively.

The purpose of stipulating the above laws applies to Moslems and does not apply to people outside the Muslim community. However, in reality, there are some deeds and undertakings carried out by non-Moslems that do not contradict Maqashid al-Syariah, such as the inheritance sharing carried out by the community of Ngesthi Kasampurnan. The sharing of inheritance carried out by Ngesthi Kasampurnan believers is to use a system divided equally among existing heirs.

The practice of inheritance sharing according to the Customary Law of Ngesthi Kasampurnan Believers based on the perspective of Imam Asy-Syatibi is compatible and not contradicted to the values of Maqashid Asy-Syariah. The practice of inheritance sharing according to the Customary Law of Ngesthi Kasampurnan Believers, which is divided equally among the heirs as in the cases above, can bring goodness (maslahat) and at the same time reject badness (mafsadat) for family members. It described as follows:

a. Maintaining one's religion (*hifz ad-din).*

In terms of religious preservation (hifz ad-din), the followers of *Ngesthi Kasampurnan* believers have carried out the provisions of inheritance sharing under the prevailing customs in the Book of Kitab Agung Pandom Suci as the guidance for their beliefs. It is a symbol of obedience to *Gusti Ingkang Tunggal* (the name of *Ngesthi Kasampurnan* believer's God).

The form of obedience to *Gusti Ingkang Tunggal* that they have done so far gives benefits for them. Its manifested in the inheritance sharing where they agree to have an equal distribution system among heirs without causing disputes and conflicts. The distribution system creates peace and unity in family harmony.

Therefore, the community of *Gusti Ingkang Tunggal b*elievers (*Ngesthi Kasampurnan*) can create serenity in worshiping, serving, and carrying out orders and avoiding restrictions on *Gusti Ingkang Tunggal*. Its serenity of devotion to God has implications for the joints in their lives. Therefore, peace can be created in kinship ties, peace in society both with fellow *Ngesthi Kasampurnan* believerss, and in coexistence with other religions.

b. Maintaining the reason (*hifz 'aql*)

What is meant by maintaining the reason is that humans can use reason like humans, away from the vices of animals. Moreover, they can stay away from things that can cause loss of reason, such as drinking alcohol and can increase the ability of the reason to think by gaining knowledge.

By sharing the inheritance in an evenly distributed system, it is hoped that there will be no division between families due to fighting over the parts, so as not to interfere with the productivity of reason in family and brotherhood life. Because if the sharing of property is not in accordance with an agreed upon agreement, it can cause prolonged mental stress and stress even to severe depression, because they feel cheated and betrayed by their own siblings.

Besides, people who love the world too much will cause harm because the love of the world is the base of all badness. This can cause their reasons and minds to be used only to think about the world. The inheritance is not used to do things that can damage our reasons, a lavish life where only pleasure is to be sought which can spoil common

sense. *Hifz 'aql* means humans can use the mind like humans, away from any kind of animal vices. Moreover, they can stay away from things that can cause loss of mind, such as drinking alcohol and can increase the ability of the reason to think by gaining knowledge.

By equal inheritance sharing system, they hope there will be no division between families due to fighting over the parts, so as not to interfere with the productivity of reason in family and brotherhood life. When property sharing is not under an agreement, it can cause prolonged mental stress and even severe depression. It can make people feel cheated and betrayed by their siblings.

Besides, people who love the world too much will cause harm because the love of the world is the basis of all badness. This can cause their reasons and minds to be used only to think about the world. The inheritance is not used to do things that can damage our reasons, a lavish life where only pleasure is to be sought which can spoil common sense.

c. Keeping the soul (*hifz an-nafs*).

Keeping the soul means maintaining the right to live respectfully and to care for the soul to avoid acts of persecution, either in the form of murder or injury. When related to inheritance, if the heirs can share the inheritance wisely according to an agreement that has lasted for tens or even hundreds of years, the heirs can live in harmony and respect each other's decisions. The property they receive is used to protect the soul or life to fulfill all the things needed to maintain the existence of life, such as food and safety or security. Likewise, to meet the needs of healthy, nutritious but halal food.

Likewise, the concept of keeping the soul (*hifz an-nafs*) is to manage and spend the inheritance that is used to sustain life, for example for medical treatment when getting sick and consumed when needed. It can also be said that it can guarantee the heirs to live well, so after being abandoned by the inheritor, the heirs do not bear the mental burden of living in shortages.

d. Maintaining the offspring (*hifz an-nasl*).

Maintaining the offspring means maintaining the preservation of the human species and fostering the mental attitude of future generations so as to avoid the loss of life among human beings. Likewise, one thing that includes maintaining the offspring is getting married to avoid adultery. Marriage shall or must be carried out due to being feared of falling into adultery as a result of avoiding marriage. Marriage also aims to maintain the offspring or honor, so human beings do not fall into promiscuity which can lead to adultery and free sex.

The realization of the sharing of inheritance in maintaining the offspring (*hifz an-nasl*), which is by obtaining a share of the inheritance, can be used to provide for their children as well as can be used for the provisions of their children if these children are married. Because providing support for their children is an obligation for parents to the children. Besides, if what the inheritance received is still leftover, it can be given to the children for household provisions, so the inheritance can still be maintained properly and enjoyed by their children and grandchildren. Therefore, children and grandchildren will not experience life in shortages.

The inheritance sharing in maintaining the offspring (*hifz an-nasl*), for example, family members are faced with the high cost of children's education and a large number of family support needs, requiring additional income for a member. Therefore, this concept can become a real solution to these needs. Because the welfare of life and the circulation of assets are not only in the class of people who own assets but with the concept, it can be generalized by supporting the heirs who are lower in their economic level.

e. Maintaining the property (*hifz al-mal*).
Maintaining the property means preserving property from actions that can damage the halalness of the property and its safety. Maintaining or preserving property includes looking for assets in a lawful/halal way, such as buying and selling transactions through greetings and avoiding fraud.
Maintaining the property (*hifz al-mal*) is in particular concerned with the distribution of assets. With the inheritance system divided equally, it is hoped that there will be no hoarding of assets for someone. Assets can be distributed fairly to all heirs. They get their rights without any differences among expert members.
Maintaining the property in an inheritance can also be intended to ensure that the assets owned do not originate from haram or by committing crimes between heirs, as well as ensuring that the assets are obtained using the pleasure of Almighty God. Besides, the assets obtained from an inheritance shall not be used for leisure and momentary worldly pleasures.

3. CONCLUSION

From the results of this research, it can be disclaimed that the inheritance distribution system carried out by Ngesthi Kasampurnan believers tribe, viewed from the Islamic inheritance law, is contrary to the Al-Qur'an and the Hadiths. The inheritance sharing system of *Ngesthi Kasampurnan* believers uses customary law stated in the Book of Agung Pandom Suci, with the sharing system divided equally among the heirs. However, viewed from Imam Asy-Syatibi's *Maqashid al-Syariah* perspective, it does not contradict to it because the purpose of *Maqashid al-Syariah* is to bring *maslahat* (goodness) and avoid *mafsadat* (badness).

4. RECOMMENDATION

The inheritance sharing system carried out by *Ngesthi Kasampurnan* believers contradicts with Islamic inheritance law and against Al-Qur'an and Hadiths. It is because their inheritance sharing system as stated in the Book of Agung Pandom Suci regulates the inheritance to be divided equally among the heirs. However, when viewed from Imam Asy-Syatibi's perspective, it does not contradict *Maqashid al Syariah* since the aim of *Maqashid al Syariah* is to bring goodness (*maslahat*). Although inheritance sharing carried out by *Ngesthi Kasampurnan* believers is against Islamic inheritance law, Al-Quran, and Hadiths, as long as it does not cause disputes between members of *Ngesthi Kasampurnan* believers and the community, the society and government accept and respect what they believe.

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EUTHANASIA'S MEASURE TO THE PARENTS AND ITS LEGAL CONSEQUENCES IN THE MAQASHID SHARI'AH PERSPECTIVE

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Abstract

Euthanasia is an effort to help someone who is experiencing pain or suffering that cannot be cured to be able to hasten death by reason of helping to eliminate the suffering that is increasingly being felt, even though if investigated in depth, euthanasia simply cannot end his suffering. In the study of Islamic law (*fiqih*), all actions that lead to the death of a person, whether intentionally or unintentionally, cannot be justified. Because an act that results in the death of another person is categorized as a grave sin and a criminal act which is prohibited in religion as well as being subject to legal sanctions. The purpose of sharia (*maqashid shari'ah*) is to create benefit, by maintaining and protecting religion, soul, mind, family and human assets and it has also been agreed that one form of benefit is protection of the human body and soul, including in it, and especially his life. Then what is the actual view of Islamic law in responding to and addressing euthanasia specifically which is done to parents themselves. So this research wants to provide answers to the problems as described. The method used in solving problems in this research is by examining the arguments that come from the texts, legal principles (*fiqh*), legal theories, and laws and regulations relating to this problem, then According to the Islamic Law view, Active Euthanasia to parents is forbidden, because it is incompatible to Sharia law and the purpose of Islamic Shari'ah or Maqasid al-Shari'ah, namely the obligation to save and preserve the soul (*hifz al-nafs*).
Keywords: *Euthanasia, Parents, Maqashid Shari'ah.*

1. INTRODUCTION

The world of health will always develop along with the times. More and more discoveries are being made by scientists to enrich the world of health. One of them is euthanasia, this term is used to describe an act of accelerating the process of someone's normal death. This is done to end the patient's suffering provided there is consent and according to the procedure.

Euthanasia is a complex and highly controversial issue, which raises many confusing questions and raises pro and contra camps. Not only in Western countries, but also in the East, even in Indonesia. Euthanasia is the act of ending an individual's life painlessly, when this action can be said to be an aid to alleviate the suffering of an individual who will end his life.

This death is what in medical terms is called euthanasia, which currently means the murder of a patient who has little hope of recovery. Euthanasia is actually not a new problem, in fact euthanasia has existed since ancient Greece. It was from Greece that euthanasia rolled and developed to several countries in the world, both in Europe, America and in Asia. In Western countries like Switzerland, euthanasia is no longer considered a murder, even euthanasia has been legalized and regulated in their Criminal Code. [1]

In Indonesia, the act of euthanasia has never been heard of happening, but there have been several requests for euthanasia. For example, in 2005 the SJ case by her husband and family asked for permission to the court to be euthanized because of her illness. [2] How does the Islamic perspective view euthanasia towards parents both actively and passively.

2. RESEARCH METHODS

The method of this research of this research is based on research of library sources and the press. The method used in solving problems in this research is by examining the arguments that come from the texts, legal principles (*fiqh*), legal theories, and laws and regulations relating to this problem.

3. DISCUSSION

a. Definition of Euthanasia

The term euthanasia comes from the Greek, namely "eu" and "thanatos". The word eu means good, and thanato means death. The point is to end life the easy way without pain. Therefore euthanasia is often referred to as mercy killing, a good death, or enjoy death (dying in peace). [3]

In Arabic it is known as qatlu ar-rahma or tasyir al-maut, which is the act of facilitating death or ending someone's life on purpose without feeling pain because of pity to alleviate the suffering of the sick. According to medical terms, euthanasia means action so that the pain or suffering experienced by a person who is going to die is reduced also means hastening the death of someone who is in great pain and suffering before his death.[4]

Euthanasia means death well without suffering, therefore in carrying out euthanasia the real meaning is not to cause death, but to reduce or alleviate the suffering of people who are facing their death. In this sense, euthanasia does not contradict human calls to maintain and develop. his life, so that it does not become a matter of decency. This means that in terms of morality can be accounted for if the person concerned wants it. [5] However, in the development of the next term, euthanasia shows more of an act that kills out of compassion, so in today's general sense, euthanasia can be described as a systematic killing because his life is a misery and suffering. This is the basic concept of euthanasia, whose meaning now develops into death based on one's rational choice, so that many problems arise from this euthanasia.

b. Types of Euthanasia

In medical practice there are two types of euthanasia, namely Active Euthanasia and Passive Euthanasia. Here is the explanation:

1. Active Euthanasia

Active euthanasia is an act that is medically intentional through an active intervention or action by a medical officer (doctor), with the aim of ending the patient's life. In other words, active euthanasia is deliberately done to make the patient die, either by giving a high-dose drug (over dose) or by injecting a drug with a dose or other means that can cause death.[6]

Euthanasia is further divided into direct active euthanasia and indirect active euthanasia. Direct active euthanasia is a directed medical action that is calculated to end the patient's life or shorten the patient's life. This type of euthanasia is commonly called mercy killing. For example, the doctor gave him a drug with a high dose (overdose) that could relieve the pain but at the same time stop his breathing. Indirect active euthanasia is a condition where a doctor or medical personnel takes medical action not directly to end the patient's life, but is aware of the risks that can shorten or end the patient's life. For example, removing oxygen or other life aids. [7] For example, a person suffering from malignant cancer with excruciating pain so that the sufferer often faints. In this case, the doctor is sure that the person concerned will die. Then the doctor gave him a drug with a high dose (overdose) which can relieve the pain but at the same time stop breathing. [8]

2. Passive Euthanasia

Passive euthanasia is a doctor's action in the form of stopping the treatment of a patient who is seriously ill, which is medically impossible to cure. Discontinuation of this drug results in accelerating the death of the patient. The reason commonly put forward by doctors is because of the patient's limited economic condition, while the funds needed for treatment are very high, while the function of treatment according to doctors' calculations is no longer effective. There are other actions that can be classified as passive euthanasia, namely the action of doctors to stop treatment of patients who according to medical research

may still be cured. The reason given by doctors in general is the inability of the patient from an economic point of view, who can no longer afford the very high funding for medical treatment. [8] For example: a cancer patient who is already critical, a person who has been in a coma for a very long time, in such a situation, he may only be able to live by using a breathing apparatus, while the expert doctor believes that the patient will not be cured. It is the breathing apparatus that pumps air into the lungs and allows them to breathe automatically. If the breathing apparatus is stopped (removed) then the patient feels pain so that it is impossible to continue breathing as a way of facilitating the death process. [10]

c. Islamic Law's View on Euthanasia

Islamic law is a perfect law that is able to solve all problems at all times and places. The following are Islamic legal solutions to euthanasia, both active euthanasia and passive euthanasia.

1. Active Euthanasia

According to the Islamic legal view, active euthanasia is forbidden, because it is included in the category of deliberate killing (al-qatl al-'amd), even though the intention is good, namely to alleviate the patient's suffering. The law remains haram, even at the request of the patient himself or his family.

The arguments in this matter are very clear, namely the arguments that forbid killing. Neither killing other people's souls, nor killing oneself. For example, the word of Allah SWT:

۞ قُلْ تَعَالَوْا۟ أَتْلُ مَا حَرَّمَ رَبُّكُمْ عَلَيْكُمْ ۖ أَلَّا تُشْرِكُوا۟ بِهِۦ شَيْـًٔا ۖ وَبِٱلْوَٰلِدَيْنِ
إِحْسَٰنًا ۖ وَلَا تَقْتُلُوٓا۟ أَوْلَٰدَكُم مِّنْ إِمْلَٰقٍ ۖ نَّحْنُ نَرْزُقُكُمْ وَإِيَّاهُمْ ۖ وَلَا تَقْرَبُوا۟
ٱلْفَوَٰحِشَ مَا ظَهَرَ مِنْهَا وَمَا بَطَنَ ۖ وَلَا تَقْتُلُوا۟ ٱلنَّفْسَ ٱلَّتِى حَرَّمَ ٱللَّهُ إِلَّا بِٱلْحَقِّ ۚ
ذَٰلِكُمْ وَصَّىٰكُم بِهِۦ لَعَلَّكُمْ تَعْقِلُونَ ﴿١٥١﴾

Meaning Say: *"Let me read what is forbidden on you by your Lord, namely: do not associate anything with Him, do good to both mothers and fathers, and do not kill your children for fear of poverty. We will provide sustenance for you and for them. , and do not approach evil deeds, whether visible in between or hidden, and do not kill the soul which Allah hath forbidden (to kill) but with something (cause) that is right "*. That is what you are ordered to understand (it). (Surah Al-An'am: 151)

وَمَا كَانَ لِمُؤْمِنٍ أَن يَقْتُلَ مُؤْمِنًا إِلَّا خَطَـًٔا ۚ وَمَن قَتَلَ مُؤْمِنًا خَطَـًٔا فَتَحْرِيرُ رَقَبَةٍ
مُّؤْمِنَةٍ وَدِيَةٌ مُّسَلَّمَةٌ إِلَىٰٓ أَهْلِهِۦٓ إِلَّآ أَن يَصَّدَّقُوا۟ ۚ فَإِن كَانَ مِن قَوْمٍ عَدُوٍّ لَّكُمْ وَهُوَ
مُؤْمِنٌ فَتَحْرِيرُ رَقَبَةٍ مُّؤْمِنَةٍ ۖ وَإِن كَانَ مِن قَوْمٍۭ بَيْنَكُمْ وَبَيْنَهُم مِّيثَٰقٌ
فَدِيَةٌ مُّسَلَّمَةٌ إِلَىٰٓ أَهْلِهِۦ وَتَحْرِيرُ رَقَبَةٍ مُّؤْمِنَةٍ ۖ فَمَن لَّمْ يَجِدْ فَصِيَامُ
شَهْرَيْنِ مُتَتَابِعَيْنِ تَوْبَةً مِّنَ ٱللَّهِ ۗ وَكَانَ ٱللَّهُ عَلِيمًا حَكِيمًا ﴿٩٢﴾

meaning: *"And it is not proper for a believer to kill a believer (another), except because he is wrong (accidentally), and whoever kills a believer because he is wrong (let it) he frees a faithful slave and pays for the diat that was handed over to his family (the murdered person), unless they (the family of the killed) give alms. If he (the slain) is from a group (disbelievers) for which there is a (peace) agreement between them and you, then (let the murderer) pay the diat that was given to his family (the murdered) and free the believing slave. Whoever*

does not get it, let him (the killer) fast for two consecutive months to receive repentance from Allah. And Allah is All-Knowing, Most Wise. "(Surah An-Nisaa`: 92)

يَٰٓأَيُّهَا ٱلَّذِينَ ءَامَنُواْ لَا تَأۡكُلُوٓاْ أَمۡوَٰلَكُم بَيۡنَكُم بِٱلۡبَٰطِلِ
إِلَّآ أَن تَكُونَ تِجَٰرَةً عَن تَرَاضٖ مِّنكُمۡۚ وَلَا تَقۡتُلُوٓاْ أَنفُسَكُمۡۚ
إِنَّ ٱللَّهَ كَانَ بِكُمۡ رَحِيمٗا ٢٩

meaning: *"O you who believe, do not eat one another's wealth in an evil way, except by way of commerce that is consensual among you. And don't kill yourselves; verily Allah is Most Merciful to you .. "*(Surah An-Nisaa`: 29).

From the abovementioned arguments, it is clear that it is unlawful for doctors to perform active euthanasia. Because the action is included in the category of deliberate murder (*al-qatl al-'amd*) which is constituted as a criminal act (*Jarimah*) and a major sin.

Doctors who perform active euthanasia, for example by giving lethal injection, according to Islamic criminal law will be sentenced to qishash (death penalty for killing), by the Islamic government, according to the word of Allah :

يَٰٓأَيُّهَا ٱلَّذِينَ ءَامَنُواْ كُتِبَ عَلَيۡكُمُ ٱلۡقِصَاصُ فِي ٱلۡقَتۡلَىۖ ٱلۡحُرُّ بِٱلۡحُرِّ
وَٱلۡعَبۡدُ بِٱلۡعَبۡدِ وَٱلۡأُنثَىٰ بِٱلۡأُنثَىٰۚ فَمَنۡ عُفِيَ لَهُۥ مِنۡ أَخِيهِ شَيۡءٞ فَٱتِّبَاعُۢ
بِٱلۡمَعۡرُوفِ وَأَدَآءٌ إِلَيۡهِ بِإِحۡسَٰنٖۗ ذَٰلِكَ تَخۡفِيفٞ مِّن رَّبِّكُمۡ وَرَحۡمَةٞۗ
فَمَنِ ٱعۡتَدَىٰ بَعۡدَ ذَٰلِكَ فَلَهُۥ عَذَابٌ أَلِيمٞ ١٧٨

Meaning: *"O you who believe, it is obligatory upon you qishaash regarding the people who were killed; free people with free people, servants with servants, and women with women. So whoever gets an forgiveness from his brother, let (who forgives) follow in a good way, and let (who is forgiven) pay (diat) to the one who forgives in a good way (too). Such is a relief from your Lord and a grace. Whoever transgresses after that, it is for him a very painful torment.* (Surah Al-Baqarah: 178)

However, if the family is killed (waliyyul maqtuul) abort qishash (by forgiving), qishash is not carried out. Then they have two more choices, ask for diyat (ransom), or forgive / give.

Firman Allah SWT :

يَٰٓأَيُّهَا ٱلَّذِينَ ءَامَنُواْ كُتِبَ عَلَيۡكُمُ ٱلۡقِصَاصُ فِي ٱلۡقَتۡلَىۖ ٱلۡحُرُّ بِٱلۡحُرِّ
وَٱلۡعَبۡدُ بِٱلۡعَبۡدِ وَٱلۡأُنثَىٰ بِٱلۡأُنثَىٰۚ فَمَنۡ عُفِيَ لَهُۥ مِنۡ أَخِيهِ شَيۡءٞ فَٱتِّبَاعُۢ
بِٱلۡمَعۡرُوفِ وَأَدَآءٌ إِلَيۡهِ بِإِحۡسَٰنٖۗ ذَٰلِكَ تَخۡفِيفٞ مِّن رَّبِّكُمۡ وَرَحۡمَةٞۗ
فَمَنِ ٱعۡتَدَىٰ بَعۡدَ ذَٰلِكَ فَلَهُۥ عَذَابٌ أَلِيمٞ ١٧٨

Meaning: *"O you who believe, it is obligatory upon you qishaash regarding the people who were killed; free people with free people, servants with servants, and women with women. So whoever gets an forgiveness from his brother, let (who forgives) follow in a good way, and let (who is forgiven) pay (diat) to the one who forgives in a good way (too). This is a*

relief from your Lord and a grace. Whoever transgresses after that, it is for him a very painful torment.(Surah Al-Baqarah: 178)

Diyat for deliberate killing is 100 camels of which 40 are pregnant (caliph), 30 are 3 years old (hiqqah) and 30 are 4 years old (jadzaah) based on the hadith of the Prophet narrated by An-Nasa`i.

If paid in the form of dinars (gold coins) or dirhams (silver coins), the diyat would be 1000 dinars, or the equivalent of 4250 grams of gold (1 dinar = 4.25 grams of gold), or 12,000 dirhams, or the value of 35,700 grams of silver (1 dirham = 2.975 grams of silver). [10]

The reason for active euthanasia that is often raised is that it is pity to see the patient's suffering so that doctors facilitate his death. This reason only looks at the outward (empirical) aspect, whereas behind it there are other aspects that are not known and cannot be reached by humans. By hastening his death, the patient does not benefit from the test given by Allah SWT. Namely, in the form of reliance on Him. Rasulullah SAW said: "*It is not true for a Muslim to be a disaster, whether it is difficulty, pain, sadness, distress or disease, even a thorn that pierced him, unless Allah erases his mistakes or sins with the tragedy that he has tried.*" (Bukhari and Muslim from Abu Hurairah ra). [11]
"*There had been among the people before you a man who got injured, then lamented. So he took a knife and cut off his hand with it. Then the blood did not stop stopping so that he died. So Allah said: My servant hastened his death before I killed. I forbid heaven for him.* "(Bukhari and Muslim).

2. Passive Euthanasia

As for the Passive Euthanasia law, in fact, it includes the practice of stopping treatment. This action is carried out based on the doctor's belief that the treatment is useless and does not give the patient any hope of recovery. Therefore, doctors stop treatment for patients, for example by stopping the artificial respiration device from the patient's body.

According to Islamic law, it depends on our knowledge of the law of treatment (at-tadaawi) itself. Namely, whether treatment is mandatory, mandatory, immoral, or makruh. On this issue there are differences of opinion. According to the jumhur of scholars, treating or taking medication is mandatory (sunnah), not mandatory. However, there are some scholars who require treatment, such as among the Syafiiyah and Hanabilah Ulama, as stated by Shaykhul Islam Ibn Taymiyyah.

According to Ahmad zahro [12], the law of medical treatment is mandatory (not mandatory). This is based on various hadits, where on the one hand the Prophet SAW demanded that his people seek treatment, while on the other hand, there was a qarinah (an indication) that the demand was not a firm demand (obligatory), but an indecisive demand (sunnah). Among the hadiths, the basis of the obligation to seek treatment by some scholars is the hadith that the Prophet Muhammad said: "Verily, Allah Azza Wa Jalla every time he creates a disease, He also creates a cure. So you get treatment! " (HR Ahmad, from Anas r.a).

The hadith above shows Rasulullah SAW ordered for treatment. According to the Science of Ushul Fiqih, the command (al-amr) only gives the meaning of a demand (li ath-thalab), not shows an obligation (li al-wujub). This is according to ushul rules:

الأصل في الأمر للطلب(*Al-Ashlu fi al-amri li ath-thalab)*

"The existence of the Order is primarily a demonstration of demand."

So, the hadith narrated by Imam Ahmad above only demands that we seek treatment. In the hadith, there is no indication that the demand is obligatory. In fact, the qarinah in other hadiths shows that the above commands are not mandatory. The other hadiths permit no

treatment. The commandment is connected with 'illat, according to the rule: "The law is determined whether or not there is' illat". [13]

Thus, facilitating this kind of death process *(taisir al-maut*) when there is no hope, it is often termed qatlur-rahmah (allowing the journey to death because of compassion).

Among the other hadiths is the hadith narrated by Ibn Abbas r.a, that a black woman once came to the Prophet SAW and said, "In fact, I had Ayan disease (epilepsy) and often exposed my genitals when relapsing. Pray to Allah for my healing! ” The Prophet SAW said, "If you want, you are patient and will get to heaven. If you don't want to, I will pray to Allah that He will heal you. " The woman said, "OK, I will be patient," then she said again, "Verily, my genitals are often exposed when I have a relapse, so pray to Allah that my genitals are not exposed." So the Prophet SAW then prayed for him ". (Narrated by Bukhari).

The hadith above indicates that it is permissible for him not to seek treatment. If this hadith is combined with the first hadith above which orders treatment, then this last hadith is an indication (*qarinah*), that the command to seek treatment is a commandment of the sunnah, not a mandatory command. In conclusion, the law for medical treatment is sunnah (mandub), not mandatory.

Thus, it is clear that treatment or treatment is sunnah, including in this case installing assistive devices for patients. If installing these devices is sunnah, then if the doctors have determined that the patient's brain organ has died, then the doctors have the right to stop treatment, such as stopping the breathing apparatus and so on. Because basically the use of these aids is a medical activity which is legal, not mandatory. The brain death meant definitely no return to life for the patient would be possible. Although some of the other vital organs can still function, they are not will be able to return life to the patient, for these organs will soon become dysfunctional.

Based on the explanation above, the law of installing assistive devices to patients is sunnah, because it includes medical activities which are sunnah. Therefore, the law of passive euthanasia in the sense of stopping treatment by removing the assistive devices for the patient after the death or damage to the brain organs, is permitted (*jaiz*) and is not haram for doctors. So after removing these tools from the patient's body, the doctor cannot be said to have sinned and cannot be held responsible for his actions.

However, for the freedom of doctor's responsibility, permission is required from the patient, his guardian, or the washi (washi is the person appointed to supervise and care for the patient). [14] If the patient does not have a guardian, or washi, then permission from the authorities (Al-Hakim / Ulil Amri) is mandatory.

In general, Islamic teachings are directed at creating the benefit of human life and life, so that the rules are given in full, both relating to civil matters and criminal matters. In principle, the deliberate killing of a sick person means predating fate. Allah has set the deadline for human life. By hastening his death, the patient cannot benefit from the test that Allah SWT has given him. [15]

The problem of the death of every human being has been determined by Allah SWT, so when his death has come, no one can resign or advance even for a moment. As Allah says:

وَلَن يُؤَخِّرَ ٱللَّهُ نَفْسًا إِذَا جَآءَ أَجَلُهَا ۚ وَٱللَّهُ خَبِيرٌۢ بِمَا تَعْمَلُونَ ﴿١١﴾

Meaning: "And Allah will never suspend (death) a person when the time comes for his death. And Allah knows what you are doing. "(Surah Al-Munafiqun (63): 11)

It can be understood from the above verse that matters of death are entirely the right of Allah SWT, so that if someone tries to die for someone else, this can be categorized as

murder. And if there is someone trying for himself to get death, then this action can be categorized as suicide by borrowing the hand of another person. [16]

Humans are required to maintain their souls (hifz an-nafs), because preserving human life is one of the main objectives of Islamic Law (Maqasid al-Syari'ah) which was revealed by Allah SWT. Therefore, a person is completely unauthorized and should not eliminate him without the will and rules of Allah himself.

d. Legal Consequences for Parents in Euthanasia.

How is the law of euthanasia against parents and its consequences? When faced with a question like this, then again we refer to the absolute example of what the case is like? Whether parental euthanasia is performed with Active Euthanasia or with Passive Euthanasia. Because basically euthanasia is divided into two types, namely Active Euthanasia and Passive Euthanasia. Then look again at the perspective of which law we will review.

From the point of view of Islamic law, active euthanasia is forbidden, because it is included in the category of deliberate murder (katul al-'mad), even though the intention is good, namely to alleviate the patient's suffering. The law remains haram, even at the request of the patient himself or his family. Medical officers (doctors) who perform active euthanasia, for example by giving lethal injection, according to Islamic criminal law will be sentenced to qishash (death penalty for killing), by the Islamic government (Khilafah), according to the word of Allah:

يَٰٓأَيُّهَا ٱلَّذِينَ ءَامَنُواْ كُتِبَ عَلَيۡكُمُ ٱلۡقِصَاصُ فِي ٱلۡقَتۡلَىۖ ٱلۡحُرُّ بِٱلۡحُرِّ
وَٱلۡعَبۡدُ بِٱلۡعَبۡدِ وَٱلۡأُنثَىٰ بِٱلۡأُنثَىٰۚ فَمَنۡ عُفِيَ لَهُۥ مِنۡ أَخِيهِ شَيۡءٞ فَٱتِّبَاعُۢ
بِٱلۡمَعۡرُوفِ وَأَدَآءٌ إِلَيۡهِ بِإِحۡسَٰنٖۗ ذَٰلِكَ تَخۡفِيفٞ مِّن رَّبِّكُمۡ وَرَحۡمَةٞۗ
فَمَنِ ٱعۡتَدَىٰ بَعۡدَ ذَٰلِكَ فَلَهُۥ عَذَابٌ أَلِيمٞ ١٧٨

Meaning: "O you who believe, it is obligatory upon you qishaash regarding the people who were killed; free people with free people, servants with servants, and women with women. So whoever gets an forgiveness from his brother, let (who forgives) follow in a good way, and let (who is forgiven) pay (diat) to the one who forgives in a good way (too). This is a relief from your Lord and a grace. Whoever transgresses after that, it is for him a very painful torment. (Surah Al-Baqarah: 178)

Whereas in Passive Euthanasia, in fact, it includes the practice of stopping treatment. This action is carried out based on the doctor's belief that the treatment is useless and does not give the patient any hope of recovery. Therefore, doctors stop the treatment of the patient, for example by stopping the artificial respiration device from the patient's body. [17]

Thus, according to Islamic law, medical treatment or treatment is sunnah, including in this case installing assistive devices for patients. If installing these devices is sunnah, then if the doctors have determined that the patient's brain organ has died, then the doctors have the right to stop treatment, such as stopping the breathing apparatus and so on. Because basically the use of these aids is a medical activity which is legal, not mandatory. The brain death meant definitely no return to life for the patient would be possible. Even though some of the other vital organs can still function, they will not be able to return life to the patient, because these organs will soon become malfunctioning. Therefore, the Passive Euthanasia Law means stopping treatment by removing the tools help the patient after death or damage to the brain organs, the law is permissible (jaiz) and it is not haram for doctors.

Based on the law in Indonesia, euthanasia is an act that is against the law, this can be seen in the existing laws and regulations, namely in Article 344 of the Criminal Code (KUH Pidana) which states that "Whoever loses the life of another person at the request of a person. himself, which he mentions real and earnest, is sentenced to a maximum imprisonment of 12 years ". This is also seen in the regulation of Articles 338, 340, 345, and 359 of the Criminal Code which can also be said to fulfill the elements of offenses in the act of euthanasia. Thus, formally the laws that apply in our country do not allow euthanasia by anyone. [18]

So in any legal perspective, euthanasia against parents is unlawful and prohibited. Therefore, the problem of the death of every human being has been determined by Allah SWT, so when his death comes no one can postpone or advance even for a moment. As Allah says:

وَلَن يُؤَخِّرَ ٱللَّهُ نَفْسًا إِذَا جَآءَ أَجَلُهَا ۚ وَٱللَّهُ خَبِيرٌۢ بِمَا تَعْمَلُونَ ﴿١١﴾

Meaning: "And Allah will never suspend (death) a person when the time comes for his death. And Allah knows what you are doing. "(Surah Al-Munafiqun (63): 11)

e. Euthanasia analysis of parents is from of view of Maqasid al-Shari'ah.

According to the opinion of the scholars, euthanasia can be done especially for people with infectious diseases, especially if it cannot be cured. As Ibrahim Hosen's opinion is based on a rule of ushul fiqh "*Al-Irtikabu Akhaffu al-Dlarurain Wajibun*", taking one of the lighter actions of the two dangerous things is obligatory, or doing the lightest of the two mudlarat. So he said, this step may be chosen because it is a choice of two bad things. First, the sufferer experiences suffering. Second, if it is contagious, it is very dangerous. This means that he is the cause of other people suffering because of contracting his disease, and that is a big sin. And he not only advocated passive euthanasia but also active euthanasia [19]

Meanwhile, according to Hasan Basri, the implementation of euthanasia is contrary, both from the point of view of religion, law, and medical ethics. And further he explained that the matter of life and death is fully the right of Allah SWT. Humans cannot take away the rights of Allah SWT. [20]

In line with Hasan Basri's opinion, Syukron Makmun argues that death is a matter of Allah SWT, humans cannot know when death has befallen him. Regarding pain, suffering and not getting better is qudratullah. Our only obligation is to try. Hastening death is not justified. The doctor's job is to heal, not kill. If the doctor is unable to, return them to the family. [21]

Why is active euthanasia Constituted as forbidden especially when euthanasia is parents, of course this is contrary to divine values and spiritual values contained in Islamic teachings. That filial piety to parents is something that is commanded in Islamic teachings. Devotion to parents is done in all aspects of life. There are several legal bases that can be used as a basis for filial piety to parents, including**:**

- QS. Al-Isra'(17): 23

۞ وَقَضَىٰ رَبُّكَ أَلَّا تَعْبُدُوٓا۟ إِلَّآ إِيَّاهُ وَبِٱلْوَٰلِدَيْنِ إِحْسَٰنًا ۚ إِمَّا
يَبْلُغَنَّ عِندَكَ ٱلْكِبَرَ أَحَدُهُمَآ أَوْ كِلَاهُمَا فَلَا تَقُل لَّهُمَآ أُفٍّ
وَلَا تَنْهَرْهُمَا وَقُل لَّهُمَا قَوْلًا كَرِيمًا ﴿٢٣﴾

Meaning: "and your Lord has commanded that you do not worship other than Him and that you should do the best you can to your mother and father. If either of them or

۞ قُلْ تَعَالَوْا أَتْلُ مَا حَرَّمَ رَبُّكُمْ عَلَيْكُمْ ۖ أَلَّا تُشْرِكُوا بِهِ شَيْئًا ۖ وَبِالْوَالِدَيْنِ
إِحْسَانًا ۖ وَلَا تَقْتُلُوا أَوْلَادَكُم مِّنْ إِمْلَاقٍ ۖ نَّحْنُ نَرْزُقُكُمْ وَإِيَّاهُمْ ۖ وَلَا تَقْرَبُوا
الْفَوَاحِشَ مَا ظَهَرَ مِنْهَا وَمَا بَطَنَ ۖ وَلَا تَقْتُلُوا النَّفْسَ الَّتِي حَرَّمَ اللَّهُ إِلَّا بِالْحَقِّ ۚ
ذَٰلِكُمْ وَصَّاكُم بِهِ لَعَلَّكُمْ تَعْقِلُونَ ﴿١٥١﴾

وَبَرًّا بِوَالِدَيْهِ وَلَمْ يَكُن جَبَّارًا عَصِيًّا ﴿١٤﴾

both of them come to an advanced age in your care, then you may not say to both of them the saying "ah" and do not yell at them and say to them a glorious word ".QS. Maryam(91): 14
Meaning: "and a person who is devoted to both parents, and he is not an arrogant person anymore disobedient".

- QS. Maryam(19): 32
  Meaning: "and devoted to my mother, and He does not make me an arrogant person

وَبَرًّا بِوَالِدَتِي وَلَمْ يَجْعَلْنِي جَبَّارًا شَقِيًّا ﴿٣٢﴾

anymore wretched"

- QS.Al-Baqarah (2) :83

وَإِذْ أَخَذْنَا مِيثَاقَ بَنِيٓ إِسْرَٰٓءِيلَ لَا تَعْبُدُونَ إِلَّا ٱللَّهَ وَبِٱلْوَٰلِدَيْنِ
إِحْسَانًا وَذِى ٱلْقُرْبَىٰ وَٱلْيَتَٰمَىٰ وَٱلْمَسَٰكِينِ وَقُولُوا۟ لِلنَّاسِ
حُسْنًا وَأَقِيمُوا۟ ٱلصَّلَوٰةَ وَءَاتُوا۟ ٱلزَّكَوٰةَ ثُمَّ تَوَلَّيْتُمْ إِلَّا
قَلِيلًا مِّنكُمْ وَأَنتُم مُّعْرِضُونَ ﴿٨٣﴾

Meaning: "and (remember), when We took the promise from the Children of Israel (namely): do not worship other than Allah, and do good to the mother and father, the relatives, the orphans, and the poor, and say the words - good words to humans, establish prayers and pay zakat. then you do not fulfill that promise, except for a small part of you, and you always turn away ".

- QS. An-Nisa'(4): 36

۞ وَٱعْبُدُوا۟ ٱللَّهَ وَلَا تُشْرِكُوا۟ بِهِۦ شَيْـًٔا ۖ وَبِٱلْوَٰلِدَيْنِ إِحْسَٰنًا
وَبِذِى ٱلْقُرْبَىٰ وَٱلْيَتَٰمَىٰ وَٱلْمَسَٰكِينِ وَٱلْجَارِ ذِى ٱلْقُرْبَىٰ وَٱلْجَارِ
ٱلْجُنُبِ وَٱلصَّاحِبِ بِٱلْجَنۢبِ وَٱبْنِ ٱلسَّبِيلِ وَمَا مَلَكَتْ
أَيْمَٰنُكُمْ ۗ إِنَّ ٱللَّهَ لَا يُحِبُّ مَن كَانَ مُخْتَالًا فَخُورًا ﴿٣٦﴾

meaning: "worship Allah and do not associate Him with anything. and do good to two mothers-fathers, intimate-relatives, orphans, poor people, close neighbors and distant neighbors, and peers, Ibn Sabil, and your companion. Indeed, Allah does not like those who are arrogant and proud.QS. Al-An'am(6): 151

وَوَصَّيْنَا ٱلْإِنسَٰنَ بِوَٰلِدَيْهِ إِحْسَٰنًا ۖ حَمَلَتْهُ أُمُّهُۥ كُرْهًا وَوَضَعَتْهُ كُرْهًا ۖ
وَحَمْلُهُۥ وَفِصَٰلُهُۥ ثَلَٰثُونَ شَهْرًا ۚ حَتَّىٰٓ إِذَا بَلَغَ أَشُدَّهُۥ وَبَلَغَ أَرْبَعِينَ
سَنَةً قَالَ رَبِّ أَوْزِعْنِىٓ أَنْ أَشْكُرَ نِعْمَتَكَ ٱلَّتِىٓ أَنْعَمْتَ عَلَىَّ وَعَلَىٰ
وَٰلِدَىَّ وَأَنْ أَعْمَلَ صَٰلِحًا تَرْضَىٰهُ وَأَصْلِحْ لِى فِى ذُرِّيَّتِىٓ ۖ إِنِّى تُبْتُ
إِلَيْكَ وَإِنِّى مِنَ ٱلْمُسْلِمِينَ ﴿١٥﴾

Meaning: "Say:" Let me read what is forbidden on you by your God, namely: do not associate anything with Him, do good to both mothers and fathers, and do not kill your children for fear of poverty, We will provide sustenance to you and to them, and do not approach evil deeds, whether visible in between or hidden, and do not kill the soul that Allah has hastened (kills it) but with something (cause) that is true. That is what is commanded you to understand. (his)".QS. Al-Ahqaf(46): 15

Meaning: "*We command humans to do good to two mothers and fathers, their mothers bear them with difficulty, and give birth with difficulty (too). to contain her until weaning her is thirty months, so that when She is an adult and is up to forty years old she prays: "O my Lord, show me to be grateful for Your blessings which You have given me and to my mother and father and so I can do righteous deeds that You are pleased; give me goodness by (giving kindness) to my children and grandchildren. Verily I repent to You and Truly I Including those who surrendered* ".

Thus Allah and His Messenger put parents in a very special position so that doing good to both of them occupies a very noble position, and on the other hand, disobeying them also occupies a very despicable position. [22]

According to Raghib Al-Asfahani (W. 502 H / 1108 AD) The word husn as a synonymous word with the word ihsan includes everything that is joyful and delightful. Hasanah is used to describe everything that makes a human happy because of the enjoyment of himself, his body and his condition. [23]

Furthermore al-Asafahani said the word ihsan was treating him better than his treatment of you. Ihsan is to give more than you have to give and take less than you should take.

Al-Qur'an uses the conjunction word "ila" to mean "distance", whereas Allah SWT does not want any distance even if it is a little bit in the relationship between the child and the mother-father. Children must always close or feel close to their parents, even if they can be attached to them, because it is used "bi" which means "ilshaq", namely attachment. Therefore, the service that is offered by the child to his parents is not for the mother-father, but for himself. That is also why the connecting word "li" which implies the designation is not chosen. [24]

From the verses of the al-Qur'an that have been described earlier, which instructs the parents to be devoted to the above, the scholars agree that the service must be done as long as it is in line with the values contained in syara '. On the other hand, a child is not justified in disobeying his parents. As has been confirmed in QS.al-Isra' (17): 23 above.

This verse requires a child to be devoted to both parents even though he is old, senile, or in a very strong illness that causes the child a lot of trouble. Perhaps the strong pain of the parents as a sign of the land for him to atone for all his sins and mistakes, is in line with that when the parents are very seriously ill even though this is the land for their children to serve and do good (*birrul walidain*) for their parents. However, it is not justified for the child to be annoyed, either in the form of speech such as the expression "cis" or in the form of an act. The act of euthanasia is a very big sin. If the word "cis" alone is prohibited from coming

out of the mouth of a child against its parents, of course there is an even greater prohibition against euthanasia to parents, both actively and passively, and including disobedient behavior towards parents (*'uququl walidain*).

And disobeying both parents is one of the great sins. This is in accordance with the opinion of Ibn 'Abbas who said that there are 70 major sins, one of which is disobedience to both parents. [25]

Then what about the rules of ushul fiqh which states that "*al-Irtifaqu Akhaffu Dlarurain*", does the lightest of the two mudlarat. Or is it the ushul rule that states "al-Dhararatu Tubihu al-Mahzhurat" Emergency permits what is haram. Based on some of the opinions of the scholars above and also the discussion of emergency boundaries described in the previous chapter, there is no opinion that justifies this euthanasia, especially if euthanasia is carried out against one or both parents. And according to Hasan Basri, [26] the ushul rule is completely unjustified. Because this rule by itself can fail if no evidence is found, either from the Al-Qur'an or Hadith. After all, in Islam, human rights and dignity are highly respected, even though sufferers, for example, invite harm or not.

5. CONCLUSION

Based on the results of the presentation of the paper above, the author's attitude in this matter can be concluded as follows:

Euthanasia from any legal perspective is prohibited. According to the Islamic Law View, Active Euthanasia to parents is forbidden, because it is incompatible to Sharia law and the purpose of Islamic Shari'ah or Maqasid al-Shari'ah, namely the obligation to save and preserve the soul (*hifz al-nafs*).

Active euthanasia to parents is still prohibited or prohibited, except in some cases of emergency nature, such as saving the life of a mother by killing the fetus if it is known that the birth process of the baby could result in the death of the mother.

As for the law of passive euthanasia, in fact, it includes the practice of stopping treatment. However, if in a doctor's diagnosis and belief, a person's condition is in the patient's main organ in the form of a brain stem that moves the heart and lungs no longer functioning, then the treatment is useless and does not give the patient hope of recovery. Then the action of stopping treatment is carried out by stopping the artificial respiratory device from the patient's body, stopping it by removing the breathing apparatus on the patient provided that after the death or damage to the brain organs, the law is permissible (jaiz).

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ZAKAT LAW MODERNIZATION IN INDONESIA: PROBLEMATICS AND SOLUTIVE THOUGHTS

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Abstract

Zakat is an instrument in Islam that aims to create a balance in the economy of society. There are two important things that must be considered in the context of reforming the zakat law in Indonesia so that it can develop more effectively and efficiently. First, currently the Presidential Regulation regarding the collection of zakat from the State Civil Apparatus (ASN) is still in the process of being made. Zakat growth can increase if a Presidential Regulation which includes cuts in ASN salaries for zakat payments can be enforced. Zakat, which comes from ASN salaries, can specifically help alleviate poverty. Second, there must be an amendment to Law No. 23 of 2011 concerning Zakat Management. Because with the current law, the central Baznas cannot freely determine the leadership of Baznas in the regions, because the authority is the regional head through the formation of a selection committee. Law No. 23 of 2011 cannot be optimized in terms of collecting zakat. The model for selecting leaders or administrators of Baznas in the regions should be centralized in the central Baznas so that those who are placed in these regions are directly elected by the center in a professional manner by looking at their competence.

Keywords: zakat, law renewal, Islamic law

1. INTRODUCTION

From an economic point of view, among the five pillars of Islam, zakat is the command that has the most economic meaning. Even zakat is one of the core variables in the elimination of ribawi practice. The Islamic economic system is a divine economic system that is built on the basis of two doctrines, namely first, prohibiting usury from all economic activities and secondly, the obligation to pay zakat both zakat on assets and zakat fitrah. The scholars agree that those who are the targets of zakat are the poor. Zakat received can be used for consumption or production, although basically zakat is worship to Allah, it also has economic value. So it is clear that zakat is not just a realization of a Muslim's concern. More than that, zakat also has a very strategic function in the context of the economic system, namely as an instrument of wealth distribution. A proper understanding of Islamic economics will see that zakat is personally an inseparable part of the distribution pattern in the Islamic economic system. The Islamic economic system recognizes differences in income and wealth for each person on the condition that these differences are caused because everyone has different skills, initiatives, efforts, and risks. However, this difference should not lead to too far a gap between the rich and the poor because it is not in accordance with Islamic sharia, which emphasizes that resources are not only a gift from Allah SWT for all human beings, but also a mandate. There is therefore no reason to concentrate resources in the hands of a few. [1]

The history of Islam has recorded how the Caliph Abu Bakr fought groups against the obligation of zakat. Disobedience to the existence of zakat will overthrow the buildings of the Muslim community that have been arranged by the Prophet. Therefore zakat is the basis and basic obligation for a Muslim. The aim is to purify oneself and property, as well as build solidarity and solidarity with the people in the context of realizing common prosperity. In Indonesia, the implementation and management of zakat is regulated by law. The basic reason for the stipulation of this law is that there is a state guarantee of independence for all citizens to practice their religion in accordance with their religion and belief. Because zakat is one of the pillars of Islam that must be carried out by its adherents and can be used as a means of developing the economy of the people, and in order to have greater useful power, the Government needs to provide guidance, service and protection for it. With regard to the definition of zakat, article 1 paragraph 2 of Law Number 38 Year 1999 regarding Zakat Management defines zakat as assets that must be set aside by a Muslim or

an entity owned by a Muslim in accordance with religious provisions to be given to those entitled to receive it. The difference in rizki that exists between humans is a necessity because Allah SWT has stated it in QS al-Nahl verse 71. As a result of the difference in rizki, it raises the social status between the rich (the have) and the poor (the have not). A rich person has abundant assets so that they are not only able to meet their needs for clothing, food and shelter, they even have excess assets that can be used for other needs. On the other hand, the poor do not have the ability to meet their daily needs. This kind of condition causes social constructs to easily break and become shaky, which as a result can cause disharmony in the relationship between people.

Therefore, to reduce the negative impact of this social inequality, Allah SWT said in QS al-Zariyat verse 19. Through this verse Allah SWT obliges the rich to give obligatory rights to the poor and the poor. Even in another verse, Allah SWT explicitly obliges zakat as a means of distributing wealth between the rich and the poor as expressed in Surah Al-Baqarah verse 110. [2]

In the Qur'an there are thirty-two words zakat and it is repeated eighty times using terms which are synonymous with the word zakat, namely the words shadaqah and infaq. This repetition implies that zakat has a very important position, function and role in Islam. [3]

Zakat is an instrument in Islam that aims to create a balance in the economy of society. Islam calls for an even distribution of income and social welfare so that wealth is not only centered and revolves around certain groups of people. The state of Indonesia as the largest Muslim country has serious concerns about the management and development of zakat. Based on Article 29 paragraph 1 of the 1945 Constitution, the Government enacted Law Number 38 of 1999 concerning Zakat Management and Law Number 23 of 2011 concerning Zakat Management. Meanwhile, experts have various opinions regarding the relationship between zakat and taxes, some consider zakat and taxes to be two different things and some others consider the two to be closely related so that the payments can be combined. [4]

There are other experts who argue that zakat is a political financial instrument in Indonesia that links state policies to fiscal policy. [5]

In the issue of political finance in Indonesia, the issue of zakat can be categorized into state fiscal policy because it is related to the regulation of state income and expenditure. However, the fiscal policy in zakat is not considered to be completely pure, because zakat does not directly enter the state treasury. The government has an important role in regulating the Islamic economy, including zakat because the state can regulate and provide stimulation so that many Muslims in Indonesia pay zakat. [6]

The obligation of zakat is the main way to bridge this gap. He is also able to realize the nature of mutual cooperation and social responsibility within the Muslim community. As for the wisdom contained in zakat worship, according to al-Zahili, among them are as follows, first, zakat preserves and maintains property from the target of the criminal acts of thieves. A muzakki will be more calm and comfortable in his social life, and be able to do good things related to the world and the hereafter, secondly, zakat is a help for destitute people and people who need help. Zakat can encourage them to worship, work with enthusiasm, and can encourage them to achieve a decent life. Third, zakat purifies the soul from the disease of misers and hunks. He also trains believers to be givers and generous. They are trained not to refrain from paying zakat, but they are trained to take part in fulfilling social obligations, namely the obligation to elevate the country by giving wealth to the poor and poor. Fourth, zakat is obliged as an expression of gratitude for the blessings of property that has been entrusted by Allah SWT. [7]

Productive zakat has a strategic role in poverty alleviation efforts in Indonesia as

evidenced by the large potential of zakat in Indonesia, as well as the zakat management mechanism that allows it to be used as a poverty alleviation program. Conceptually, social entrepreneurship (social entrepreneurship) has a close orientation with the mission of managing productive zakat. As with zakat, the concept of social entrepreneurship also puts forward the aspect of togetherness in the spirit of brotherhood (ukhuwah) as shown by the social mission (goal), also emphasizes the seriousness aspect of mustahiq in building economic independence (empowerment). In addition, it also puts forward moral tools about good and bad to become a guide in carrying out charity as determined by Allah SWT, which is shown by the application of ethical business principles. Social entrepreneurship also provides space for the creation of benefits (maslahah) that can continuously be felt by the community, this is shown through the aspects of social impact and sustainability. Empirically, social entrepreneurship is relatively capable of being a solution to the problem of poverty independently and sustainably. [8]

Withdrawal of zakat is done vertically and divided horizontally. Zakat is taken vertically when it reaches the nisab, which is the minimum zakat obligation to be issued. The minimum limit for taking zakat assets is in accordance with the stipulated provisions. Meanwhile, the maximum limit for taking zakat assets is not stipulated as well as the size of goods that must be issued on goods that must be issued zakat. The excess of assets owned is issued according to the provisions determined by nas. Meanwhile, zakat distribution is carried out horizontally or evenly to groups entitled to receive At least the element of division in eight asnaf. Zakat is seen in terms of economic demand which is a collection of demands by individuals who want an item with their ability to pay the price and try to buy it. It cannot be denied that zakat is an addition to new income. This will lead to an increase in demand for goods. Meanwhile, in the production sector, it will increase productivity, so that existing companies are increasingly moving forward, even giving rise to the establishment of new companies to face this demand. On the other hand, the capital that goes to the company is increasing. Every item has a very important position and is a fundamental need, so every demand will not change. This is what causes the productivity of the company and the guarantee that the invested capital can survive. Then the effect of zakat on the level of demand can be proven when zakat is taken from those who have high incomes and given to those who have limited income, then the consumptive tendency of those who have high incomes will be less than those who have limited income. The optimistic effect of zakat is a reduction in the level of difference between consumptive tendencies and existing income to achieve a balance between expenditure and income. [9]

1.2. Research Method and Benefit

This research is descriptive analytical and uses primary data sources and secondary data sources which are analyzed using qualitative methods, with data collection techniques literature study and library research. This study aims to create a balance in the community's economy. Islam calls for an even distribution of income and social welfare so that wealth is not only centered and revolves around certain groups of people. Indonesia as the largest Muslim country has serious attention to the problem of zakat management and development so that zakat growth can increase in Indonesia.

1.3. PaperStructure

The focus of this research is to discuss how to maximize zakat income to reduce poverty in Indonesia. The initial problem that arises and will be examined through this research is that the growth of zakat can increase if the Presidential Decree which includes cutting ASN salaries for zakat payments can be completed and the amendments to Law No. 23 of 2011 concerning Zakat Management. Because with the current law, the central Baznas

cannot freely determine the leadership of Baznas in the regions. In order to clarify the limits of the research, this research only tries to answer the Presidential Decree regarding ASN Zakat Payment that must be issued immediately and Law Number 23 of 2011 concerning zakat must be amended immediately.

2. BACKGROUND

2.1.1. Updates In The Aspects Of Laws Related To Zakat In Indonesia

According to the language, zakat means growing and increasing. Zakat also means taharah which means holy. This last meaning, for example, is found in Surat al-Syams verse 9. According to the term, zakat is the name of something that is removed from the property or body in a certain way and can also be interpreted with the ownership of certain property for people who have rights (mustahiq) with the condition- certain conditions. Subsequently, the legal basis of zakat managers is implemented based on Law Number 23 of 2011 on Zakat Managers, in Article 1 number 2 of the zakat management law is regulated that zakat is a property that must be issued by a Muslim or business entity to be given to those who are entitled to receive it in accordance with Islamic law. Based on Article 1 number 5 of Law Number 23 of 2011 on Zakat Management is regulated that a Muslim or business entity that is obliged to pay zakat is called muzaqi while the person who is entitled to pay zakat is mustahiq as regulated in Article 1 number 6 of Law Number 23 of 2011 about the Zakat Manager. The zakat manager based on Article 2 of Law Number 23 of 2011 is implemented based on the first, implemented in accordance with Islamic law. Second, the trust that is the zakat manager must be trusted. Third, the benefits of zakat management are done to provide the greatest benefits for the mustahik. Fourth, justice is the management of zakat in its distribution is done fairly. Fifth, the certainty of the law that is in the management of the penis can guarantee the certainty of the law badi mustahik and muzaki. Sixth, integrated, namely the management of zakat is implemented hierarchically in an effort to increase the collection, distribution and use of zakat. Seventh, accountability that is zakat management can be held accountable and accessible by the community. [10]

Based on this explanation, it is understood that zakat is an obligation for Muslims to be implemented. The zakat obligation as described in the law managing zakat is inversely proportional to the amount of zakat received by the National Zakat Agency. With the majority of Indonesia's population being Muslim, the potential for zakat should be owned by Indonesia as well as support significant economic growth, given the zakat set by the National Zakat Agency. Article 27 of Law Number 23 Year 2011 concerning Zakat Management explicitly regulates that first, zakat can be utilized for productive efforts in the context of handling the poor and improving the quality of the people. Second, the utilization of zakat for productive business as referred to in paragraph 1 shall be carried out when the basic needs of the mustahik have been met. Further provisions regarding the utilization of zakat for productive business as referred to in paragraph 1 shall be regulated in a Ministerial Regulation. Based on the explanation above, it can be understood that the management of zakat in Indonesia has not been carried out efficiently and effectively, because effective law in general can make what is planned to be realized. Meanwhile, the management of zakat at this time has not been able to encourage the improvement of the community's economy so that poverty is still widely encountered today. The distribution of zakat is carried out based on the provisions of Islamic teachings, as for the groups of people who are entitled to receive zakat in Surah At-Taubah Verse 60 which is actually zakat-zakat, only for destitute people, poor people, zakat administrators, converts. those who are persuaded by their hearts, to (free) slaves, lucky people, for the way of Allah SWT and those who are on their way, as a decree that is required by Allah SWT and Allah is All-Knowing, Most Wise. Based on this explanation, there are eight groups of people who are entitled to receive zakat, namely first,

poor people, namely people who are very miserable in life, have no property and do not have the energy to cover the needs of themselves and their families. Second, the poor are people who have a steady income and job but are in a state of deprivation, not sufficient to cover the needs of themselves and their families. Third, amil zakat (zakat committee), a person chosen by faith to collect and distribute zakat to those who are entitled to receive it. Amil zakat must have certain conditions, namely Muslim, puberty, and baligh, free, fair (wise), hearing, seeing, men and understanding religious law. This work is a duty for him and must be rewarded with his job, namely given to him zakat. Fourth, converts, namely people who have just converted to Islam. Fifth, the slave (slave) who wants to free himself from his master by ransom money. Sixth, people who are in debt due to personal interests are not immoral and are unable to pay it. As for people who are in debt for the benefit of the public, such as building mosques or Islamic foundations, their debts are paid in zakat, even though they are able to pay them. Seventh, people who struggle in the way of Allah SWT (sabilillah) without salary and compensation for the sake of defending and defending Islam and the Muslims. Eighth, the traveling traveler (ibn sabil) who does not aim to become immoral in the overseas, then experiences difficulties and misery on his way. [11]

Another problem that needs to be the attention of Muslims today is the problem of utilizing zakat. This is based on the fact that most of the distribution of zakat to the poor is still sporadic and consumptive in nature, namely to fulfill immediate needs but after that they are still classified as poor. Even though the vision of zakat is to change mustahiq into muzakki or in other words, changing the habit of receiving into a habit of giving. Therefore, the indicator of the success of zakat management is not on the achievement of the target of receiving or collecting zakat, but on the graph of decreasing the number of mustahiqs to muzakki. Groups of mustahik who receive zakat (eight asnaf) are mentioned in the Koran sequentially with the intention of indicating the priority of zakat distribution targets. In distributing zakat, it is necessary to pay attention to the distribution of one asnaf not to wrong another asnaf. If muzakki is reminded not to delay in issuing zakat so that it has passed more than a year, then zakat should not settle for more than a year in amil's hands without being distributed. Amil zakat must be proactive in looking for mustahik, especially the poor and poor in their working area, as the system applied in the days of the previous Islamic caliphs, not the poor who enrolled amil or muzakki asking for zakat sharing as is commonly found in society. One of the most important zakat goals is to demand a balance in the prosperity of the people. The prosperity of some of the other people, when accompanied by a strong adhesive between the two of them, will undoubtedly lead to envy. With the transfer of wealth from the rich to the weak, there will undoubtedly be a balanced economic atmosphere for the people, the rich will get richer but this will not cause the poor to get poorer because they have the opportunity to enjoy the economy of the rich so that they can support themselves properly. [12]

The enforcement of Islamic law in Indonesia is considered capable of realizing social justice for all religious communities. Apart from that, Islamic law can also create an egalitarian society without human exploitation based on ethnicity, race, language, religion and class. In realizing and creating this, it is not by applying Islamic law absolutely, completely and completely, but in an optimal and efficient manner. In implementing Islamic law in the social life of the Indonesian population, the Indonesian government also realizes the importance of the role of zakat function in socio-economic life for all Indonesian people in order to realize social welfare in every level of society, therefore the passing of Law Number 38 concerning Year Zakat Management 1999. With the existence of this law, the State is able to organize the implementation of the collection and distribution of zakat for those in need in order to create an even distribution of welfare levels both socially and economically. As for the settlement of disputes over zakat, this is the absolute competence

of the religious court without exception, this is as mandated in article 49 of Law Number 3 of 2006 concerning Amendments to Law No. 7 of 1989 concerning Religious Courts. However, in implementing Law Number 38 of 1999, there are several problems that actually hinder the creation of an even distribution of welfare. With these imperfections, the State is deemed necessary to rearrange the management of zakat in a new law which can correct all the weaknesses contained in Law Number 38 of 1999 concerning Zakat Management, and this can be realized in a a period of ten years after 1999, namely by the enactment and promulgation of Law Number 23 of 2011 concerning Management of Zakat. [13]

With the amendment to the new Law on zakat management, there are several things that need to be considered with regard to the implementation of zakat management in Indonesia, including first, that the management of zakat in Indonesia includes three aspects, namely the planning, implementation and coordination processes. in the collection, distribution and utilization of zakat. Second, that in the implementation of zakat management nationally it is carried out by BAZNAS (National Amil Zakat Agency), which in carrying out its duties and functions BAZNAS can form LAZ (Amil Zakat Institution) and UPZ (Zakat Collecting Unit) in order to facilitate and facilitate the implementation of zakat management. . Third, that the management of zakat in Indonesia has principles which include Islamic law, trust, benefit, justice, legal certainty, integration, and accountability. Fourth, the management of zakat in the new zakat law aims to increase the effectiveness and efficiency of services in managing zakat and increase the benefits of zakat to realize community welfare and poverty alleviation. Fifth, the types of zakat that are managed based on the zakat management law are zakat mal and zakat fitrah, this is as regulated in Article 4 paragraph 1. Sixth, in practice BAZ or LAZ not only manages zakat but can also receive infaq from parties. third. Seventh, BAZNAS in carrying out its duties and functions is financed from the state revenue and expenditure budget as well as amil rights, as well as BAZNAS in districts or cities which is financed by regional revenue and expenditure budgets and amil rights. Meanwhile LAZ can use amil rights to finance all its activities. Eighth, BAZNAS supervision is carried out by the minister of religion. Ninth, in the new zakat management law there are additional sanctions, namely sanctions, administration and changes to the provisions of criminal sanctions, so that the criminal threat in the new zakat management law becomes heavier than the previous provisions. [14]

The pattern of distribution of productive zakat must be arranged in such a way so that the target of this program is not achieved. Several steps are used as a reference in distributing productive zakat, including the first, namely forecasting predict, project, and make estimates before giving zakat. Second, planning, namely formulating and planning an action about what will be carried out to achieve the program, such as determining the people who will be get productive zakat, determine the goals to be achieved, and others. Third, organizing and leading, namely gathering various elements that will bring success to the program, including making standard rules that must be obeyed. Fourth, controlling, which is monitoring the running of the program so that if something goes wrong or deviates from the procedure it will be detected immediately. [15]

Zakat as a form of social worship has enormous strength and potential in fighting all forms of poverty in Indonesia. In fact, he is able to inspire the spirituality of the people to do ta'awun or help among the people and share for the sake of mutual welfare. Article 29 paragraph 1 of the 1945 Constitution states that the State is based on One Godhead. This article, according to Hazairin, implies that the State of the Republic of Indonesia is obliged to operate in the sense of providing facilities so that laws originating from the religion of the Indonesian people can be implemented as long as its implementation requires tools of power or state administrators. Given the enormous potential for zakat in improving the economy of the community and reinforced by article 29 of the 1945 Constitution, as well as national

ideals, the management of zakat needs to be regulated in a law. Therefore, on 23 September 1999, the Government of Indonesia issued Law no. 38 of 1999 concerning Zakat Management accompanied by implementing regulations by the Ministry of Religion. [16]

There are four things that are considered by the Law on the Management of Zakat. First, the State guarantees the independence of every citizen to worship according to their respective religions. Second, the payment of zakat is the obligation of Indonesian Muslims who can afford it and the result of collecting zakat is a potential source of funds to realize the welfare of the community. Third, zakat is a religious provision to realize social justice for all Indonesians by paying attention to the underprivileged community. Fourth, efforts to improve the zakat management system need to be continuously improved so that the implementation of zakat is more optimal and accountable. This law consists of 10 chapters with 25 articles systematically as follows: Chapter I General Provisions, Chapter II Principles and Objectives, Chapter III on the Organization of Zakat Management, Chapter IV Collection of Zakat. Chapter V Zakat Use, Chapter VI Supervision, Chapter VII Sanctions, Chapter VIII Other Conditions, Chapter IX Transitional Provisions, and Chapter X Closing Provisions. Chapter I explains some of the main terms in the Law, namely the management of zakat, zakat, muzakki, mustahiq, religion, and ministers. Also includes the obligation of zakat for able Muslims or a body owned by Muslims. With regard to the purpose of being able, the explanation of this Law states that being able is based on religious provisions. Chapter II contains the basics and purpose of zakat management. This law states that zakat is in principle based on faith and piety. Its management must be able to improve services for the community in the payment of zakat in accordance with its religious guidelines, and also improve the function and role of religious institutions in an effort to realize social welfare and social justice. In addition, management should also increase the results and usefulness of its management. Chapter III contains rules on the organization of zakat management. The management of zakat is done by the Amil Zakat Agency formed by the Government which consists of the community and elements of the Government for the regional level and the Amil Zakat Institution formed and managed by the community gathered in various Islamic organizations, foundations and other institutions. As for the collection of zakat property and how to use it can be found in chapters IV and V. In this section contains about various zakat, namely zakat fitrah and zakat mal. Property which includes part of zakat mal among them are first, gold, silver, money, then second, trade and enterprise, then third, agricultural produce, plantation produce, and fishery products, fourth, mining produce, fifth, farm produce, sixth, revenue and services revenue, and seventh, rikaz. To calculate the amount of property to be issued, muzakki do their own calculation based on religious law, either related to the time (haul) or the rate (nisab). If the muzakki is not able to calculate the zakat obligation himself, then the muzakki can ask for help from the zakat amil body or the Zakat Amil Body provides assistance to the muzakki to calculate it. When zakat has been paid to the Amil Zakat Body or the Amil Zakat Board, then the value of the zakat is reduced from the profit or income of taxable waste from the relevant taxpayer in accordance with applicable laws and regulations. This provision is found in article 14 paragraph 3. [17]

There are two things regarding the role of zakat, namely first, zakat as part of the levies imposed by the government on the community (zakat administration as part of the state revenue and expenditure budget). [18] Among the Islamic thinkers who reject this point is Dawam Rahardjo. According to him, the management of zakat by the government is feared that it will cause the loss of the substance of zakat as an order of Allah SWT. Second, zakat as a welfare system for the Islamic community is separate from the State Budget and Indonesia adopts the latter. This is evidenced by the exclusion of zakat as an element of state revenue as stated in the APBN. Furthermore, zakat is a deduction for taxable income (PKP),

which means that state income will be reduced and this is against the wishes of the IMF as a debt donor for Indonesia, due to the payment of zakat made by a Muslim. [19]

The low realization of zakat collected at the Zakat Collecting Institution is due to the public's knowledge of the sources of assets which are the objects of zakat which are still limited to conventional sources which are clearly stated in the al-Qur'an and hadith with certain conditions. [20]

Even Firmansyah analyzed that the low zakat collection was also caused by failures in the management of zakat in the past which still left the public distrustful of zakat collection institutions. As a result, many people still maintain the traditional pattern of zakat distribution, namely the direct distribution of zakat by muzakki to individuals who are deemed entitled to receive it. [21]

Continuing from this further than that, one way to overcome social problems that are currently of great concern to developing countries including Indonesia is to develop social entrepreneurship or popupler with the name social entrepreneurship. [22]

The concept and character of social entrepreneurship has a spirit similar to that of zakat management. Thus, the management of productive zakat in the form of social entrepreneurship is interesting to study further. Productive zakat is a model of zakat distribution [23] which zakat funds are given to a person or group of people to be used as working capital. [24] Asnaini defines productive zakat as zakat in the form of assets or zakat funds given to mustahiqs which are not spent directly for consumption of certain needs, but are developed and used to support their business, so that with this effort they can meet their daily needs continuously. [25]

In Law Number 23 Year 2011 concerning Zakat Management, it is also stated that zakat can be utilized for productive efforts in the context of handling the poor and improving the quality of the people. There are at least five messages contained in Law Number 23 Year 2011 concerning Zakat Management, namely first, constitutionally that Law Number 23 Year 2011 regarding Zakat Management is in accordance with the 1945 Constitution of the Republic of Indonesia Article 27 (2), Article 29 (1) and (2), as well as Article 34 (1) and (2). Second, juridically, there is a vertical synchronization between Law Number 23 Year 2011 regarding Zakat Management and the 1945 Constitution of the Republic of Indonesia, which has fulfilled legal principles. Third, ideologically, the state is obliged to regulate implementation procedures in order to improve the quality of the ummah through effective and efficient zakat management. Fourth, philosophically, Law Number 23 Year 2011 regarding Zakat Management which aims at eliminating poverty. Fifth, socio-religiously, Law Number 23 of 2011 concerning Zakat Management aims to encourage clear integration, synergy and coordination in the management of zakat and other socio-religious funds that can be integrated and integrated from the center to the regions so as to create programs that are right on target, right amount, and on time for the poor as the main mustahiq of zakat. [26]

To realize this noble goal of zakat, it is necessary to formulate a new approach in the management of productive zakat. The social entrepreneurship model (social entrepreneurship) is seen as having a spirit and values that are not much different from the development of productive zakat. Social entrepreneurship as an alternative approach to productive zakat management in alleviating poverty and social problems is in line with the opinion of Yusuf Wibisono who says that poverty and social problems have a complex and unified nature that makes them only able to be overcome through a partnership framework that allows a multi-sector approach and interdisciplinary, institutionalized, and defended in a sustainable manner. To find out the relationship between productive zakat and social entrepreneurship, it seems that we need to re-examine the strategic role of social entrepreneurship in economic development. [27]

Social entrepreneurship is increasingly playing a role in economic development because it turns out to be able to create creative social and economic values. First, it creates job opportunities. The economic benefits that are felt from social entrepreneurship in various countries are the creation of new job opportunities that have increased significantly. Research conducted by John Hopkins University in 1998 in thirteen countries showed that the workforce employed in this sector ranged from one to seven percent. In addition, it also provides employment opportunities for people with disabilities to be involved in productive activities. John Hopkins stated that the success of Muhammad Yunus, among others, was his ability to empower six million women who became economically productive forces, form phone-women scattered in villages and empowered thousands of beggars to carry out more productive activities. Then secondly, make innovations and new creations in the production of goods or services needed by society. Various innovations in social services that have not been handled by the government so far can be carried out by social entrepreneurship groups such as combating HIV and drugs, eradicating illiteracy, and malnutrition. Often the service standards carried out by the government are not on target because they tend to be rigid in following the established standards. Meanwhile, social entrepreneurship is able to overcome it because it is done with full dedication. Third, it becomes social capital which is the most important form of various capital that can be created by social entrepreneurship because even though in an economic partnership the most important are values, namely shared value, trust, and a culture of cooperation (a culture of cooperation), all of which is social capital. The success of Germany and Japan is due to the roots of long-term relationships and an ethic of cooperation that are able to foster innovation and develop industries in their respective countries. The World Bank also states that a critical problem in poverty reduction is insufficient social capital. Fourth, increasing equality and equitable distribution of social welfare, which is one of the goals of economic development. Through social entrepreneurship, this goal will be realized, because business actors who initially only think about achieving maximum profit will then be moved to think about even distribution of income so that sustainable economic development can be carried out. For example the success of Grameen Bank is one proof of this benefit. Likewise the efforts of J.B. Schramm from the United States who has supported thousands of students from poor families to continue their education in higher education. [28] The basic criteria for social entrepreneurship in Indonesia cover at least five aspects, namely social mission / goals, empowerment, ethical business principles, social impact, and sustainability. [29]

The long history of the application of zakat, from the classical era of Islam to the reality of its application in modern times in several Islamic countries with the main focus on the application of zakat in Indonesia using Charles Peirce's historical investigative theory and Lieven Boeve's truth deficit, the author finds a number of polarizations in the practice of collecting zakat and its management in Indonesia which further causes a deficit or reduction in the role and function of zakat itself which has reached the golden age during the heyday of Islam. This occurs due to many factors including the ineffective implementation of the Zakat Law, lack of public trust in zakat institutions, and lack of awareness of compulsory zakat. To overcome this deficit, it requires solid steps from the state and society with the spirit of recontextualizing the high and sustainable spirit of zakat. [30]

2.1.2. Indonesia Effectiveness And Synergy Of Zakat - Related Institutions In Indonesia

In ministerial regulation No. 14 of 2014 concerning the Implementation of Law Number 23 of 2011 concerning the management of zakat, namely in article 55 paragraphs 1, 2, and 3 states that first, district or city baznas are authorized to collect zakat through UPZ

and / or directly. Second, the collection of zakat through the UPZ as referred to in paragraph (1) is carried out by forming an UPZ at the regional government work unit office / district / city regional institution, district / city level vertical agency offices, regency / city regional owned enterprises, private scale companies district / city, mosque, mosque, mosque, break, mosque or other names, school / madrasah and other educational institutions, sub-districts or other names, and village / kelurahan or other names. Third, the direct collection of zakat as referred to in paragraph (1) shall be carried out through the facilities provided by the district / city BAZNAS. [31]

A separate management system that runs independently between BAZ and LAZ, weak management, less professional handling, and lack of clarity in the distribution of zakat, so that zakat is not yet usable for the people of Indonesia, encouraging the DPR to pass a new zakat management law, namely the -Invit No. 23 of 2011 and repeal Law no. 38 of 1999. Law no. 23 of 2011 mandates the management of zakat in an integrated manner, by giving authority to BAZNAS (National Zakat Agency) as a government-owned zakat management institution that manages zakat nationally. BAZNAS functions as a planner, implementer, control of collection, distribution and utilization, to reporting of zakat. Thus, zakat management institutions that have been managed by the community will be coordinated by BAZNAS. In Law 23 of 2011 (hereinafter referred to as UUPZ) there are several criminal provisions. There are sanctions given to every zakat manager who because of his negligence does not record or record incorrectly the assets of zakat, infaq, shadaqah, grants, wills, inheritance, and kafarat, namely being threatened with a maximum imprisonment of three months and / or a maximum fine. IDR 30,000,000.00, which is also contained in the old Zakat Law (Article 21 of Law No. 38 of 1999). Then in Article 41 which states that every person who deliberately and violates the law violates the provisions referred to in Article 38 shall be sentenced to imprisonment of a maximum of one year and / or a maximum fine of Rp.50,000,000.00 (fifty million rupiah). Article 38 itself states that every person is prohibited from deliberately acting as amil zakat from collecting, distributing, or utilizing zakat without the permission of the authorized official. The UUPZ emphasizes that LAZ who wants to get permission to distribute, distribute and utilize zakat must at least be registered as an Islamic social organization that manages the fields of education, preaching and social affairs. Observing the provisions of Article 41, it can be interpreted that this constitutes an act of criminalization. According to the Director of Zakat Empowerment at the Ministry of Religion of the Republic of Indonesia, the absence of sanctions for LAZ that does not have a license is one of the triggers for the ineffective management of zakat funds in the country. From the data held by the Indonesian Ministry of Religion, only about 18 LAZs have registered and received accreditation from the Indonesian Ministry of Religion, even though currently there are around 260 LAZs in Indonesia. [32]

The Amil Zakat Agency (BAZ) or the Amil Zakat Institute (LAZ), if giving zakat that is productive, must also provide guidance and assistance to the mustahik so that their business activities can run, such as providing spiritual and intellectual religious guidance so that the quality of their faith and religion will increase. [33]

People who have a weak economy must be freed first from their mental poverty so that it is not easy to beg, the main goal is to make a weak economic spirit become rich and ready to do business after that, then the zakat funds will be rolled out but they do not run independently but are grouped so that they can help among their group members and even help other groups. Therefore zakat funds are given to mustaḥiq who have an empowering side. [34]

Islamic Sharia obliges each individual to make efforts to fulfill his daily needs and also establishes a collective obligation for the Islamic community to meet the needs of all those who cannot. One of the ways that Islam demands for this collective obligation is the

institution of zakat which is an inseparable part of Islamic teachings. Zakat is a source of state income during the time of the Prophet and the institution that manages it is called Baitul Mal. One of the purposes of zakat is to narrow economic inequality in society fairly and equally, so that the rich do not get richer and the poor do not get poorer. Considering that zakat has economic value because it relates to assets, so it has the potential to be used as a business with professional and transparent management provisions in accordance with Islamic law. [35]

Zakat teaches the discipline of the ummah and this is related to the practitioners of the practice of zakat among others umara (government), scholars, amil zakat, mustahiq, and Muslims in general. Shari'ah zakat requires each practitioner of the practice of zakat to have a soul and act disciplined. The umara (government) as the main bearer of the zakat mandate, is required to be disciplined and act disciplined in dealing with the practice of zakat in its jurisdiction. Without discipline from the umara (government), zakat will not work as it should. The above zakat shows that the importance of zakat is practiced by Muslims, so that a person who has met the conditions is required to fulfill it, not only on the basis of sincerity, but if necessary with government intervention. Therefore, religion prescribes' amilin (manager), in addition to imposing sanctions on those who avoid zakat. [36]

In relation to the ideals of prospering and building the economy of the people, there are two problems, among others, at the implementation level that is the solution of problems will involve many religious scholars and jurists for example in relation to the obligation to pay zakat for professional workers who can obtain greater wealth such as professional zakat. The aghnia who have extra money, they keep it in the bank and or invest it in the form of industry, land, hospitality, means of transportation and so on, which can be of greater profit. This form of zakat may not be found in the formulations of fiqh compiled by previous scholars and jurists. This can be understood because at the time of fiqh was formulated, there were no professional jobs and economic activities like today because the teachings of Islam are dynamic and always responsive to the demands and developments of the times. Therefore, the formulation of fiqh should not stop because fiqh is a product of thought about a teaching that is formulated in response to its social conditions. In addition, because Islam itself is a religion of revelation for mankind throughout the ages so it has the potential to always be dynamic, responsive and able to solve all human problems. Second, at the level of utilization is the distribution of zakat to finance the development or improvement of religious facilities such as mosques, mushallah, schools, hospitals, and others that are of public interest (maslahah mursalah). There is a tendency to categorize it into asnaf sabilillah. Yusuf Qardhawi also argues that from the zakat fund allocated by sabilillah today, it is better to use it to finance the Islamic struggle in the field of teaching, education, and enlightenment provided all these forms of activities are truly based on the spirit the struggle to uphold the truth in the way of Allah SWT. Including publishing newspapers, magazines, and print media to uphold kalimatullah and dispel lies that mislead the minds of Muslims. Such efforts and activities include jihad fi sabilillah. [37]

2.1.3. Development And Renewal Of Zakat Law In Indonesia

Zakat law in Indonesia has developed in several aspects, namely the first is in the laws and regulations. During the colonial period, the Dutch East Indies saw zakat as a threat to the colonizers because zakat could be a force for Muslims in fighting for independence. Therefore, through Bijblad Number 1892 dated August 4, 1893 concerning zakat policy, the Dutch East Indies government prohibited all government employees and indigenous priyayi from helping the implementation of zakat. The prohibition was stated in Bijblad No. 6200 dated February 28, 1905. The role of zakat during the colonial period was very urgent, besides having religious values, it also had political content. After independence, the legal

position of zakat did not yet have strong legal force because BAZ was formed only through the regulation of Religious materials, namely the Regulation of the Minister of Religion No. 4 of 1968. In addition there is a Regulation of the Minister of Religion No.5 of 1968 concerning the Establishment of a Baitul Mal which functions as a collector of zakat to then be paid to BAZ. Furthermore, then there is Presidential Decree no. 44 of 1969 on May 21, 1969 contains the formation of the Committee for the Use of Zakat Money, chaired by Idham Chalid as the Coordinating Minister for People's Welfare at that time. The results of this collection of zakat are not known. The formation of the Amil Zakat Board was started by Ali Sadikin as the governor of the DKI Jakarta Government by forming the Amil Zakat Agency (BAZ) in 1968. This was followed by other regions such as East Kalimantan in 1972, West Sumatra in 1973, North Sulawesi, South Sulawesi, and West Nusa Tenggara in 1985. The development of zakat institutions received the attention of the government with the issuance of Joint Decree of the Minister of Home Affairs and the Minister of Religion of the Republic of Indonesia Number 29 and 47 of 1991 concerning the Development of Amil Zakat, Infaq and Shadaqah Bodies and Instruction of the Minister of Religion Number 5 of 1991 concerning BAZIS Technical Guidance and Minister of Home Affairs Instruction Number 7 of 1998 regarding BAZIS General Development. In 1999, the Republic of Indonesia Law No. 38 of 1999 concerning Zakat Management. The Zakat Management Law is followed up by the Decree of the Minister of Religion (KMA) Number 581 of 1999 concerning the Implementation of Law No.38 of 1999 and the Decree of the Director General of Islamic Community Guidance and Haj Affairs Number D / 291 of 2000 concerning Technical Guidelines for Zakat Management. The Codification of Zakat Law in Indonesia has changed with the issuance of Law No. 23 of 2011 concerning Zakat Management replaces the previous regulation, namely the Republic of Indonesia Law No. 38 of 1999. The codification of zakat law was responded by the issuance of regional regulations on zakat management in various regions in Indonesia. When tracing the statutory system in Indonesia based on Law No. 12 of 2011, zakat regulations in Indonesia are regulated in Regional Regulations (perda) and laws. Thus, the legal position of zakat management regulations already has high legal force because it is in accordance with Article 29 paragraph 2 of the 1945 Constitution that the State guarantees the freedom of each resident to embrace his religion and to worship according to his religion and belief. The existing law on zakat management focuses more on the role of amil in managing zakat. Second, the legal substance of zakat, namely aspects of the development of zakat law in the substance of the law, includes first, muzakki is a Muslim or a business entity that is obliged to pay zakat The determination of a legal entity as mustahik is one form of tajdid in the zakat legal system. Both zakat paid by muzaki to BAZNAS or LAZ are deducted from taxable income (article 22). Third, the obligatory object or property of zakat in zakat mal contains various sources of assets currently acquired by humans. The legal basis is in accordance with the verse of the Koran, surah al-Baqarah verse 267. Zakat assets are contained in article 4 of Law No. 23 of 2011 concerning the management of zakat, namely gold, silver and other precious metals, money and other securities, commerce, agriculture, plantation and forestry, mining livestock and fisheries, industry, income and services, and rikaz. Third, the existing institution, namely the Amil Zakat Institution with amil as part of musthaik zakat, becomes an institution that has the authority in terms of collecting and managing zakat. In formal juridical terms, zakat law has been codified and entered into national legislation. The concept of amil, which is originally a personal institution, is a form of Islamic law development as a form of tajdid. Amil's professionalism is important in an effort to improve the utilization of zakat assets. [38]

The government has issued Law Number 23 Year 2011 regarding zakat management. However, what exists is a law on zakat management, not a zakat law, which

of course will more fully regulate all matters relating to zakat, including its management. Of course, the law only applies to Muslims. So it is hoped that the law in question contains principles and rules that encourage people to change into people who are aware of their higher zakat obligation. As described, the law acts as a means of renewal and community development. Furthermore, the Government issued a Decree of the Minister of Religion of the Republic of Indonesia Number 581 of 1999 concerning the Implementation of Law Number 38 of 1999 concerning the management of zakat. This Ministerial Decree is the implementing regulation of the zakat management law. Implementing regulations of a law are in the form of government regulations and are not in the form of ministerial decrees. In addition, the power to bind a ministerial decree is very different from the power to bind a government regulation. Regarding the management of zakat, it can be carried out by the government or private institutions under the supervision of the government. In the zakat management law, it is stated that zakat management is carried out by the Amil Zakat Agency (BAZ) which is formed by the government. In this case it is necessary to get clarity whether the amil zakat body is a government agency or a private institution. This is important because between private institutions and government agencies there are different legal consequences. The establishment of this zakat management institution is the right thing for clarity and legal certainty if this zakat management institution will receive donations from the government or the regions, there is no problem as long as the donation meets the relevant positive legal rules. Thus we need to encourage the issuance of government regulations on zakat so that in the management of zakat, the government plays a greater role in realizing justice and prosperity which in turn is achieved by the Modern Law State, namely the Prosperity State. Islamic law in Indonesia began to develop, especially in the field of Islamic Economics, this is felt by the birth of Islamic economic institutions. One form of Islamic economic enforcement can be done by law enforcement in the field of zakat. Zakat Law Enforcement is an indicator to be able to create a rule of law that leads to a welfare state in Indonesia. [39]

Islamic jurists state that the scholars agree that it is obligatory for the authorities to appoint amil or zakat management institutions. However, the formulation of the centralized management of zakat is in the hands of the government, it is still debatable by looking at the bright role of society in managing zakat through LAZ. Criteria for criminalization which include punishment must pay attention to the objectives, the existence of the element of victimizing, the principle of cost and yield, and community support, which are not fulfilled in criminalizing LAZ as stipulated in Article 41 of the Zakat Management Law. The purpose of the government to form a new UUPZ, is to further improve the collection, distribution and utilization of zakat, so as to create a prosperous Indonesian society. Observing this intention, it is felt that the criminal provisions for LAZ are inaccurate because there is no bad record of LAZ's performance and if the law is seen as a tool for social change, namely changing the poor to become prosperous, then it should not be the sanction approach being carried out but by providing incentives.

3. CONCLUSION

2020 is the year of hope for the growth of zakat in Indonesia, because optimism for the increase in the amount of zakat collected this year is closely related to two things, first, the Presidential Regulation on the collection of zakat from the State Civil Apparatus (ASN) which is currently still in the process of making it. if the Perpres has been completed it will have significant results. Zakat growth can increase if the Presidential Decree, which includes cutting ASN salaries for zakat payments, can be completed and enforced this year. Zakat, which comes from the ASN salary, can contribute as much as Rp. 17 trillion in a year. This figure is equivalent to the Ministry of Social Affairs (Kemensos) budget in 2017 so that Baznas can specifically help alleviate poverty.

Second, amendments to Law No. 23 of 2011 concerning Zakat Management. Because with the current law, the central Baznas cannot freely determine the leadership of Baznas in the regions, because the authority is the regional head through the formation of a selection committee. After the selected names appeared, the central Baznas could only approve them. The process of selecting the leadership of Baznas in regions like this cannot produce a professional figure because most of those elected are retirees whose activities are mostly in administrative matters. So that the collection and distribution activities cannot be optimal. Law No. 23 of 2011 cannot be optimized in collecting zakat. The model for electing Baznas leaders or administrators in the regions should be centralized in the central Baznas, such as ministries that have regional heads in the regions. The figures placed in the area are chosen directly by the center in a professional manner by looking at their competence. Thus, if there is a policy regarding zakat collection and distribution, it will be easier and faster to execute.

4. ADVICE

2020 is the year of hope that these two things can be achieved, there is :

1. Namely the issuance of a Presidential Decree on ASN Zakat Payments
2. Amandments to Law Number 23 of 2011 concerning zakat.
3. It aims to create a balance in the economy of society. Islam calls for an even distribution of income and social welfare so that wealth is not only centered and revolves around certain groups of people. Indonesia as the largest Muslim country has serious attention to the problem of managing and developing zakat.

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Monetary policy is usually defined as an effort to control macroeconomic conditions so that it can run as desired by regulating the amount of money circulating in the economy. These efforts were made to ensure price stability and inflation and an increase in equilibrium output. Fiscal policy is an economic policy in order to direct economic conditions for the better by changing government revenues and expenditures. This policy is similar to monetary policy to regulate the money supply, but fiscal policy places more emphasis on regulating government revenue and spending. Nasution, *Pengenalan Eksklusif Ekonomi Islam*, Jakarta: Kencana Prenada Media Group, 2006, hal. 23.

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