

Revealing the Enforcement of Mbasuh Dusun Tradition for Pregnant Women Outside of Marriage in Indonesia

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Abstract

This research aims to reveal the enforcement of the mbasuh dusun tradition in cases of pregnancy outside marriage in Bengkulu City, Indonesia. This type of research is field research. The nature of this research is descriptive analytic. Data collection techniques in this study used observation, interviews, and documentation. The data obtained was analyzed using descriptive qualitative methods to obtain conclusions and research findings. The result of this study is that: the implementation of the mbasuh dusun tradition is a customary sanction for pregnant women outside of marriage in Bengkulu City, as *al-'urf al-shabih* and has an effective impact. This mbasuh dusun tradition is carried out by slaughtering a goat, and the perpetrator must be present to be aware and must apologize. Then give charity (and ask for prayers) at the place where the goat was slaughtered or outside the house. Unlike customary sanctions in other regions, the implementation of the mbasuh dusun tradition has a goal and purpose, so that the perpetrator is ashamed and does not repeat the act again, so that it can effectively reduce and even deter the perpetrator. The application of this customary sanction in the context of developing marriage law in Indonesia, it is necessary to review the legalization of marriage of pregnant women outside of marriage in the Compilation of Islamic Law (KHI), and it turns out that the provision of sanctions for pregnant women outside of marriage has a significant impact on creating a deterrent effect and bringing benefits to the community.

Keywords: Mbasuh Dusun; tradition; pregnant women outside of marriage; customary sanctions

Introduction

In the context of developing marriage law in Indonesia, it appears that the enforcement of customary sanctions in the form of the mbasuh dusun tradition is very much needed by reviewing the legalization of marriage of pregnant women outside of marriage in the Compilation of Islamic Law (KHI). In contrast to customary sanctions in other regions, the implementation of the mbasuh dusun tradition as a customary sanction for women who become pregnant outside of marriage in Bengkulu City, Indonesia, appears to be more effective in its application and creates a deterrent effect for others to commit the same act.

In Indonesia, many facts have revealed the practice of freedom of association that results in pregnancy outside of marriage.¹ This deviant phenomenon has reduced the sacredness of marriage, which should be something holy and go through various stages that need attention and seriousness, not just legalizing the marriage of pregnant women outside of marriage.² Marriage is not just for biological purposes,³ but also obtaining offspring in order to form a family is the main purpose of a marriage.⁴

In preserving offspring, Islamic teachings prohibit adultery and all forms of actions that can lead to adultery. Adultery, which is prohibited in Islam, includes not only the criminal act of rape, but also sexual intercourse outside of marriage, even if it is based on mutual consent.⁵ The desire to have sex with the opposite sex is human nature, but Islam forbids it without marriage.⁶ As mentioned in the Qur'an Surah al-Isrā' verse 32 which reads: *And do not approach adultery, for it is an abominable deed and an evil way.*

¹ Jelia Karlina Rachmawati, "Penerimaan Diri Remaja Hamil Pra Nikah: Studi Kasus Pada 2 Remaja Hamil Pra Nikah Di Kota Bandung" (Universitas Pendidikan Indonesia, 2014).

² Susi Tilayanti, "Praktek Tajdid Nikah Pada Pasangan Hamil Diluar Nikah Desa Umong Seribee Kecamatan Lhoeng Kabupaten Aceh Besar." (UIN Ar-Raniry Banda Aceh, 2019).

³ Efrinaldi Efrinaldi, Jayusman Jayusman, and M Yenis, "Revealing The Dilemma Of Marriage Dispensation Regulations In Indonesia," *ADHKI: Journal Of Islamic Family Law* 5, no. 1 (2023): 31–46, <https://doi.org/10.37876/adhki.v5i1.113>.

⁴ Muhammad Amin Summa, *Hukum Keluarga Islam Di Dunia Islam*, II (Jakarta: PT. Raja Grafindo Persada, 2005).

⁵ Zamakhsyari Hasballah, "Teori-Teori Hukum Islam Dalam Fiqih Dan Ushul Fiqih" (Cita Pustaka Media, 2013).

⁶ Ibnu Elmi A S Pelu et al., "Sex Recession Phenomenon from the Perspective Maqashid Sharia Based on Objectives Marriage Law in Indonesia," *Al-Istinbath: Jurnal Hukum Islam* 7, no. 1 (2022): 39–54, <https://doi.org/10.29240/jhi.v7i1.4204>.

The perpetrator of adultery, in Islamic law there are sanctions, namely: 100 volumes for the unmarried and stoning for the married. This punishment aims to create individual and community peace and prevent adultery.⁷

The prohibition of adultery is part of preserving human offspring and their honor.⁸ Pregnancy of a woman out of wedlock is a pregnancy that no one wants. When faced with this situation, women are often the ones who feel the strongest psychological pressure.⁹ If the situation is allowed to drag on and a marriage is not immediately arranged with the man who impregnated her, it is feared that a worse situation will occur. Cases of suicide and abortion are examples that are usually dominated by psychological distress, due to pregnancy outside marriage. Women feel that their lives are uncomfortable, always haunted by shame, low self-esteem, feelings of sin, depression, and pessimism.¹⁰

To prevent and deter this behavior, Bengkulu City imposes customary sanctions in the form of the *mbasuh* *dusun* tradition. For example, in 2018 it was seen in the case of Yd and Dy, both of whom were active in youth organizations. Dy became pregnant out of wedlock. When Dy was six months pregnant, her family found out about it, and Dy's father reported to the Imam and the Head of the Neighborhood Association (Ketua RT), asking for an opinion about the problem of his daughter who was six months pregnant. The Imam and RT suggested a customary settlement. Rajo penghulu adat was appointed and the family handed over the matter to adat. The adat meeting decided on the customary sanction of slaughtering a goat for the *mbasuh* *dusun*. Then Yd and Dy were married at night, without wearing Bengkulu traditional clothing and without a reception.¹¹ The administration of marriage by the Head of the Religious Affairs Office (KUA) is carried out as in general, in accordance with Marriage Law Number 1 of 1974.¹²

Previous research related to this research is: research by Rara Alfitri Ramadhanti, "Sanksi Adat bagi Pelaku Hamil di Luar Nikah di Desa Gunung Meraksa Kecamatan Tanjung Sakti Pumu Kabupaten Lahat" (Customary

⁷ Makhrus Munajat, "Mabaadi' Al-Jinayat Al-Islamiyyah Wa Tathbiquha Fi Al-Siyaq Al-Indunisiy," *Journal of Indonesian Islam* 7, no. 2 (2013): 404–26, <https://doi.org/10.15642/JIIS.2013.7.2.404-426>.

⁸ Nasruddin S. and Sulaemang L, "Pregnancy Married in the Perspective of Islamic Law and Five Mazhab," *Al-'Adl* 14, no. 1 (2021): 14, <https://doi.org/10.31332/aladl.v14i1.2234>.

⁹ A Saiin, "Prohibition of Marriage Due to Maqashid Sharia Perspective, An Approach," *Advances in Humanities and Contemporary Studies* 2, no. 1 (2021): 33–40, <https://doi.org/10.30880/ahcs.2021.02.01.005>.

¹⁰ Fatimah, "Penyelesaian Hukum Perempuan Hamil Luar Nikah Di Kota Bengkulu Dalam Rangka Pengembangan Hukum Perkawinan Di Indonesia" (Lampung: UIN Raden Intan Lampung, 2021).

¹¹ "Interview with Ris, Bibik Wt 10 Januari 2021 Di Bengkulu" (n.d.).

¹² "Interview with Bambang, Tokoh Masyarakat Kota Bengkulu, 15 Januari 2021," (2021).

sanctions for perpetrators of pregnancy outside of marriage in Gunung Meraksa Village, Tanjung Sakti Pumu District, Lahat Regency)." In this study, it is explained that in the Gunung Meraksa Village Community, customary sanctions are applied to perpetrators of pregnancy outside of marriage. With the implementation of these customary sanctions, it is a process of purifying the village and the implementation of these sanctions can have a deterrent effect and can minimize the occurrence of adultery (pregnancy outside of marriage), especially among young people.¹³

DY Witanto's research entitled, "Hak dan Kedudukan Anak Luar Nikah, Pasca Lahirnya Putusan Mahkamah Konstitusi Tentang Uji Materil Undang-undang Perkawinan" (The Rights and Position of Extra-Marital Children, After the Constitutional Court Decision on the Materil Test of the Marriage Law). This paper examines children based on their status and position before the law; legitimate children, adulterous children, discordant children, extra-marital children, adopted children, and stepchildren.¹⁴ Nyoman Sujana's article entitled "Kedudukan Hukum Anak Luar Nikah dalam Perspektif Putusan Mahkamah Konsitusi Nomor 46/PUU-VIII/2010" (The Legal Position of Extra-Marital Children in the Perspective of the Constitutional Court Decision Number 46/PUU-VIII/2010). This paper discusses the position of extramarital children from sirri marriages.¹⁵

Asep Lukman Daris Salam's article entitled "Analisis Hukum Hak-Hak Nasab Anak Luar Nikah Menurut Putusan Mahkamah Konstitusi Nomor 46/PUU/VIII/2010" (Legal Analysis of Nasab Rights of Extra-marital Children According to the Constitutional Court Decision Number 46/PUU/VIII/2010).¹⁶ This article explains that the Constitutional Court's decision is final. Likewise, Nurul Hak's article entitled, "Kedudukan dan Hak Anak Luar Nikah Pasca Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010 tentang Status Anak Luar Nikah, Studi Persepsi Hakim Pengadilan Agama se-Wilayah Pengadilan Tinggi Agama Bengkulu" (The Position and Rights of Extra-Marital Children After the Constitutional Court Decision Number 46/PUU-VIII/2010 on the Status of Extra-Marital Children (Study of Perceptions of Religious Court Judges in the Bengkulu Religious High Court

¹³ Rara Alfitri Ramadhanti, "Sanksi Adat Bagi Pelaku Hamil Di Luar Nikah Di Desa Gunung Meraksa Kecamatan Tanjung Sakti Pumu Kabupaten Lahat." (Palembang: UIN Raden Fatah, 2022).

¹⁴ Darmoko Yuti Witanto, *Hukum Keluarga: Hak Dan Kedudukan Anak Luar Kawin: Pasca Keluarnya Putusan MK Tentang Uji Materiil UU Perkawinan* (Jakarta: Prestasi Pustaka Publisher, 2012).

¹⁵ I Nyoman Sujana, *Kedudukan Hukum Anak Luar Kawin Dalam Perspektif Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010* (Yogyakarta: Aswaja Pressindo, 2015).

¹⁶ Asep Lukman Daris Salam, "Analisis Hukum Hak-Hak Nasab Anak Luar Nikah Menurut Putusan Mahkamah Konstitusi Nomor 46/PUU/VIII/2010," *As-Sakinah: Jurnal Hukum Keluarga Islam* 1, no. 1 (2023): 35–60, <https://doi.org/10.51729/sakinah11132>.

Region)." This research also emphasizes that the Constitutional Court's decision is final and binding. The decision is the result of the *ijtihad* of constitutional judges.¹⁷ Wahyu Wibisana's article entitled, "Perkawinan Perempuan Hamil di luar Nikah Serta Akibat Hukumnya Perspektif Fiqh dan Hukum Positif"(Marriage of Pregnant Women outside of Marriage and its Legal Effects from the Perspective of Fiqh and Positive Law). The research found that women who are pregnant outside of marriage, the imams of the *mazhab* differ in opinion about the permissibility of marrying them. Meanwhile, in Positive Law, marrying a pregnant woman outside of marriage is legal.¹⁸

Fikri et.al's article entitled, "Perlindungan Anak di Luar Nikah dalam Hukum Negara dan Hukum Islam, Perspektif Hakim Pengadilan Agama Parepare".(Protection of Children Outside of Marriage in State Law and Islamic Law (Perspective of Parepare Religious Court Judges). This paper emphasizes that there is no room or gap to provide protection without marriage registration. Child protection in Islamic law can be done by determining the origin of *nasab* for children in a legal marriage and protection is given to children through recognition. The protection of children outside of marriage can be done through *itsbat nikah* and the application of Article 43 paragraph 1 of Law No.1 of 1974 after the judicial review of the Constitutional Court. The rights that can be given to children out of wedlock without a valid marriage are limited to civil rights regarding the right to live, the right to education and health, and the right to obtain public services, so that civil rights related to inheritance rights and guardianship rights cannot be given to children out of wedlock without a valid marriage.¹⁹ The similarity between this research and the research of Witanto, Sujana, and Fikri is the impact of the marriage of pregnant women outside of marriage, namely on the status of children. Meanwhile, this research and Wibisana's research both focus on the marriage of pregnant women outside of marriage. The difference with the research that will be conducted is the enforcement of the *mbasuh dusun* tradition for pregnant women outside of marriage in Bengkulu City. The focus of this research is how the implementation of the *mbasuh dusun* tradition for pregnant women outside of

¹⁷ Nurul Hak, *Kedudukan Dan Hak Anak Luar Nikah Pasca Putusan MK Nomor 46/PUU-VIII/2010, Tentang Status Anak Luar Nikah (Studi Persepsi Hakim Pengadilan Agama Se Wilayah PA Tinggi Agama Bengkulu* (Lampung: (Disertasi Universitas Islam Negeri Raden Intan Lampung, 2018).

¹⁸ Wahyu Wibisana, "Perkawinan Wanita Hamil Di Luar Nikah Serta Akibat Hukumnya: Perspektif Fiqh Dan Hukum Positif," *At-Ta'lim: Jurnal Pendidikan Agama Islam* 15, no. 1 (2017): 29–35, http://jurnal.upi.edu/file/03_Perkawinan_Wanita_Hamil_Diluar_Nikah_-_Wahyu2.pdf.

¹⁹ Fikri Fikri, Budiman Sulaeman, and Andi Bahri, "Perlindungan Anak Di Luar Nikah Dalam Hukum Negara Dan Hukum Islam (Perspektif Hakim Pengadilan Agama Parepare)," *DIKTUM: Jurnal Syariah Dan Hukum* 12, no. 1 (2014): 54–76, <https://doi.org/10.35905/diktum.v12i1.196>.

marriage in Bengkulu City in the context of the development of marriage law in Indonesia?

This type of research is field research.²⁰ The nature of this research is descriptive analytic.²¹ This research uses a normative approach, namely Islamic law that views problems from a legal-formal angle or from normative aspects. The primary data of this research are the results of observations at the research location, the results of interviews with informants, and the results of documentation. Secondary data are books and documents related to this research. The data collection methods in this study used observation, interviews, and documentation. The data obtained was analyzed using a qualitative descriptive method so that conclusions were obtained.²²

Discussion

'Urf and the Application of Customary Sanctions

The word 'urf comes from the word 'arafa, ya'rifu (عرف يعرف) which is often interpreted with "al-ma'ruf" (المعروف) with the meaning of "something known or something good".²³ 'Urf according to the language means knowing, then used in the sense of something that is known, known, considered good, accepted by a healthy mind. The definition of 'urf according to the jurists is: "Something that has been mutually recognized by humans and they make it a tradition, whether in the form of words, actions, or attitudes of leaving something. It is also called custom".²⁴

'Urf as meant in the science of ushul fiqh is: "Something that has been accustomed (among) people or in some of them in terms of muamalat and has seen in themselves in some things continuously that are accepted by common sense."²⁵ 'Urf is something that has been recognized by the community and is a habit among them both in the form of words and actions. By some scholars of ushul fiqh, 'urf is called adat (custom).²⁶

²⁰ Dolet Unaradjan, *Pengantar Metode Penelitian Ilmu Sosial*, h. 198 (Jakarta: PT Grapindo, 2000).

²¹ Dani Vardiansyah, *Filsafat Ilmu Komunikasi: Suatu Pengantar* (Jakarta: Indeks Kelompok Gramedia, 2005).

²² Wiranto Surachmad, *Dasar Dan Teknik Penelitian Research* (Bandung: Alumi, 1982).

²³ Amir Syarifuddin, *Ushul Fiqh* (Jakarta: Kencana, 2009).

²⁴ Efrinaldi Efrinaldi et al., "Urf Review of The Practice of Gold Marriage Mahar in The Community of Tanjung Senang District Bandar Lampung," *Al-Istinbath: Jurnal Hukum Islam* 7, no. 1 May (2022): 287–310, <https://doi.org/10.29240/jhi.v7i1.4140>.

²⁵ H A Basiq Djalil and M A SH, *Ilmu Ushul Fiqih: 1 & 2* (Kencana, 2014).

²⁶ Agus Moh Najib, "Reestablishing Indonesian Madhhab, 'Urf and the Contribution of Intellectualism," *Al-Jami'ah: Journal of Islamic Studies* 58, no. 1 (2020): 171–208, <https://doi.org/10.14421/ajis.2020.581.171-208>.

Some ushuliyin, such as al-Nasafi, Ibn Abidin, Al-Rahawi in his Sharh Kitab *Al-Manar* and Ibn Nujaim in *Al-Asybah Wa Al-Nazhair* are of the opinion that 'urf is the same as custom, and there is no difference between the two, but some ushuliyin, such as Ibn Humam and Al-Bazdawi, distinguish between custom and 'urf in its position as an argument for establishing shara' law. Custom is defined as something that is done repeatedly without any rational connection. Whereas 'urf is the custom of the majority of people, whether in word or deed. In this sense, adat is broader than 'urf. Custom includes all types of 'urf, but not vice versa. The habits of certain individuals or groups in eating, dressing, sleeping, and so on are called customs, but not 'urf. But on the other hand, 'urf is more general than adat, because adat only covers actions, while 'urf covers actions and speech as well.²⁷

The scholars view 'urf as one of the arguments for inferring Islamic law, this can be seen from several sayings of scholars. There are also some scholars who strengthen the validity of 'urf with the arguments of the Qur'an and Hadith. They cite verse 199 of Surah Al-A'raf as evidence: "*Be you forgiving and enjoin people to do what is right, and turn away from those who are foolish.*"²⁸ Among the hadeeths that are used as evidence for 'urf is the hadeeth narrated by a group other than Tirmidhi, which tells the story of Hindun's complaint about her husband Abu Sufyan's stinginess in providing for her, and he said: "*take from your husband's wealth what is sufficient for you and your children.*" The fair rate of maintenance in this hadeeth is the rate of maintenance that was common in Arab society at that time. And also the mauquf hadeeth of Ibn Abbas: "*What is considered good by the Muslims is also considered good in the sight of Allah.*"²⁹

In addition to having an important position in determining the law 'urf also has an important position in determining a law, as it is known that Islamic law has two sides, namely, the side of determination (*istinbath*) and the side of application (*tathbiq*). Both can run parallel or not. This means that a legal product can sometimes be applied directly without considering the interests of the locus where the law is applied, and there are times when it cannot be applied,³⁰ because it is not in accordance with the interests of the community in the place where the Islamic law will be applied. In this regard 'urf becomes the

²⁷ Suwarjin, "Ushul Fiqh" (Yogyakarta: Penerbit Teras, 2012), 148–52.

²⁸ Suwarjin.

²⁹ Yahdi Dinul Haq, Hafizah Muchtia, and Zia Alkausar Mukhlis, "Bid'ah in Concept of Masalah Mursalah and Istihsan According to Imam Asy-Syathibi," *JURIS (Jurnal Ilmiah Syariah)*. <https://doi.org/10.31958/Juris.V20i2.3352> (2021).

³⁰ Nofiardi Nofiardi, "The 'Urf Perspective of Maanta Barih Pasaran: Reinforcing the Kinship System through a Local Wisdom in Nagari Balingka," *Al-Istinbath: Jurnal Hukum Islam* 7, no. 1 May (2022): 75–92, <https://doi.org/10.29240/jhi.v7i1.4132>.

basis for the application of a law. In fact, *urf* was even seen as the effect of *fiqh* application.³¹

The scholars of *fiqh* divide *urf* into three types:

1. In terms of its object, *urf* is divided into: *Al-'Urf Al-Lafẓhi* (habits involving expressions) and *Al-'Urf Al-'Amali* (habits in the form of actions):³²
 - a. *Al-'Urf Al-Lafẓhi* is the habit of the community in using certain memorization / expressions in expressing something so that the meaning of the expression is understood and comes to mind the community. For example, the expression *meat* means *beef*; whereas the words *meat* include all existing *meat*. If someone goes to a butcher and the butcher has a variety of meats, and the buyer says "I buy one kilogram of *meat*" the butcher immediately buys *beef*, because the local custom has specialized the use of the word *meat* to *beef*.³³

If other indicators are needed to understand the expression, then it is not called *urf*. For example, a person comes in a state of anger and has a small stick in his hand, saying "If I see him I will kill him with this stick". From his words it is understood that what he meant by killing him was hitting him with the stick. This kind of expression, according to Abdul Aziz Al-Khayyath (a professor of *fiqh* from Aman University, Jordan), is not called *urf*, but is included in *Majāz* (metaphor).

- b. *Al-'Urf Al-'Amali* is a community custom relating to ordinary actions or civil *mu'amalah*. What is meant by "ordinary actions" is the actions of the community in matters of their lives that are not related to the interests of others such as the habit of taking off work on certain days of the week, the habit of certain people eating certain foods or drinking certain drinks and the habit of the community in wearing certain clothes on special occasions.

As for what relates to civil *mu'amalah*, it is the custom of the community to do contracts/transactions in a certain way. For example, it is the custom of the community in buying and selling that the goods purchased are delivered to the buyer by the seller, if the goods purchased are heavy and large,

³¹ Mohammad Hipni, "The Study of Maqashidi Sharia Toward Maduresse Traditional Inheritance by Using System Approach," *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 14, no. 1 (2019): 50–71, <https://doi.org/10.19105/al-ihkam.v14i1.2159>.

³² Hikwan Wahyudi, Ubay Harun, and Muhammad Taufik, "Islamic Law Perspective on the Use of Incense in Thanksgiving Events at the Balabe Customs in Kailinese Ethnic," *International Journal Of Contemporary Islamic Law And Society* 3, no. 2 (2021): 74–86, <https://doi.org/10.24239/ijcils.Vol3.Iss2.36>.

³³ Nurmala Nurmala et al., "The Customary Phenomenon Of Sumbangsih In Musirawas Urban Muslims Based On Islamic Law," *Akademika: Jurnal Pemikiran Islam* 28, no. 1 (2023): 15–26, <https://doi.org/10.32332/akademika.v28i1.6715>.

such as refrigerators and other household appliances, without being charged additional fees. Another example is the custom of people buying and selling by taking goods and paying money without a clear contract, as is the case in self-service markets. This sale and purchase in Islamic fiqh is called *bay'u al-mu'athbah*.

2. In terms of its scope, 'urf is divided into two, namely *Al-'Urf Al-'Am* (general custom) and *Al-'Urf Al-Khash* (specific custom);
 - a. *Al-'urf Al-'Am* is a certain custom that applies widely throughout society and in all regions. For example, in the sale and purchase of a car, all tools used to repair the car such as keys, pliers, jacks and spare tires are included in the selling price, without a separate contract and additional fees.
 - b. *Al-'urf Al-Khash* is a custom that applies in certain regions and communities. For example, among traders, if there are certain defects in the goods purchased, they can be returned and for other defects in the goods, consumers cannot return the goods. Or the custom of determining the warranty period for certain goods. Another example is the custom that applies among lawyers that the legal defense services that he will do must be paid in advance in part by his client, 'urf typical like this according to Mustafa Al-Zarqa countless and constantly evolving in accordance with changes in the situation and conditions of society.
3. In terms of its validity from the view of Shara', 'urf is divided into two, namely *Al-'Urf Al-Shahih* (habits that are considered valid) and *Al-'Urf Al-Fasid* (habits that are considered damaged).³⁴
 - a. *Al-'Urf Al-Shahih* is a custom that applies in the midst of society that does not contradict the text (verse or hadith), does not eliminate their benefits, and does not cause harm to them.³⁵ For example, during the engagement period the man gives a gift to the woman and this gift is not considered a dowry.³⁶
 - b. *Al-'Urf Al-Fasid* is a custom that contradicts the arguments of Shara' and the basic rules that exist in Shara'. For example, the custom among merchants in legalizing usury, such as lending money among merchants. However, such a practice is not one that is helpful in the eyes of sharee'ah, because the exchange of similar goods, according to sharee'ah,

³⁴ Mochamad Su'eb, "Epistemology of Urf in the Usulul Fiqh," *EDUTECH: Journal of Education And Technology* 2, no. 1 (2018): 23–29.

³⁵ Nailur Rahmi and Rinta Okta Henny, "Sanksi Adat Tentang Larangan Perkawinan Terhadap Orang Sesuku Dengan Pelaku Zina," *Al-Istinbath: Jurnal Hukum Islam* 5, no. 2 November (2020): 329–42, <https://doi.org/10.29240/jhi.v5i2.1525>.

³⁶ Suhaimi Suhaimi, Agustri Purwandi, and Akhmad Farid Mawardi Sufyan, "Binsabin Dan Tonggebban as Madurese Local Wisdom: An Anthropology of Islamic Law Analyses," *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 16, no. 1 (2021): 161–79, <https://doi.org/10.19105/al-lhkam.v16i1.3861>.

should not exceed each other, and such a practice is a lending practice that prevailed in the jahiliyyah era known as *Riba' Al-Nasi'ah* (usury arising from debt and credit). Therefore, this kind of custom, according to the scholars of ushul fiqh is included in the category of *Al-'Urf Al-Fasid*.³⁷

In Islamic legal theory, acceptable customs are only good customs, while bad or fasid customs must be rejected and even eliminated.³⁸ Abdul Wahab Khallaf said "Customs that do not contradict the arguments of shara' are good customs, while bad customs are the opposite".

The rules that exist in Islamic law are very flexible, namely basically Islamic law provides opportunities for people to carry out everything according to what they want. Anything can be done, the most important thing is to keep the actions taken so that they do not invite or cause things that are prohibited by Islamic law so that what was originally allowed does not turn into something that is prohibited.³⁹

In terms of application, customary sanctions are only imposed on someone who violates customary law.⁴⁰ The relationship between customary sanctions and Islamic law is that customary sanctions have violated the law that occurs in society, while Islamic law is the law ordered by Allah Subhanahu Wa Ta'ala for his people brought by a Prophet. So, customary sanctions given to violators of customary law must not pass Islamic law.

Customary law and Islamic law are part of the legal system in Indonesia in addition to statutory law.⁴¹ The concept of Islamic law is different from the concept of statutory law, because Islamic teachings convince its laws as rules sourced from divine revelation.⁴²

³⁷ Nasrun Haroen, "Ushul Fiqh 1" (Jakarta: Logos Wacana Ilmu, 1997), 139–41.

³⁸ Januddin Muhammad Yusuf and Nawir Yuslem, "Acehnese Dayah Ulama's Response to the Use of Urf in Istinbath of Fiqh Law from Islam Nusantara," *Al-Istinbath: Jurnal Hukum Islam* 8, no. 1 May (2023): 291–306, <https://doi.org/10.29240/jhi.v8i1.5732>.

³⁹ Ayik Muhammad Zaki, "Tradisi Tonjokan Pada Walimatul 'Ursy Di Di Desa Tapung Lestari Kecamatan Tapung Hilir Kabupaten Kampar Riau" (Yogyakarta: Universitas Islam Indonesia, 2018), 9–10.

⁴⁰ Rosdalina Bukido et al., "Harmonization of Customary and Islamic Law in the Gama Tradition of the Muslim Mongondow Community of North Sulawesi," *Ijtihad: Jurnal Wacana Hukum Islam Dan Kemanusiaan* 22, no. 2 (2022): 239–54, <https://doi.org/10.18326/ijtihad.v22i2.239-254>.

⁴¹ Slamet Sumarto Martitah and Arif Hidayat, "The Existence of Customary Law and Islamic Law in the Optics of the Indonesian Legal System in Indonesia," in *ICILS 2020: Proceedings of the 3rd International Conference on Indonesian Legal Studies, ICILS 2020, July 1st 2020, Semarang, Indonesia* (European Alliance for Innovation, 2021), 305.

⁴² Khairuddin Tahmid and Idzan Fautanu, "Institutionalization of Islamic Law in Indonesia," *Al-'Adalah* 18, no. 1 (2021): 1–16, <https://doi.org/10.24042/adalah.v18i1.8362>.

Islamic law is a combination of two words, law and Islam. Law can be understood as a set of rules or norms that regulate human behavior in a society, either set by the authorities or grow and develop in society. The form can be written such as laws and regulations or unwritten such as customary law and laws that live in society. Islam literally means submission, safety, or prosperity. This means that people who follow Islam will get safety and prosperity in the world and the hereafter. According to Mahmud Syaltut, Islam is the religion of Allah SWT whose basics and sharia were revealed to the Prophet Muhammad SAW (Peace be Upon Him) and charged him to convey and invite all mankind.⁴³ Etymologically and terminologically reviewed about Islamic law, etymologically law comes from Arabic, namely al-hukm' which means hindrance. While terminologically, it is a view of certain issues related to human actions or deeds. So, Islamic law is a norm whose provisions from Allah SWT, as well as the Prophet Muhammad SAW are contained in the Qur'an and Hadith to be guided by humans (Muslims) in carrying out life in the world in order to be organized.⁴⁴ Islamic law is seen as part of the teachings of Islam whose legal norms (Islam) originate from Islam. Syamsul Anwar argued that Muslims believe that Islamic law is based on divine revelation. Therefore, it is called shari'at, which means the path that God has drawn for humans.

Meanwhile, customary law (Adatrecht) is a legal system that grows and develops from customs in society. R. Soepomo, formulates customary law as non-statutory law, most of which is customary law and a small part is Islamic law. The customary law also covers the law based on the decisions of judges containing legal principles in the environment, where he decided the case.⁴⁵ Based on this formulation, customary law is unwritten (non-statutory) law that is mostly customary law and a small part is Islamic law, and is applied in adat courts (adat rechtspraak). Von Savigny (1799-1861) is famous for his thesis Volkgeist, that all law was originally formed in the way people say, customary law, in ordinary language. The law was first formed by custom and common belief, then by jurisprudence. So, what is meant by customary law is an unwritten, uncodified customary rule, decided by legal functionaries, has sanctions, has existed for a long time, which is still alive and developing and obeyed by the community.⁴⁶

Initially in the history of the nation and the State of Indonesia, customary law got it, who consistently fought for the position of customary law in the national legal system, among others, was Moh. Koesnoe. He highlighted the misunderstanding of the position of customary law in the national legal

⁴³ Achmad Irwan Hamzani, *Hukum Islam Dalam Sistem Hukum Di Indonesia*, (Jakarta: Kencana, 2020), p.15-16.

⁴⁴ Hamzani, h.15-16.

⁴⁵ Rosdalina Bukido, *Hukum Adat* (Yogyakarta: CV Budi Utama, 2017), p. 42.

⁴⁶ Mansur, *Hukum Adat: Perkembangan Dan Pembaruannya*, p.13.

system among many parties (pros and cons), that from the cons, customary law is of the opinion that customary law turns backwards, to what is past. Soetandyo argues that the political arena in realizing the national legal system, by fighting for customary law, the supporters of the idea are actually heirs to an old idea, an idea that was originally put forward by the previous generation of nationalists, and was even stated in the text of the Youth Pledge in 1928. Similarly, colonial legal politics that placed Islamic law in the same position as customary law, such as the Receptive Theory by Christian Snouck Hurgronje, that for indigenous people basically applies customary law, Islamic law applies if the norms of Islamic law have been accepted by the community as customary law.⁴⁷

In the dynamics of society in Indonesia, it appears that in many regions customary sanctions have a relationship with Islamic law.⁴⁸ In application, it appears that Islamic law is a set of rules from Shari'a and also regulations that apply to Muslims to be applied, which prioritizes trust to be stronger to carry out Islamic law. The customary sanction is a punishment given to people who deviate from the area they live in, which is made by mutual agreement of the local community. One of the customary sanctions applied, among others, in the Bengkulu community, as the focus of this paper, is the customary sanction in the form of the *mbasuh dusun* tradition against pregnant women outside of marriage, which can be reviewed in the perspective of Islamic law.

Mbasuh Dusun Tradition for Pregnant Women Outside of Marriage

Kitab Simbur Cahaya is used as a customary rule for the community and is a general rule that applies throughout the Palembang archipelago - including Bengkulu. The contents cover all community relations, starting from the rules of *bujang, gadis* and marriage rules, clan rules, farming hamlet rules, *kaum* rules, and customary punishments..⁴⁹

Sanctions that require paying fines and washing the hamlet are categorized into:

1. *Bunting Gelap* (dark pregnancy) is when a girl or widow becomes pregnant and it is not known who impregnated her. She pays a fine of 12 ringgit and *mbasuh dusun* by giving a goat to the head of the *dusun*. If she gives birth at someone else's house, then the person who owns the house must also be

⁴⁷ Muhammad Jazil Rifqi, "The Superiority of Customary Law over Islamic Law on the Existence of Inheritance: Reflections on Snouck Hurgronje's Reception Theory," *Millah: Jurnal Studi Agama*, 2021, 217–52, <https://doi.org/10.20885/millah.vol21.iss1.art8>.

⁴⁸ Rachmi Sulistyarini et al., "The Contact Point of Customary Law and Islamic Law (Legal History Perspective)," *International Journal of Social Sciences and Management* 5, no. 2 (2018): 51–59, <https://doi.org/10.3126/ijssm.v5i2.19672>.

⁴⁹ Linda Wahyuni, "Sanksi Mbasuh Dusun Bagi Pelaku Zina Dalam Kitab Simbur Cahaya Perspektif Hukum Islam (Studi Pada Masyarakat Kota Bengkulu)" (Yogyakarta: Universitas Islam Indonesia, 2019).

penalized with a goat.⁵⁰ If the wife becomes pregnant in the dark and the husband complains to the dusun head, the wife is fined 12 ringgit and the tradition of mbasuh dusun is enforced with a buffalo, 100 gantang of rice, 100 coconut seeds, 1 jar of enau sugar, and 1 jar of bekasam.⁵¹

2. *Sumbang Kecil*, which is adultery committed by a man and a woman who are related by marriage. Such as between a man's father-in-law and his daughter-in-law or son-in-law and his father-in-law. Then the sanction is mbasuh dusun with a goat plus a fine of 40 ringgit and faced with a large trial and king's punishment (sultan's decree).⁵²
3. *Sumbang Besar* is adultery committed between a man and a woman who are still related to each other. Such as a father with his daughter or a brother with his biological sister. The sanction is the implementation of the tradition of mbasuh dusun with a buffalo plus a fine of 80 ringgit and will be faced with a large court and the king's punishment.⁵³

Over time, the traditions that apply to pregnant women outside of marriage in Bengkulu City, which are carried out by the chairman or kutei/ adat and the village government, are as follows:

1. Slaughtering one goat at the time of the marriage contract and jambar chicken
2. Not wearing traditional clothes
3. It is not permissible to hold walimah/parties.⁵⁴ The marriage of a pregnant woman out of wedlock is not allowed to invite a large crowd. The perpetrator is only allowed to get married at the Religious Affairs Office (KUA).

The process of resolving pregnant women out of wedlock is through complaints from the community first to the Head of the Neighborhood Association (Ketua RT) or Imam, who then proceeds to the Chief of Adat. The complaint cannot be accepted immediately, but must be accompanied by evidence by finding data or information about them. Once proven, both parties are summoned and a hearing is held at the village head's office, attended by the

⁵⁰ M Si Farida and H Y Hasan, "Undang-Undang Simbur Cahaya Sebagai Sumber Hukum Di Kesultanan Palembang," *Universitas Srinijaya* (Universitas Sriwijaya, 2012), h. 3, Bab 1 Pasal 10.

⁵¹ Farida and Hasan, Bab II Pasal 23 (tambahan).

⁵² Farida and Hasan, Bab II Pasal 28 (tambahan)

⁵³ Farida and Hasan.

⁵⁴ "Interview with M. Safri, Tokoh Adat Kota Bengkulu, Senin 4 April 2021 Dan Interview with M. Zainul, Tokoh Adat Di Kecamatan Kampung Melakyu Kota Bengkulu, Senin 4 April 2021," (n.d.).

village head and the head of the Customary Consultative Body. At the hearing, sanctions for their actions are determined.⁵⁵

In Bengkulu the elements of a traditional leader or *Rajo Penghulu* are: *penghulu adat* (traditional leader), *penghulu syara'* (sharia cleric) and *cerdik cendikio* (ingenious scholars). *Penghulu adat* consists of the customary leader and customary officials in various urban villages in Bengkulu City. *Penghulu syara'* are the imams and shara' officials, such as the *khatib*, *bilal*, *gharim* in the urban villages of Bengkulu City. Meanwhile, *cerdik cendikio* are community leaders from among the clever people who are able to understand and master the problems that arise in society (teachers, lecturers, and so on).⁵⁶

Pregnant women outside of marriage with the sanction of the *mbasuh dusun* tradition in Bengkulu City⁵⁷ is called *dapek salah* (can go wrong).⁵⁸ This tradition is actually very urgent, if one knows and understands its philosophy.⁵⁹ In ancient times, the perpetrators had to be paraded around the hamlet or village naked. But now it is no longer enforced.⁶⁰

According to Imam Maksum, a religious figure in Bengkulu City: the *mbasuh dusun* tradition is actually very far from the punishment for adultery contained in the Qur'an and hadith. However, if a person lives and resides in one area, then the customary traditions applied in that area must be followed. This *mbasuh dusun* tradition, its goals and objectives, can reduce and even make the perpetrator deterred.⁶¹

Among the cases of pregnant women out of wedlock who are subject to the sanction of *mbasuh dusun* are: a pregnant girl out of wedlock who was impregnated by her biological father. Her pregnancy was discovered after five months. They could not be married off because of *syar'i* restrictions. A traditional discussion with the family by way of *mbasuh dusun* cut a goat with *setawar* flour. After that, the husband and wife were divorced. The husband went his separate way with the family. The out-of-wedlock pregnant girl stays

⁵⁵ "Interview with M. Safri, Tokoh Adat Kota Bengkulu, Senin 4 April 2021 Dan Interview with M. Zainul, Tokoh Adat Di Kecamatan Kampung Melakyu Kota Bengkulu, Senin 4 April 2021."

⁵⁶ "Interview with Harmen Zet, Ketua Badan Musyawarah Adat (BMA), Tanggal 28 Juli 2019," (n.d.).

⁵⁷ J F Holleman, "The Maintenance and Development of Indonesian Adat Law," in *Van Vollenhoven on Indonesian Adat Law* (Netherlands: Springer, 1981), 213–59.

⁵⁸ "Interview with Harmen Zet, Ketua Badan Musyawarah Adat (BMA), Tanggal 28 Juli 2019."

⁵⁹ Fatimah, "Penyelesaian Hukum Perempuan Hamil Luar Nikah Di Kota Bengkulu Dalam Rangka Pengembangan Hukum Perkawinan Di Indonesia."

⁶⁰ "Interview with Zailan, Ketua RT Kelurahan Pagar Dewa Kecamatan Selebar, Tanggal 23 Juli 2019," (n.d.).

⁶¹ "Interview with Imam Maksum, Imam Masjid Ar-Rahman Kelurahan Pagar Dewa, Tanggal 2 Agustus 2019," (n.d.).

with her mother until she gives birth, and no one marries her.⁶² This incident occurred in 2017.

There was a pregnant woman who was impregnated by someone else's husband. The customary sanction was to wash the village with a goat, then marry her off. After the marriage contract, the man immediately divorced her, because this was an agreement with his first wife. After the marriage, the woman was abandoned and the man returned to his first wife. Shortly afterwards, the family moved from Bengkulu City.⁶³ This event occurred in early 2020.

A pregnant woman out of wedlock (Yn) was married to a man who did not impregnate her (Ad). At the time of the marriage, the man did not know that the woman he married was pregnant. She was 6 months pregnant at the time of marriage. After one week of marriage, the man who married the pregnant woman took the wife to her parents. This happened in 2017. The customary sanction for the woman who was pregnant outside of marriage was to cut the goat and wash the village with setawar flour and apologize to the community. And the man declared divorce with his wife.⁶⁴

A pregnant woman out of wedlock (Gd) who was married to a man who did not impregnate her. She was four months pregnant. At the time of the marriage, the man who married the extramarital pregnant woman knew that his wife-to-be was pregnant. He accepted this situation, arguing that the man who impregnated her was a close friend and was like his own family. This happened in early 2018. The customary sanctions imposed are: on the third day of childbirth, they cut a goat to wash the village; the wife apologizes to her husband. The husband's family accepted this situation.⁶⁵

A woman pregnant out of wedlock was impregnated by her boyfriend, but he did not want to take responsibility, because he said it was not his seed. This happened in early 2020. Previously, at the end of 2019, the woman had been grebeg with a man. After customary deliberations and the sanction of mbasuh dusun, she did not want to marry the man who was grebeg. The reason was that she did not want to disappoint her parents, because she was still studying, and felt that she was not pregnant. But 3 months after being raided, it turned out that she was pregnant. Meanwhile, she was no longer dating the man, and already had a new boyfriend. When she found out she was pregnant, she asked her boyfriend to marry her and was honest that she was pregnant. Her new boyfriend did not want to get married, saying that he was not the one who

⁶² "Interview with Nurhidayat Tokoh Agama, 12 April 2020," (n.d.).

⁶³ "Interview with Iim Fahimah Tokoh Agama, 12 April 2020," (n.d.).

⁶⁴ "Interview with Sari (Kakak Laki-Laki Yang Menikahkan Perempuan Hamil Luar Nikah), 15 April 2020," (n.d.).

⁶⁵ "Interview with Wawan (Laki-Laki Yang Menghamili Perempuan Hamil Luar Nikah), 15 April 2020," (n.d.).

impregnated her. But, finally after 6 months of pregnancy, her new boyfriend wanted to marry her.⁶⁶

In solving the problem, it is not necessarily immediately tried, but there are stages of resolution first, namely:

1. In the event of an arrest or raid. Notification reports or complaints from individuals on customary violations, reporting to village government officials or the Head of the Neighborhood Association (Ketua RT) or one of the *Rajo Penghulu* apparatus (*penghulu adat*, *penghulu syara'* and *cerdik cendikio*).
2. Village government officials, Head of the Community Association (RW Heads), Head of the Neighborhood Association (RT Heads), or one of the *Rajo Penghulu's* officials convey an order to the local customary leader for a *dapek salah* settlement to be held.
3. *Penghulu adat* (traditional leader) as *Rajo Penghulu* (the king of *Penghulu*) informs all *Rajo Penghulu* members to attend the *Rajo Penghulu* consensus that will be held. Informing the head of the sub-district police to appoint their members to attend the *Rajo Penghulu* consensus, the customary head asks the head of the Neighborhood Association (RT Heads) to prepare a place where the *Rajo Penghulu* consensus can be held.⁶⁷
4. The Head of the Neighborhood Association (RT Heads) prepares the seats for the *Rajo Penghulu* assembly, the families, the general public and so on.
5. The traditional leader asks the head of the neighborhood association (RT) to notify other members of the *Rajo Penghulu*, village government officials, and the complainant, parties, witnesses and family to be present at the place and time prepared by the head of the neighborhood association (RT), or village government officials. The Head of the Neighborhood Association (RT) together with village government officials prepare and arrange the arrangement of the *Rajo Penghulu* consensus venue.
6. The *Rajo Penghulu* mufakat is opened by the customary leader who checks the completeness and attendance list of the *Rajo Penghulu* mufakat participants.
7. After everyone is present, the customary *Penghulu* asks the head of the Neighborhood Association (RT) to appear to resolve the *dapek salah* case to *Rajo Penghulu* by granting *Rajo Penghulu's* permission, the head of the Neighborhood Association (RT) presents the parties who *dapek salah* by custom.
8. The customary leader then asks the person who has been *dapek salah* whether they are willing to be resolved by the consensus of the *Rajo Penghulu*. If the *dapek salah* is willing, the next question is asked about his/her health condition, willingness and sincerity. If the *dapek salah* states that he is healthy, willing and sincere, then the customary deliberation can be opened by the

⁶⁶ "Interview with MY (Bibik Perempuan Hamil Luar Nikah), April 2020," (n.d.).

⁶⁷ "Interview with Sabirin, Ketua Adat Kecamatan Gading Cempaka, Tanggal 30 Juli 2019," (n.d.).

Penghulu adat. If the *dapek salah* does not want to be resolved by custom, then this dispute will be carried out legally.⁶⁸

In the implementation procedure after the *Rajo Penghulu* trial, then the mbasuh dusun tradition is carried out, as follows: According to the head of the Neighborhood Association (RT Heads) of Selebar Sub-district, the mbasuh dusun tradition is carried out in the afternoon. The requirements: 1 goat. No buffaloes, no cows, chickens, etc. The money fine actually depends on the agreement. For monetary fines, it actually depends on the agreement, and if you cannot hand over the goat directly, you can also hand over money worth a goat, then it will be carried out by the residents. The perpetrator is actually obliged to come. It is not obligatory to get married.⁶⁹

If there is a raid, it must be reported to the parents, or their representatives, so that they can take follow-up or further steps. If the perpetrator does not want to carry out mbasuh dusun, then there is no difference between unmarried or married perpetrators.

The same thing happened in Kampung Melayu Sub-district, where the goat was still slaughtered. However, most of the time on the day of the ceremony, the adulterer does not come. If they do not want to be present in carrying out mbasuh dusun, they still pay or hand over money for the price of a goat. From the implementation of mbasuh dusun there is a deterrent effect, if seen in the Sub-district of Kampung Melayu it can be said that it rarely happens.⁷⁰

The mbasuh dusun tradition is carried out by slaughtering a goat, the blood is collected, the meat is cooked outside the house, the perpetrator must be present to be aware and must apologize. Then do a small alms (ask for prayer) at the place where the goat was slaughtered or outside the house. This prayer aims to prevent the community from disaster, as well as a closing in resolving the problem. This process is also attended by *Rajo Penghulu*, government officials and the community.⁷¹

As for the slaughter of the animal, the blood was taken and then sprinkled on 40 (to the right 20 and to the left 20) houses by the two perpetrators while apologizing. This sprinkling uses cold leaves. The goat should be a male and not a small one. Mbasuh dusun is so that the perpetrator is

⁶⁸ "Interview with Sabirin, Ketua Adat Kecamatan Gading Cempaka, Tanggal 30 Juli 2019."

⁶⁹ "Interview with Zailan, Ketua RT Kelurahan Pagar Dewa Kecamatan Selebar, Tanggal 23 Juli 2019."

⁷⁰ "Interview with Harmen Zet, Ketua Badan Musyawarah Adat (BMA), Tanggal 28 Juli 2019."

⁷¹ "Interview with Sabirin, Ketua Adat Kecamatan Gading Cempaka, Tanggal 30 Juli 2019."

ashamed and does not repeat the act again. If the family does not want to settle the matter in accordance with this custom or tradition, then they are expelled or handed over to the police, because this customary sanction is in cooperation with the police.

If the violation of the custom is repeated by the same person and the violator does not have good intentions to change it, then the Rajo Penghulu with his authority can sanction ostracizing him, even expelled from the place of residence.⁷²

Based on the description of the *mbasuh dusun* tradition, the rules applied in Bengkulu City have undergone shifts and various changes along with the times from year to year. However, the rules are still sourced from *Simbur Cahaya*. Many rules are no longer used and have been replaced with other rules.

The Enforcement of the Mbasuh Dusun Tradition as a Customary Sanction in the Context of the Development of Marriage Law in Indonesia

Legal reform in Islam is carried out in order to be able to realize the objectives of sharia as much as possible which includes the benefit of human life in this world and the hereafter.⁷³ Indeed, since the beginning, Islamic law essentially aims to realize the benefits of human life in this world and the hereafter.⁷⁴

Furthermore, it is known that the instrument of Islamic law reform is *ijtihad*. *Ijtihad* when associated with the formulation of law; determine the law on new problems for which there is no legal provision. Or determining, finding new legal provisions for a problem that already has legal provisions, but is no longer in accordance with the current conditions and human interests.⁷⁵

The Compilation of Islamic Law (KHI) accommodates one of these opinions which states that the marriage of a pregnant woman outside of marriage is valid only with the man who impregnates her, without having to be repeated after giving birth. The case of pregnant women outside of marriage does not only concern the adultery of the perpetrators and the *hudud*

⁷² “Interview with Sabirin, Ketua Adat Kecamatan Gading Cempaka, Tanggal 30 Juli 2019.”

⁷³ Jayusman Jayusman et al., “Masalah Perspective on Husband Nusyuz in Islamic Law and Positive Law In Indonesia,” *Muqaranah* 6, no. 1 (2022): 69–84, <https://doi.org/10.19109/muqaranah.v6i1.11164>.

⁷⁴ A Malthuf Siroj, *Pembaruan Hukum Islam di Indonesia: Telaah Kompilasi Hukum Islam* (Yogyakarta: Pustaka Ilmu, 2017), p. 44.

⁷⁵ Asni, *Pembaharuan Hukum Islam Di Indonesia: Telaah Epistemologis Kedudukan Perempuan Dalam Hukum Keluarga* (Jakarta: Kementrian Agama Republik Indonesia, 2012), p. 48.

punishment for their actions, but also concerns the status and fate of the life of the baby in the womb.⁷⁶

According to researchers, the prohibition of adultery even to the point of causing pregnancy outside of marriage as the focus of this research, namely the marriage of pregnant women outside of marriage in Bengkulu city, is more about the translation of verses that explain the role and position of humans as caliphs/leaders. Humans are the noblest creatures, social creatures, perfect creatures; so that the goal is to achieve mashlahah, either in the form of benefits achieved or mudharat avoided.⁷⁷

So this prohibition of adultery, when associated with the position of man as a leader is the implementation of *hifzih an-nasl* (nurturing the offspring), protecting offspring.⁷⁸ Meanwhile, the marriage of pregnant women outside of marriage in Bengkulu city, which has actually been carried out, anticipates a deterrent effect with the mbasuh *dusun* tradition, which is a customary sanction imposed on the perpetrator.

Islam becomes a strongly held belief and assimilates with the traditions and culture that have developed in the area where it develops. So that between the teachings of Islam and the culture and traditions of the community there is mutual adjustment, as long as it does not conflict with the basic values in Islam such as the people of Indonesia, especially Bengkulu.⁷⁹

When there are social changes, it is almost certain that there will be changes in the law, therefore social changes such as the relationship between Muslims and local traditions; which occur in Bengkulu society can affect Islamic law. In order to create legal adaptability, Muslims in Indonesia must always make *ijtihad*.⁸⁰ There are several rules related to changes in the law.

1. في تغيير الفتوى واختلافها بحسب تغير الأزمنة والأمكنة والأحوال والنية والعوائد⁸¹

“Changes in the law occur due to changes in time, place, circumstances and customs.”

⁷⁶ Ahmad Rizza Habibi, “The Dynamics of Illegitimate Child Status in Sharia and National Law of Indonesia: Is There a Harmonization?,” *Al-Manhaj: Journal of Indonesian Islamic Family Law* 3, no. 1 (2021): 70–80, <https://doi.org/10.19105/al-manhaj.v3i1.4787>.

⁷⁷ Oni Syahroni, *Maqashid Bisnis Dan Keuangan Islam* (Jakarta: PT Raja Grafindo, 2016), cet, 2, p. 4.

⁷⁸ Wan Abdul Fattah Wan Ismail et al., “A Comparative Study Of The Illegitimate Child Term From Shariah And Malaysia Legal Perspective,” *Humanities & Social Sciences Reviews*, 2020, <https://doi.org/10.18510/hssr.2020.8412>.

⁷⁹ Supardi Mursalin, “Acculturation of Islamic Family Values and Bengkulu Local Traditions in Forming a Sakinah Family,” *Manchester Journal of Transnational Islamic Law & Practice* 19, no. 2 (2023): 123–36.

⁸⁰ Abu Hamid Muhammad al-Ghazali, *Al-Mustasyfā Min Ilmi Al-Uṣūl* (Beirut: Dār al-Fikr, n.d.), p.176.

⁸¹ Ibn al-Qayim al-Jauziah, *Iʿlām Al Muwaqīʿin ‘an Rabbi Al-Ālamīn* (Beirut: Dār al-Jai, n.d.), juz III, p. 3.

2. الحكم يدور مع علته وجودا وعد ما⁸²

“The ruling depends on the illat, its presence or absence.”

3. لا ينكر تغير الاحكام بتغير الزمن والامكنة والاحوال⁸³

“It is undeniable that legal changes occur due to changes in time, place and circumstances.”

4. للأكثر حكم الكل

“The majority is judged to be all.”

5. الحكم يدور مع مصالح العباد فحيثما وجدت المصلحة فثما حكم الله⁸⁴

“The law revolves around human benefit, so wherever benefit is found there is the law of Allah.”

6. المحافظة على القديم الصالح والأخذ بالجديد الاصلح

“Keeping the old is good and taking on the new is better.”⁸⁵

The aforementioned rules indicate that the ruling on an event may only apply to a certain community and at a certain time.⁸⁶ Therefore, the ruling must be reconsidered when the law will be applied at a different time and place, especially if the ruling no longer reflects the benefit as the purpose of Islamic law, then the ruling is no longer valid and there must be a new *ijtihad* that brings more *mashlahab* (benefits) to the community.⁸⁷ This kind of thing has been done by Imam Shafi'i in taking his law with the terms *qaul qadim* and *qaul jadid*, which *qaul qadim* was done by Imam Shafi'i when he was in Iraq and *qaul jadid* when he was in Egypt.⁸⁸

Furthermore, in Bengkulu City, the application of sanctions for women who become pregnant outside of marriage is based on the Kitab Simbur Cahaya, although it has undergone shifts and various changes, along with the development of the times from year to year. The mbasuh dusun tradition practiced in Bengkulu can be declared as *Al-'Urf Al-Shabih*, as a custom that

⁸² Ali Ahmad Gulam Muhammad An-Nadawi, *Al-Qawā'id Fiqhiyah* (Damaskus: Dār al-Qalam, 1994), Cet 3, p. 125.

⁸³ Ibn al-Qayim al-Jauziah, *I'lām Al Muwaqī'in 'an Rabbi Al'Ālamin*, p. 414.

⁸⁴ Jalaluddin As-Suyuti, *Al-Asybah Wa an-Nazhāir* (Beirut: Dār al-Fikr, n.d.), p. 176.

⁸⁵ Syafii Ma'arif, *Islam Dan Masalah-Masalah Kenegaraan* (Jakarta: LP3S, 1985). p. 47

⁸⁶ Jayusman Jayusman, Rahmat Hidayat, and Rizki Zulu Febriyansyah, “Qawaid Fiqhiyah’s Review of Buying Shoes with A Paid Lots System At Toidiholic Store Bandar Lampung,” *JURNAL ILMIAH MIZANI: Wacana Hukum, Ekonomi, Dan Keagamaan* 9, no. 2 (2022): 131, <https://doi.org/10.29300/mzn.v9i1.6952>.

⁸⁷ Abdul Aziz, “Konsep Mashadir Al-Ahkam (Studi Komparasi Antara Pemikiran Asy-Syāfi'i Dan Muhammad Syahrūr)” (Surakarta: LP2M IAIN Surakarta, 2016), http://eprints.iain-surakarta.ac.id/5600/1/Abdul_Aziz_Konsep_Masadir_al-Ahkam.pdf.

⁸⁸ Roibin, *Sosiologi Hukum Islam, Telaah Sosio Historis Pemikiran Imam Syafi'i* (Malang: UIN Malang Press, 2008).

applies in the midst of the community that does not contradict the nash (verse or hadith), does not eliminate their benefits, and does not give them mudharat.

Furthermore, in order to take *mashlahab* to avoid *mafsadab*, from pregnant marriages in the Compilation of Islamic Law (KHI), the author tries to see with a review of achieving benefits and avoiding harms. Indeed, the case of pregnant women outside of marriage does not only concern the adultery of the perpetrators and the hudud punishment for their actions, but also concerns the status and fate of the life of the baby in the womb.⁸⁹ Pregnant marriages in this case are to preserve offspring so that the children who are born are not neglected and still have a bright future, because no matter what the parents are like, children are still born in a state of fitrah (pure).⁹⁰

Thus, it is time for the Compilation of Islamic Law (KHI) to seek preconception of the provisions of pregnant marriage, so as not to be too easy and underestimate the prohibitions and provisions of Allah. Violation of *sharia* is not something that is considered shameful. In the past, when there were people who were pregnant outside of marriage, they were considered unclean, even their children did not want to greet and hold them. After being tolerated by the rules of pregnant marriage, it seems too easy and does not consider it a 'disgrace. In this research, it seems very urgent to apply the customary sanctions in Bengkulu City, as *Al-'Urf Al-Shabih*, in accordance with the concept in Kitab Simbur Cahaya, namely *mbasub dusun*, for pregnant women outside of marriage in Bengkulu City. The application of this customary sanction in the form of the *mbasub dusun* tradition has significant implications in minimizing cases of women becoming pregnant out of wedlock.

Conclusion

The conclusion of this research is that: the implementation of the *mbasub dusun* tradition is a customary sanction for pregnant women outside of marriage in Bengkulu City, Indonesia. The case of extramarital pregnant women does not only concern the adultery of the perpetrators and the hudud punishment for their actions, but also concerns the status and fate of the life of the baby in the womb. The application of customary sanctions in Bengkulu City refers to the concept in Kitab Simbur Cahaya, namely *mbasuh dusun*, for the perpetrators of pregnancy outside of marriage in Bengkulu City, appearing as *Al-'Urf Al-Shabih*. In contrast to customary sanctions in other regions, the implementation of the

⁸⁹ Mursyid Djawas et al., "The Legal Position of Children of Incest (A Study of Madhhab Scholars and Compilation of Islamic Law)," *Samarab* 6, no. 1 (2022): 139–55, <https://doi.org/10.22373/sjhh.v6i1.11904>.

⁹⁰ Euis Nurlaelawati and Stijn Cornelis Van Huis, "The Status of Children Born out of Wedlock and Adopted Children in Indonesia: Interactions between Islamic, Adat, and Human Rights Norms," *Journal of Law and Religion* 34, no. 3 (2019): 356–82, <https://doi.org/10.1017/jlr.2019.41>.

mbasuh dusun tradition has a significant impact on women who are pregnant outside of marriage for a deterrent effect. In the implementation of this mbasuh dusun tradition, if the family does not want to resolve the provisions of this custom or tradition, then they are expelled or handed over to the police, because this customary sanction has collaborated with the police, so that customary sanctions can be applied effectively.

The application of customary sanctions in the form of the mbasuh dusun tradition, in the context of developing marriage law in Indonesia, appears necessary by reviewing the legalization of marriages of pregnant women outside of marriage. This is because the imposition of sanctions for pregnant women outside of marriage has significant implications for creating a deterrent effect and can realize security, order, and benefit for the community evenly.

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