



Review of Islamic Law and Positive Law: Regarding the Obligation to Comply with the Marriage Law

History of Author	Abstract
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Introduction

Indonesia is a constitutional state as stipulated in Article 1 paragraph (3) of the 1945 Constitution confirms that Indonesia is a constitutional state.¹ This means that the rule of law underpins the fabric of national, social and political institutions. After the proclamation of the rule of law, the existence of a judiciary whose task was to uphold the rule of law was a defining characteristic. With the help of the Executive Branch, the People's Representative Council formulates a unified legislative body by establishing interconnected laws and regulations. Legislation, among other things, produces the Marriage Law. The Marriage Law is a statutory law made by the government that establishes the legal framework for marriage in Indonesia.²

Laws (UU) are the result of the government's (leader) ijtihad to control problems in Indonesia. Every citizen is required to comply with laws produced by the government because the position of government or ruler is an honorable position according to Islamic law. Of course, this is also in line with the magnitude of the task, the scope of accountability, and the weight of the burden involved in upholding religion and overseeing global order as a substitute for carrying out prophetic duties.³

Every statutory regulation that is made must be based on the provisions stipulated in Law Number 20 of 2004 in order to guarantee its certainty and development. For Muslims, following state law is the same as following the directions of Allah and His Messenger. This is as in Surah An-Nisa

¹ "1945 Constitution" 105, no. 3 (1945): 129-133.

² Muhammad Arafat, "Mandatory Policy to Comply with Law No. 1 of 1974 on Marriage," *Researchgate Islamic University of Indonesia*, no. 1 (2022): 1-15.

³ Indra hadi Rozi Andrini, Mawardi Muhammad Saleh, "Basic Compulsory Compliance with Marriage Laws Reviewed According to Islamic Law," *An-Nida'* 45, no. 1 (2021): 95-114.

verses 59 and 83, Allah commands us to obey His Messenger and Ulil Amri. Just as the DPR makes laws and it is well recognized that the DPR is a representative of the people who are elected by the people and for the people in general elections (Pemilu). The formation of the DPR is the achievement of a consensus among all Indonesian people regarding an action and its consequences; the decision must be obeyed by the community.⁴

The Marriage Law or often known as UUP is a legal document that has been made by the government and serves as the basis for carrying out legal marriages in Indonesia. If we want to get married, it is right for us to comply with the laws that have been implemented in this country, especially in UUP, but many individuals choose to do otherwise under the justification that "Laws are only human laws and not God's laws."⁵ This is interesting to discuss because there are many assumptions that there is no obligation to comply with legislation because these laws are made by fellow human beings.

Discussions about the obligation to comply with the Marriage Law specifically have not been written by many other researchers. Existing writings can be grouped into two groups, namely writings that discuss the basis for compliance with laws and their relevance to the thinking of a figure, some of these writings are Basic Obligation to Comply with Marriage Laws (UUP): Study of Muhammad 'Abduh's Thoughts by Khoiruddin Nasution,⁶ Basis for Compulsory Compliance with the Marriage Law Reviewed According to Islamic Law by Muhammad Arafat, Rozi Andrini, Mawardi Muhammad Saleh and Indra Hadi;⁷ Basis for Obligation to Comply with UUP No. 1 of 1974 concerning Marriage Socio-Historical Analysis.⁸

second group is writing that relates the view of positive law or Islamic law to the basis of the obligation to comply with legislation, the writing is *Ulul amri and the Strength of Legal Products (Study Against Perspective of Teungku Dayah Salafi Aceh Besar)* by Analiansyah;⁹ *Ijma' in the Context of Establishing Law in a State* by Hasanuddin Muhammad, Agus Alimuddin, Lisda Aisyah, and Muhammad Wahdini;¹⁰ *Relevance of Ijma' and Qiyas in the Structure of Islamic Law and Structure Positive Law in Indonesia* by Deden Hidayat.¹¹

The difference between this paper and previous works is that this paper will discuss the views of positive law and Islamic law on the obligation to comply with the Marriage Law and what is the relevance of this obligation to consensus which is based on the opinion of some scholars.

⁴ Khoiruddin Nasution, "The Basics of Complying with the Marriage Law (Uup): A Study of Muhammad 'Abduh's Thought," *ADHKI: Journal of Islamic Family Law* 1, no. 1 (2019): 1-16. the status of obeying the contents of the UUP is related to and is a matter of the State, not related to the legality of religion, not related to the validity of marriage. Instead Muhammad 'Abduh is a thinker who believes that obeying the UUP is part of an obedient obligation to the government (uli al-amr

⁵ Ibid. the status of obeying the contents of the UUP is related to and is a matter of the State, not related to the legality of religion, not related to the validity of marriage. Instead Muhammad 'Abduh is a thinker who believes that obeying the UUP is part of an obedient obligation to the government (uli al-amr

⁶ Ibid. the status of obeying the contents of the UUP is related to and is a matter of the State, not related to the legality of religion, not related to the validity of marriage. Instead Muhammad 'Abduh is a thinker who believes that obeying the UUP is part of an obedient obligation to the government (uli al-amr

⁷ Rozi Andrini, Mawardi Muhammad Saleh, "The Basis for Compulsory Compliance with the Marriage Law in View According to Islamic Law."

⁸ Muhammad Arafat, "Mandatory Policy to Comply with Law No. 1 of 1974 on Marriage."

⁹ Analiansyah, "Ulil Amri and the Power of His Legal Products (Study of the Perspective of Teungku Dayah Salafi Aceh Besar)," *Analysis* 21, no. 2 (2014): 265.

¹⁰ Muhammad Wahdini Hasanuddin Muhammad, Agus Alimuddin, Lisda Aisyah, "Ijma' in the Context of Establishing Law in a Country," *Istinbath: Law Journal* 17, no. 1 (2020): 202-218.

¹¹ Deden Hidayat, "The Relevance of Ijma' and Qiyas in the Structure of Islamic Law and Positive Legal Structures in Indonesia," *Istinbath: Law Journal* 16 (2019): 67-81.

His paper is a research using a normative juridical approach. Comparatively, normative studies in the realm of law seek legal principles and legal doctrines in order to provide answers to existing legal challenges, while juridical research examines legal elements based on pre-existing laws and regulations.¹² Then use theory consensus which will be associated with why as citizens must comply with laws and regulations. The main data source for this paper is previous books or journals that are relevant to this paper. This paper will answer the views of positive law and Islamic law on the obligation to comply with the Marriage Law, why as part of a country we must comply with applicable laws and what is the basis for this obligation and what is its relevance to consensus’.

The scope and systematic discussion of this paper includes an introduction which contains the background why the author raised this research, then continues with a discussion which contains an explanation regarding the obligation to comply with the law from the perspective of positive law and also Islamic law and then its relevance to consensus’, and finally this paper closes with a conclusion.

Discussion

Marriage Law

The making of laws and regulations includes five stages, namely; 1. planning, 2. preparation, 3. discussion, 4. ratification or determination, and 5. promulgation, as stated in Article 1 paragraph (1) of this Law. Each stage certainly involves many people. Then, laws are legislative and executive products through certain procedures, laws are formed by the House of Representatives with the approval of the President. The planning of laws and regulations begins with the National Legislation Program which is prepared in a planned, integrated and systematic manner, in order to create a national legal system, which is based on the aspirations and legal needs of the community. Fourth, it is still planning, that the birth of laws and regulations is the result of a study, which is called an academic text. Discussion of the draft law is carried out in two levels of discussion, namely: a. level I discussions at commission meetings, joint commission meetings, Legislation Body meetings, Budget Committee meetings, or Special Committee meetings; and b. level II discussion at the plenary session. The draft law that has been approved by the DPR is submitted by the leadership of the DPR for ratification by the president, who then disseminates the draft law to provide information and/or obtain input from the public and stakeholders.¹³

Laws and written regulations regarding marriage were enforced during the Dutch colonial era, but only applied to Christians who were Dutch or native. Meanwhile, for residents who are Muslim, this has not yet been implemented. The Dutch East Indies rulers wanted to secure their control and influence over the colony during the colonial era, so they regulated it through a number of legal products, including the marriage law. This approach makes it possible to regulate the population system of the colonized country. The government’s Marriage Bill at that time could not fully consider women’s interests in ensuring that women and men in the household had an equal relationship. This is evident in the design of the marriage contract which designates the man as the head of the household, with the woman having the obligation to manage household affairs as a result.¹⁴

¹² Peter Mahmoud Marzuki, *Legal Research* (Jakarta: Kencana Prenada Media Group, 2005).

¹³ Nasution, “The Mandatory Basis of Complying with the Marriage Law (Uup): A Study of the Thoughts of Muhammad ‘Abduh.” the status of obeying the contents of the UUP is related to and is a matter of the State, not related to the legality of religion, not related to the validity of marriage. Instead Muhammad ‘Abduh is a thinker who believes that obeying the UUP is part of an obedient obligation to the government (uli al-amr

¹⁴ Abdul Manan, *Various Problems of Islamic Civil Law in Indonesia* (Jakarta: Prenada Media Group, 2000).

On 22 December 1973, the Government's Minister of Religion introduced the idea of the Marriage Bill, which was then adopted by the DPRD and changed to become the Marriage Law. Thus, on January 2, 1974, the Law was approved by the President and published in the State Gazette Number 1 of 1974. There are two things that stand out in the history of the Religious Courts in Indonesia for a period of about 15 years, from before the enactment of the Law No. 1 of 1974 which discussed marriage until the issuance of Law no. 7 of 1989 concerning the Religious Courts. The first talks about how Law No. 1 of 1974 which regulates marriage and government regulation no. 9 of 1975 appeared. Second, in connection with the adoption of Government Regulation Number 28 of 1977 concerning Representation of Owned Land, which was amended by Law Number 41 of 2004 concerning Waqf.¹⁵

The Obligation to Comply with Marriage Laws from the Perspective of Positive Law and Islamic Law

Indonesia is included as a country that upholds the civil law system, legal material (*laws and regulations*) is an important component in the development of state law. Civil law has a direct impact on the ability of judges to make decisions. Because the existence of legal material is very important, there are still efforts to improve it in line with the development of national laws and regulations. In order to achieve orderly rules and regulations by paying attention to hierarchy, local wisdom, customary law resuscitation, and jurisprudential repositioning that are relevant to the rejuvenation of national legal materials, legal materials need to be improved.

The Marriage Act is one of the official results of government laws and regulations, as they are known. According to Article 27 paragraph (1) of the 1945 Constitution which states that "*all citizens simultaneously have a position in law and government and are obliged to uphold law and government without exception,*" The Marriage Law which covers marriage, inheritance, and waqf has become the legal basis used in Indonesia. Therefore, it is proven, in accordance with Indonesian law, we are obliged as Indonesian citizens, to comply with Law No. 1 Year 1974 was no exception.

The product of positive legislation that has existed since the New Order era is Law no. 1 of 1974 concerning Marriage. According to Article 27 paragraph (1) of the 1945 Constitution it is proven that we as citizens of Indonesia are obliged to comply with Law Number 1 of 1974 without exception based on the legal basis. Including marriage, inheritance, and waqf.

Many individuals were involved in the legal birth process in the Indonesian constitution, from planning to ratification. According to the constitution, their coalition concerned includes legislative, executive and community groups. The parties involved can also be divided into several groups of experts (*scholar*), leader (*Umrah*), and community leaders (*Russia*). This agreement of the ulema, community leaders and leaders is comparable to the ruling of *uli al-amr* in Qur'anic terminology. Thus, adhering to the agreement of scholars, authorities, and prominent figures is the same as adhering to *uli al-amr* as the third set of laws that must be upheld after the Al-Qur'an and the Sunnah of the Prophet Muhammad SAW'.¹⁶

Surahs An-Nisa' (4): 59 and An-Nisa' (4): 83 serve as the basis for complying with laws that the

¹⁵ Dermina Dalimunthe, "The Process of Forming Laws According to Law no. 12 of 2011 concerning the Formation of Legislation," *Jurisprudence: Islamic and civil sciences* 3, no. 1 (2017): 66-82.

¹⁶ Nasution, "The Mandatory Basis of Complying with the Marriage Law (Uup): A Study of the Thoughts of Muhammad 'Abduh." the status of obeying the contents of the UUP is related to and is a matter of the State, not related to the legality of religion, not related to the validity of marriage. Instead Muhammad 'Abduh is a thinker who believes that obeying the UUP is part of an obedient obligation to the government (*uli al-amr*)

government instituted according to Islamic law. The verse injunction to obey the government is directed at a country, not a Muslim country otherwise, it is directed at the government of a nation. The community has the responsibility to uphold the law as a formal and legal agreement reached by the people's representatives and as a sign of the community's submission to the authorities. Verses 59 and 83 of surah al-Nisa' (4): 59 serve as the basis for following the government.

The Marriage Law must be followed for three main reasons, including First, namely how to fulfill orders to obey the government to do what is legal (*oli al-amr*). Second, complying with the law is a realization that is brought about by consensus', the third main source of Islamic teachings after the Qur'an and the sunnah of the Prophet Muhammad. Third, a number of experts in various scientific and professional domains in solving societal problems come to their conclusions and produce laws.¹⁷

In relation to the Qur'an's injunction to obey the authorities in the fact that law is the result of a constitution approved by ulil amri, which consists of the government, scholars and intellectuals, as well as the general public, it can be said that law no. 1 of 1974 concerning marriage is appropriate for us as Muslims who adhere to Islamic law because it is a form of obedience to the government.

Concept Relevance consensus Against the Obligation to Comply with the Marriage Law

Law is the product of the minds of experts in various fields as well as experts who have resolved various social disputes and have a thorough understanding of jurisprudence, whether it is in the form of jurisprudence, fatwas or individual jurisprudence. *consensus*', which is the third source of Islamic law after the Qur'an and the Sunnah of the Prophet Allah, can be said to be equal to law because basically, jurisprudence and fatwa are products of Islamic law produced by individuals, while the law itself is the result of the thoughts of various experts.

According to Abu Zahrah, *consensus* is a technique used by the mujtahidin to create a legal framework for legal issues that do not appear in the Qur'an or Hadith. The agreement of all Muslim mujtahid scholars in several countries after the death of the Prophet Muhammad SAW.¹⁸ *consensus* are agreements and intentions that dominate in the period after the death of the Prophet Muhammad SAW. When the Prophet was still alive, of course when problems arose people could ask the Prophet directly, and the Qur'an resolved legal issues so that consensus not needed.¹⁹

The mushrooming of Muslims around the world after the death of Prophet Muhammad SAW has helped to maintain a delicate balance between nations with different political systems. When it was based on the agreement of the mujtahids of the people of the Prophet Muhammad SAW in his time on the topic of *syar'i* after the death of the Prophet (the idea *consensus* from traditional scholars). After that term *consensus* according to classical scholars, namely as follows: (a) *consensus* which all mujtahids agree on; (b) mujtahids who gave their opinions came from various parts of the Islamic world; (c) the mujtahid is obliged to give his views; and (d) the law agrees that it is actually not found in the Al-Qur'an and Hadith.²⁰

Depart from destination *consensus*, namely the discovery of new *syara'* laws that are not listed in the texts. So that *consensus* is very necessary and still needed to provide answers to problems

¹⁷ Muh Yunan Putra and M Hi, "Comply with Government Regulations and Laws According to Islamic Shari'a," *Sangaji, Journal of Sharia and Legal Thought* 4, no. 1 (2020): 19–40.

¹⁸ Muhammad Abu Zahrah, *Ushul Al-Fiqh* (Kairo: Darul Fkr al-araby, 1958).

¹⁹ Amir Syarifuddin, *Usul Fiqh: Volume 1* (Jakarta: Logos Discourse of Science, 1997).

²⁰ Abdul Aziz Dahlan, *Encyclopedia of Islamic Law 1* (Jakarta: Van Hoeve's New Ichtar, 2006).

that people do not know about how to perform *ijtihad*. Especially in the study of Islam and social life because Indonesia is a multicultural country. With this way, *consensus* can be considered as a source of law in Islam, because it is characterized by the concept of state law. Using Al-Quran, Hadith, *consensus* the scholars and mujtahid based consensus regarding religious cases, and the decisions of the ulema, government, supreme justices in matters of justice, politics, and war as standard, Syekh Rasyid Ridho argues that Islamic law originates from four different types of sources.²¹

As a legislative body that represents the people, the People's Consultative Assembly (MPR RI), the People's Representative Council (DPR), and the Regional Representatives Council (DPD) are institutions that can carry out consensus if seen from the ideas of Fazlur Rahman. The same applies to the view of Abdul Wahab Khallaf (a mujtahid trustworthy), namely that the government can do whatever it says *Consensus*' The problem arises, of course, when we combine this with the framework consensus proposed by fiqh scholars, because we are aware that not all the MPR, DPR and DPD are Muslims. However, looking at things historically, during the *tabi'in* period or during the Umayyad dynasty in running the government, skill was the fundamental criterion.

The word *Ulil amri* appears in verse 59 of An-Nisa, and its meaning is explained by Muhammad Abduh. If the person representing the people is knowledgeable in a particular field, it makes sense to seek his advice. Thus, *consensus* which is done in the present tense is part of the *sukuti* *Consensus*' from there, the authors conclude that *syar'i* law must be consensus as a result of popular consensus, so it must be obeyed based on QS An-Nisa.

According to Muhammad Abduh, the purpose of consensus is to reach consensus based on the pursuit of *maslahah* or benefits for society as a whole. According to Abd. Karim Zaidan, all the concerns of the people are reviewed by them using techniques from the texts of revelations and their opinions published in different media. If all agree on the decision stipulated by the institution of the scholars, then it is an *Ijma'* which has similarities with the concept laid down by the proposed scholars and the decision must be obeyed.²²

Conclusion

From the explanation above, it can be concluded that as citizens who comply with the rules, it is mandatory for each individual to comply with legislation, especially the Marriage Law. The obligation to comply with the Marriage Law as an Indonesian citizen who is obliged to comply with the applicable laws in Indonesia is based on Article 27 paragraph (1) of the 1945 Constitution which reads "all citizens have the same position before law and government and are obliged to uphold law and government. it with no exception." In Islam itself it also requires us to obey *ulil amri* based on Q.S An-Nisa: 59, so that if compared to the word *ulil amri* with the authorized government, obeying the law is tantamount to obeying *Ulil Amri* or the government itself.

²¹ N A Yaqin, "State Law Argument as a Source of Islamic Law in the Thought of Sayyid Muḥammad Rasyīd Riḍā and Wahbah Az-Zuḥailī," *Al-Mazaahib: Journal of Comparative Law* 5 (2018): 215–235.

²² Abd Karim Zaidan, *Al-Wajiz Fi Ushul Al-Fiqh* (Beirut: Muassasah al-Risalah, 1998).

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