

Sharia and Human Rights Paradigm Against the Right to Marriage and Family Building

Mirsan Mirsan^{1*}, Sidik Sidik² & Muhammad Syarief Hidayatullah³

¹ Islamic Family Law Study Program, State Islamic University Datokarama Palu, Indonesia

² State Islamic University Datokarama Palu, Indonesia

³ State Islamic University Datokarama Palu, Indonesia

*Corresponding Author: Mirsan, E-mail: Mirsanzhan7wali@gmail.com

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ABSTRACT

Marriage is the behaviour of creatures created by God Almighty so that life in the natural world develops well. Marriage not only occurs among humans, but also occurs in plants and animals. So marriage is one of the cultures that are regular and follow the development of human culture in community life. In simple societies the culture of marriage is simple, narrow and closed, in advanced (modern) societies the culture of marriage is advanced, broad and open.

It is common to find that the regulation of marriage issues in the world does not show uniformity. The differences are not only between one country and another, religion and even small groups of people can occur due to different ways of thinking because of different perspectives.

Through the literature review method, this paper aims to find out the paradigm of Sharia and human rights towards the right to marriage and family formation.

The essence of marriage is not just a formal bond, but also means worship, because it fulfils the demands of human nature in family life, in addition to preserving the survival of human children, it also ensures social stability and a dignified existence for men and women.

Human rights limits that marriage must be in accordance with laws and regulations or the local wisdom of the community.

1. Introduction

Marriage is not only based on biological needs between men and women that are recognised as legitimate, but as a means of the process of human nature. Likewise, in Islamic marriage law contains basic elements of a psychological and spiritual nature including inner and outer life, truth and humanity. In addition, marriage is also based on religion, meaning that religious aspects become the main basis of household life by implementing faith and devotion to Allah SWT. While the basics of the understanding of marriage are based on the three wholes that everyone needs to have before carrying it out, namely: faith, Islam and sincerity (Djamali, 2002).

According to Article 1 of Law Number 1 of 1974 concerning Marriage, what is meant by marriage is the inward and outward bond between a man and a woman as husband and wife with the aim of forming a happy and lasting family (household) based on God Almighty. Therefore, marriage is a contract in which all aspects contained in the word nikah or tazwij are sacred ceremonial utterances (Tihami & Sahrani, 2014).

¹ Mirsan is a Student of Islamic Family Law Study Program at Postgraduate School, State Islamic University Datokarama Palu, Indonesia. This paper was presented at the 2nd International Conference on Islamic and Interdisciplinary Studies (ICIIS) 2023, as a presenter, held by the Postgraduate School State Islamic University Datokarama Palu, Indonesia.

Marriage is one of the most important dimensions of life in human life anywhere in the world. So important is marriage, it is not surprising that the religions of the world regulate the issue of marriage, even the traditions or customs of the community and also the State institutions do not miss regulating marriage that applies among its people.

It is a common fact that the regulation of marriage in the world does not show uniformity. The difference is not only between one religion and another, even within one religion there can be differences in marriage arrangements due to different ways of thinking because they adhere to different schools or schools (Aibak, 2009).

The family is a universal social institution, found in all levels and groups of society in the world, in addition to religion. The family is a miniature society, nation and state. The two institutions, family and religion, are the institutions that are hardest hit by globalisation and modern life. In the era of globalisation, people's lives tend to be materialistic, individualistic, social control is getting weaker, the relationship between husband and wife is getting stretched, the relationship between children and parents is shifting, the sacredness of the family is getting thinner.

2. Literature Review

2.1 Sharia

Islamic law as the totality of the Commandments of God that a Muslim is obliged to obey aims to mould mankind into order, security and safety. Based on this objective, its provisions are always the Commandments of Allah. And these commandments contain obligations, rights, and prohibitions that must be carried out by every Muslim in daily life (Djamali, 2002)

Islamic law is one aspect of Islamic teaching that occupies an important position in the view of Muslims, because it is the most concrete manifestation of Islamic law in the doctrinal-Islamic scheme, so that an orientalist, Joseph Schacht, considered that "it is impossible to understand Islam without understanding Islamic law.

2.2 Human Rights

Human rights are essentially the most essential rights possessed by every human being in their capacity as individuals. As long as this right does not interfere with the rights of others, this right should not be inviolable by anyone, even the guarantor must be protected by the state. This right arises with the aim of protecting human beings as whole individuals (Nurhidayatulloh, Marlina, 2019). On the other hand, philosophically, it is also a gift from God to every creature that cannot be abandoned for any reason. These human rights include the right to life, the right to religion, the right to establish a household with one another, etc.

3. Results and Discussion

When viewed from a historical perspective, Islamic law was originally a dynamic and creative force. This can be seen from the emergence of a number of schools of law that are responsive to their respective historical challenges and have their own style, according to the socio-cultural and political background in which the school of law takes place to grow and develop (Barkatullah & Prasetyo, 2006).

The taklifi ruling on marriage is referred to by some scholars as "the characteristics that are prescribed in marriage". These characteristics vary according to a person's condition, in terms of his ability to fulfil his obligations and his fear of falling into sin. For this reason, there are five types of rulings on marriage.

- Firstly, it is fard. If a Muslim is certain that he will commit adultery if he does not get married, and on the other hand he is able to provide for his wife and will not oppress her. In this case, marriage becomes obligatory, because zina is forbidden. Since adultery cannot be avoided except through marriage, the Shari'ah rule states that "everything that helps a person to avoid what is forbidden is fard".

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- Secondly, it is obligatory. If he is capable and will not oppress his wife, but he thinks that he will commit adultery if he does not get married. The necessity in this case is lower than the necessity in the previous case (fardhu). This is the view of the Hanafi fuqaha (jurists). This is because the evidence for the fard and its causes are certain (qaṭ'ī), whereas the obligatory evidence and its causes are approximate (ẓannī).
- Thirdly, it is haram. If the mukalaf is unable to provide for his wife and is sure to be unjust to her in the future. This is because marriage will only lead to something that is haraam. Anything that is stipulated to be forbidden is forbidden, but the forbidding applies to other things, not to the substance of marriage itself.
- Fourthly, it is makrooh. If the mukalaf thinks that he will do wrong if he gets married.
- Fifthly, it is Sunnah if the mukalaf is in a normal state, i.e. he is not afraid of committing adultery if he does not marry and he is not afraid of doing wrong (Mathlub, 2005).

Based on MPR Decree No. XVII/MPR/1998, on 23 September 1999, Law No. 39/1999 on human rights was enacted, commonly referred to as the Human Rights Law (Arinanto, 2018). In this law, in addition to regulating "human rights and basic human freedoms, several matters relating to basic human obligations are also emphasised".

Marriage as the first step in forming a small family that is happy and prosperous physically and mentally in accordance with what has been mandated by the 1945 Constitution where the State guarantees each Indonesian citizen to form a family, as Article 28 B paragraph (1) of the 1945 Constitution which reads "everyone has the right to form a family and continue offspring through legal marriage".

Marriage is contained in Article 1, Law No.1 of 1974 which states that marriage is a physical and mental bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family based on God Almighty (Saebani, 2009)

The definition of marriage according to human rights is a very important event in society. By living together, they give birth to offspring, which are the main joints for the formation of the state and nation (Soimin, 2002). Given the important role of living together, the regulation of marriage must indeed be carried out by the state, here the state plays a role in legalising the legal relationship between a man and a woman.

In general, human rights in Indonesia include the right to life, the right to family, and to continue offspring, the right to self-development, the right to justice, the right to personal freedom (to choose and have political beliefs, to express opinions in public, to embrace their respective religions. Not to be enslaved, to choose citizenship without discrimination, to be free to move, move and reside in the territory of the Republic of Indonesia), the right to security, the right to welfare, the right to participate in government, women's rights and children's rights.

Law No. 39/1999 on Human Rights in Indonesia contains an explanation of the freedom to marry and continue offspring, as stated in article 10 paragraph (1). In article 2 of the Marriage Law, a valid marriage is a marriage that is conducted based on the religion and belief of each person.

An understanding of human rights must also be done in the context of humans as social beings, where in their lives, humans are always in contact with other humans. As stipulated in article 1 of the *Universal Declaration of Human Rights*, humans should associate in an atmosphere of brotherhood, meaning that one human being must respect and appreciate another human being. Human rights are not absolute, meaning that the freedom and human rights of one will be limited by the freedom and human rights of another (Sochmawardia, 2003).

Article 10(2) of the Human Rights Act expressly states that a valid marriage can only be entered into by the free will of both parties. In this case, the main principle of a valid marriage is the free will of both parties. In the elucidation of Article 10 paragraph (2) of the Human Rights Law, what is meant by free will is a will born from a pure intention without coercion, deception, or pressure of any kind and from anyone against the prospective husband and/or prospective wife.

Marriage is addressed in article 16 of the UDHR, according to which men and women of legal age, regardless of nationality, citizenship or religion, have the right to marry and to found a family. Both have equal rights to marriage, during marriage and at the time of divorce. The only requirement for marriage is consent. Marriage can only take place if both parties agree unconditionally.

According to the UDHR, the family is a natural and fundamental unit of society, therefore this right should be protected by society and the state.

As the most fundamental right, human rights must inevitably be realised in a concrete way, not only by ratifying international human rights conventions, but also by implementing these rights into national law (Wardaya, 2005). As international instruments recognised by Indonesia as a member state of the United Nations, the principles of human rights must be incorporated into positive law, albeit with the caveat that they must be adapted to Indonesian culture. Here the government is obliged to respect, protect, uphold and promote human rights so that they become accepted norms that become the basis for citizens in their lives. Human rights must be directed to be able to build community life. Human rights are not general basic values rooted in individual circumstances but are conditioned into society. The struggle to uphold human rights is not merely limited to the cultivation of awareness but also conscious efforts to improve and change the conditions that hinder the realisation of human rights (Kusumah, 2007).

4. Conclusion

Marriage is a physical and mental bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on the Almighty God. The essence of marriage is not just a formal bond, but also means worship, because it fulfils the demands of human nature in family life, in addition to preserving the survival of human children, it also ensures social stability and a dignified existence for men and women. Marriage has a great purpose and noble motives, because marriage is a place of love, affection, to obtain legitimate offspring in society and an intimate mutual relationship between husband and wife.

Human rights also provide a limitation that marriage must be in accordance with statutory regulations. However, when the laws and regulations do not regulate, a person may enter into a marriage based on their respective laws and beliefs.

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