



Hukum Islam

Hukum Yang Hidup di Indonesia

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



Diterbitkan oleh:

Badan Penerbit Fakultas Hukum Universitas Indonesia
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2021

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ICILI 2020 Editor Heru Susetyo, SH. LL.M. M.Si. M.Ag. Ph.D. dan Fahrul Fauzi, S.H.

viii, 331 hal ; 17,6 cm x 25 cm

ISBN 978-602-5871-66-5

Edisi Pertama
Cetakan Pertama, April 2021

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**KATA SAMBUTAN
LEMBAGA KAJIAN ISLAM DAN HUKUM ISLAM**

Assalamualaikum warrahmatullahi wabarakatuh,

Alhamdulillah biidznillah atas ijin Allah SWT buku bungai rampai berisikan tulisan terpilih dari para partisipan 5th ICILI 2020 yang berlangsung secara on-line karena situasi pandemi COVID-19.

Terimakasih banyak atas kontribusi partisipan, para pengajar dan peneliti Hukum Islam di Indonesia, panitia kegiatan dari Fakultas Hukum Universitas Indonesia. Terimakasih juga kami sampaikan kepada Ibu Dr. Wirdyaningsih dan rekan-rekan dari Asosiasi Dosen Hukum Islam Indonesia (ADHII) selaku co-organizer dari 5th ICILI 2020 ini. Ungkapan terimakasih yang sama kami haturkan kepada seluruh pimpinan dan staf FHUI di bawah kepemimpinan Dekan Dr. Edmon Makarim dan the Dream Team, crew LKIH FHUI baik dosen, peneliti, alumni, maupun adik-adik LKHI Muda.

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

Wassalamu 'alaikum warrahmatullahi wabarakatuh,



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

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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; Mubarak, 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 (Mubarak, 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 (*muqqat*) 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 hakim (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 *ubudiyah* 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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