



## Examining Malay Customary Marriage Law in the Malay Countries: An *Urf* Perspective

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### Abstract

The purpose of this paper is to find out more clearly about the position of customary law for the Malay community, which can be said to be all Muslim, by analyzing it through the study of 'urf in Islamic law. This research is categorized as qualitative research. Qualitative research intends to understand the phenomenon of what is experienced by the research subject, for example, behavior, perception, motivation, action, and others, thoroughly and descriptively in a special natural context by utilizing the scientific method. The findings in this paper are that Malay customary marriage law, which has been practiced so far in Malay countries, is in accordance with Islamic law. The Malay customary marriage law that may be applied is a law that does not conflict with Islamic values, or 'urf al-sahih. Meanwhile, Malay customary marriage law that cannot be applied is a law that is contrary to Islamic values, or 'urf al-fasid, because it can damage the purpose of the shari'a to be passed down (maqashid shari'ah).

**Keywords:** Marriage Law, Malay Custom, 'Urf

### Abstrak

Tujuan dilakukannya penulisan ini adalah menemukan lebih jelas lagi tentang bagaimana kedudukan hukum adat bagi masyarakat melayu yang dapat dikatakan semuanya beragama Islam, dengan menganalisa melalui kajian 'urf dalam hukum Islam. Penelitian ini dikategorikan ke dalam jenis penelitian kualitatif. Penelitian kualitatif bermaksud memahami fenomena tentang apa yang dialami oleh subyek penelitian, misalnya perilaku, persepsi, motivasi, tindakan dan lain-lain secara menyeluruh dan deskriptif pada suatu kontek khusus yang alamiah dengan memanfaatkan metode ilmiah. Adapun hasil temuan dalam tulisan ini adalah hukum perkawinan adat melayu yang dilakukan selama ini di kawasan negara-negara melayu adalah sesuai dengan hukum Islam. Adapun hukum perkawinan adat melayu yang boleh diterapkan adalah hukum yang tidak bertentangan dengan nilai-nilai Islam atau 'Urf al-Sahih. Sedangkan



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hukum perkawinan adat melayu yang tidak boleh terapkan adalah hukum yang bertentangan dengan nilai-nilai Islam atau *'Urf al-fasid*, karena dapat merusak tujuan syariat diturunkan (*maqashid syari'ah*).

**Kata Kunci:** Hukum Perkawinan, Adat Melayu, *'Urf*.

## Introduction

In various parts of the world, there are various ethnic groups, cultural customs and religions, where each cultural custom has its own characteristics and privileges. With that too, comes the diversity of different cultural customs.<sup>1</sup> One of the privileges of these cultural customs is found on the peninsula of the archipelago (Indonesia, Malaysia, Singapore, Brunei, and Thailand), namely the Malay area. The uniqueness of the cultural customs of the Malay nation is one of the gifts entrusted by God Almighty. With the richness of these cultural customs, it proves that these privileges have made the Malay nation a complete nation, so that the wealth of cultural customs that is owned at the same time becomes one of the regional identities. Thus, it becomes a matter of pride for the Malay nation, which with the peculiarities of these cultural customs, it is very easy to recognize the people.<sup>2</sup>

One country that still applies customary law is Indonesia, but it is supported by another legal system. This is because Indonesia is a diverse country with various cultural customs. This diversity also causes the Indonesian state to adopt various legal products, thus forming a legal system. The Indonesian legal system is a plural legal system, known as continental law, namely Islamic law, customary law, and western law.<sup>3</sup> An anthropologist named John R. Bowen also stated in his research on the Gayo community in Aceh. From this research, it is concluded that there are three systems that have developed in the lives of Indonesian people, especially those in Aceh, namely the customary law system, Islamic law and national law. According to him, the three legal systems synergize with each other in accordance with their respective roles and functions in the life of the Gayo community in Aceh.<sup>4</sup>

The characteristics of traditional Malay culture have uniqueness and noble wisdom values that shape the character of the community according to their living environment and place of residence. More than that, each culture has a familiarity and friendliness with the natural environment that surrounds them. Culture is a shared value system and has become the identity of a society. Culture is closely related to the results of thought in the form of knowledge, belief, art, values and morals, law, customs and abilities acquired by humans as members of society.<sup>5</sup>

Customary law is an unwritten law, meaning that it is not promulgated by the government, but it lives and develops in society. Customary law grows as a belief generated by

<sup>1</sup> Sudijono Sastroatmodjo, *Perilaku Politik* (Semarang: IKIP Press, 1995), 594.

<sup>2</sup> Heliz Zefri, *Tari Melemang Bentan Penaga Di Pulau Bentan Kepulauan Riau* (Bandung: Perpustakaan Universitas Pendidikan Indonesia, 2016), 56.

<sup>3</sup> Muhammad Daud Ali, *Hukum Islam: Pengantar Ilmu Hukum Dan Tata Hukum Islam Di Indonesia* (Jakarta: PT. Raja Grafindo Persada, 2007), 207.

<sup>4</sup> Jhon R. Bawen, *Islam, Law, End Equality in Indonesia: An Anthropology Public Reasoning* (Inggris: Cambridge University Press, 2006), 28.

<sup>5</sup> Soerjono Soekanto, *Sosiologi: Suatu Pengantar*, 43rd ed. (Jakarta: Raja Grafindo Persada, 2010), 266.

the community and is used by the community and is obeyed by the community to be used as applicable legal values. No one can determine for sure when it will come into effect, but a study reveals that customary law is the oldest in existence.<sup>6</sup> Customary law has been known for generations to regulate social life in a society which aims to create security and order in a particular society.

In everyday life, the Malay community is guided by applicable customary law. One of these customary laws is marriage customs. In customary marriage, it is absolutely necessary for the Malay indigenous people to follow because there is a moral sanction if someone does not follow the applicable customary law. A series of provisions and regulations in marriage which were originally part of the sharia dimension, then there was an acculturation between the sharia dimension and the customary dimension through the interaction between Islamic law and the structure and culture of the Malay community in the Riau Archipelago. do not always have to be contradicted. This is due to the flexibility and elasticity of Islamic law.<sup>7</sup> Islamic law merged into the culture of the Malay people of the Riau Archipelago, thus forming a legal construction. In this case, in the field of Malay customary marriage law.

The customs that live in a society are not purely born from the community itself, but through a long process between various cultures. As it is known that customary is owned by a community group and passed down from one generation to the next. Likewise with Malay customs, customs in the Malay dialect have a meaning as a human institution as a whole,<sup>8</sup> passed down from their ancestors to their children and grandchildren, and are influenced by Islam.

From the various references collected, not too much research related to customary marriage law were found, both researches conducted in Indonesia and other countries. The research conducted in Indonesia, such as research by Muhammad Faishal,<sup>9</sup> Mailin,<sup>10</sup> Benny Agusti Putra,<sup>11</sup> Muhammad Taufik,<sup>12</sup> Hidayat,<sup>13</sup> Haljuliza Fasari,<sup>14</sup> and Ahmad Fahmi.<sup>15</sup> As for

<sup>6</sup> Jumianti, "Tradisi Baghembah Dalam Perspektif 'Urf, Studi Di Desa Pengadah, Kecamatan Bunguran Timur Laut, Kabupaten Natuna" (Skripsi, Malang, Fakultas Syariah UIN Maulana Malik Ibrahim, 2016), 7.

<sup>7</sup> Bani Syarif Maula, *Sosiologi Hukum Islam Di Indonesia*, 1st ed. (Yogyakarta: Aditya Media Publishing, 2010), 202.

<sup>8</sup> Ratno Lukito, *Pergumulan Antara Hukum Islam Dan Hukum Adat Di Indonesia* (Yogyakarta: INIS, 1998), 3.

<sup>9</sup> Muhammad Faishal, "Keberadaan Masyarakat Melayu Batu Bara" (Disertasi, Medan, Program Studi Aqidah dan Filsafat Islam Universitas Islam Negeri Sumatera Utara, 2020).

<sup>10</sup> Mailin, "Komunikasi Penanaman Nilai-Nilai Budaya Melayu Pada Masyarakat Batak Toba Muslim Di Kota Tanjungbalai Sumatera Utara" (Disertasi, Medan, Program Studi Komunikasi Islam Program Pascasarjana Universitas Islam Negeri Sumatera Utara, 2016).

<sup>11</sup> Benny Agusti Putra, "Transformasi Budaya Islam Melayu Jambi, Dari Masyarakat Tradisi Hingga Masyarakat Urban" (Disertasi, Palembang, Program Doktor Peradaban Islam Universitas Islam Negeri Raden Fatah, 2019).

<sup>12</sup> Muhammad Taufik, "Islam Kampar: Studi Akulturasi Islam Dan Tradisi Lokal" (Disertasi, Yogyakarta, Program Doktor Universitas Islam Negeri Sunan Kalijaga, 2011).

<sup>13</sup> Hidayat, "Akulturasi Islam Dan Budaya Melayu (Studi Tentang Ritus Siklus Kehidupan Orang Melayu Di Pelalawan Provinsi Riau)" (Disertasi, Yogyakarta, Program Doktor Universitas Islam Negeri Sunan Kalijaga, 2007).

<sup>14</sup> Haljuliza Fasari, "Akulturasi Islam Dan Kebudayaan Melayu (Simbolisme Upacara Siklus Hidup Orang Melayu Palembang)" (Disertasi, Palembang, Program Doktor Universitas Islam Negeri Raden Fatah, 2017).

<sup>15</sup> Ahmad Fahmi, "Kontruksi Hukum Adat Pernikahan Masyarakat Melayu Palembang Berdasarkan Syariat Islam" (Disertasi, Palembang, Program Doktor Universitas Islam Negeri Raden Fatah, 2019).

other research in international scope, such as group research conducted by J.D. Hansen, M.K. Luckert, S. Minae, and F. Place entitled *Tree Planting Under Customary Tenure Systems in Malawi: Impacts of Marriage and Inheritance Patterns*.<sup>16</sup> Likewise, the research conducted by E. Martin and J.F. Gamella,<sup>17</sup> whose research is almost the same as that of D. Bazarkulo Va and J. Compton entitled *Marriage Traditions and Investment in Education: The Case of Bride Kidnapping*.<sup>18</sup>

As for special studies on marriage and culture in Indonesia, such as research conducted by J.E. Yulianto, D. Hodgetts, P. King, and J.H. Liu in 2021 with the title *Navigating Tensions in Inter-Ethnic Marriages in Indonesia: Cultural, Relational, Spatial and Material Considerations*.<sup>19</sup> While the research that specifically discusses the practice of Malay marriage and culture is a research conducted by R. Muhammad, M.S.M. Zahari, A.S.M. Ramly, and R. Ahmad with the title *The Roles and Symbolism of Foods in Malay Wedding Ceremony*.<sup>20</sup>

Therefore, this study is important to examine in view of the problems of religious life that develop in Malay society in the Malay countries. The intent and purpose are to obtain clarity in Islamic law regarding the implementation of Malay customary marriages. The point of emphasis is to find out more clearly about the position of customary law for the Malay community, which can be said to be all Muslim, by analyzing it through the study '*urf* in Islamic law.

The main question (*green question*) is whether the traditional Malay marriage is still appropriate to be maintained. That is, based on the concept of '*urf* in Islamic law, the customary that has been enforced by the Malay community must be implemented and maintained, or vice versa, because it is not in accordance with the criteria of '*urf* in Islamic law which can be used as *illat* in establishing a law. It could be that traditional Malay marriages fall into the category of '*Urf al-fasid*, which is something that has become a human tradition, but the tradition is contrary to *syara'*, justifies what is forbidden or cancels what is obligatory. This framework or background of strategic issues will be used as a foothold by researchers in continuing this research.

This research is categorized into the type of qualitative research. There are six characteristics in qualitative research, as presented by Donald Ary, namely: a) considering the context and situation, b) natural, c) the main source is human, d) the data is descriptive, e) research design and observations run simultaneously, and f) data analysis is inductive.<sup>21</sup> In

<sup>16</sup> J. D. Hansen et al., "Tree Planting Under Customary Tenure Systems In Malawi: Impacts of Marriage and Inheritance Patterns," *Agricultural Systems* 84, no. 1 (2005): 99–118, <https://doi.org/doi:10.1016/j.agsy.2004.05.003>.

<sup>17</sup> E. Martin and J. F. Gamella, "Marriage Practices and Ethnic Differentiation: The Case of Spanish Gypsies (1870–2000)," *The History of the Family* 10, no. 1 (2005): 45–63, <https://doi.org/doi:10.1016/j.hisfam.2004.03.004>.

<sup>18</sup> D. Bazarkulova and J. Compton, "Marriage Traditions and Investment in Education: The Case of Bride Kidnapping," *Journal of Comparative Economics*, 2020, <https://doi.org/doi:10.1016/j.jce.2020.07.005>.

<sup>19</sup> J. E. Yulianto et al., "Navigating Tensions in Inter-Ethnic Marriages in Indonesia: Cultural, Relational, Spatial and Material Considerations," *International Journal of Intercultural Relations* 86 (2021): 227–39, <https://doi.org/10.1016/j.ijintrel.2021.12.008>.

<sup>20</sup> R. Muhammad et al., "The Roles and Symbolism of Foods in Malay Wedding Ceremony," *Procedia - Social and Behavioral Sciences* 101 (2013): 268–76, <https://doi.org/doi:10.1016/j.sbspro.2013.07.200>.

<sup>21</sup> Donald Ary, *An Invitation to Research in Social Education* (Beverly Hills: Sage Publication, 2002), 424–25.

research methodology, qualitative research intends to understand phenomena about what is experienced by research subjects, such as behavior, perceptions, motivations, actions and others thoroughly and descriptively in a special natural context by utilizing scientific methods.<sup>22</sup> Therefore, the purpose of this research is to know and fully understand the legal position of Malay customary marriage based on '*Urf* in Islamic law.

### **Customs and Marriage Law**

Customary is an act that is done repeatedly in the same form.<sup>23</sup> In the Big Indonesian Dictionary (KBBI), customary is defined as a tradition, namely a hereditary habit (from ancestors) that is still carried out in a community group.<sup>24</sup> In another sense, customary has been practiced for a long time and has become part of the life of a group of people from the same country, culture, time, or religion. Customary applies from generation to generation, either through oral information in the form of stories, written information in the form of ancient books and or something contained in the inscriptions.<sup>25</sup> Customary is a mechanism that can help to facilitate the personal development of community members, for example in guiding children to adulthood. Customary is also important as a law that regulates mutual association in society.<sup>26</sup>

Customary generally refers to conventions that have been around for a long time, whether intentionally taken or as a result of accidental adjustments to circumstances, which are obeyed and greatly exalt deeds or practices.<sup>27</sup> Therefore, custom is a reflection of the personality of a nation, it is also the embodiment of the soul of the nation concerned from century to century. Every nation in this world has its own customs which are different from one another. Therefore, custom is the most important element that gives identity to the nation concerned.<sup>28</sup>

Meanwhile, the basic concept of customary law can be studied from the reflection of the personality of a nation because it is one of the embodiments of the soul of the nation concerned from century to century. So, it can be said that custom is a pattern of habitual behavior of an ethnic group. Customary law experts agree that it is not easy to provide an understanding of customary law.<sup>29</sup> However, some experts are still trying to provide an understanding. The provision of understanding is intended to provide convenience in understanding, including Soekanto. According to Soekanto, customary law is "a complex of customs which are mostly

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<sup>22</sup> Lexy J. Moleong, *Metodologi Penelitian Kualitatif* (Bandung: Remaja Rosdakarya, 2006), 65.

<sup>23</sup> Soekanto, *Sosiologi: Suatu Pengantar*, 13.

<sup>24</sup> Pusat Bahasa Departemen Pendidikan Nasional, *Kamus Besar Bahasa Indonesia* (Jakarta: Balai Pustaka, 2005), 1208.

<sup>25</sup> Jumianti, "Tradisi Baghembah Dalam Perspektif '*Urf*, Studi Di Desa Pengadah, Kecamatan Bunguran Timur Laut, Kabupaten Natuna," 31.

<sup>26</sup> Jumianti, 31.

<sup>27</sup> R. Levy, *The Social Structur of Islam* (London: Cambridge University Press, 1955), 248.

<sup>28</sup> Djaenab, "Hukum Adat Dalam Pembentukan Hukum Islam Di Indonesia," *Ash-Shahabah, Jurnal Pendidikan Dan Studi Islam* 7, no. 1 (2013): 84.

<sup>29</sup> Soerjono Soekanto, *Meninjau Hukum Adat Indonesia, Hukum Adat Di Indonesia: Suatu Pengantar Untuk Mempelajari Hukum Adat* (Jakarta: Rajawali Press, 1981), 2.

unbooked, not codified (*ongecodificeerd*), and are coercive (*dwang*), have sanctions (from the law), so have legal consequences (*rechtsgevolg*).<sup>30</sup>

Besides Soekanto, there is also a translation of customary law from Dutch, namely *adatrecht*. This nomenclature was first introduced scientifically by Snouck Hurgronje. As quoted by Pide, Hurgronje mentions the term adat law as *adatrecht*, which is to give a name to a system of social control that exists in Indonesian society.<sup>31</sup> According to Pide, apart from Hurgronje, Van Vollenhoven also introduced the term *custom the staatsrecht* (customary constitutional law). *Custom the staatsrecht* is one element that comes from community organizations in Indonesia. This was then followed by Logemann who asserted that at that time the constitutional law of the Dutch East Indies showed a privilege, because it consisted of two elements with very different sources and structures, so he called it dualistic.<sup>32</sup> So that Pide concludes that the things discussed in *custom staatsrecht* are legal communities or legal alliances that exist in Indonesia which aim to know the customary law itself as a whole.<sup>33</sup>

In contrast to what Tolib Setiady said, customary law violations are law rules that regulate events or wrongdoing that result in disturbing the balance of society so that it needs to be resolved (punished) so that the balance of society is not disturbed.<sup>34</sup> Meanwhile, Bushar Muhammad agrees more with Soekanto's opinion, by further emphasizing that what is called customary law is the entire custom (which is not written)<sup>35</sup> that lives in society, in the form of decency, habits, and customs that have legal consequences.<sup>36</sup> Based on Beslissingenleer's, Ter Haar states that, there is no reason whatsoever to call something by the name of law other than what is decided as law by community officials in charge of making legal decisions. So that it provides an understanding that customary law as a whole of the regulations that are embodied in the decisions of legal functionaries (in a broad sense) who have authority (*macht*) and influence (*imloed*) in their implementation apply immediately (spontaneously) and are obeyed wholeheartedly.<sup>37</sup>

Regarding customary law, Ter Haar with the Beslissingenleer said that the applicable customary law can only be known from the decisions of legal officers such as customary heads, judges, customary meetings, village officials and so on stated in or outside the dispute. This means that customary law has a form in decisions that are full of authority. So, the time of stipulation is the *existential moment* (at the birth) of customary law.<sup>38</sup> This means that customary law is a scientific technical term, which denotes the customary rules that apply among the community which are not in the form of regulations established by the government, but are formed by the community. The term used by Hadikusuma regarding customary law is as a

<sup>30</sup> Soekanto, 2.

<sup>31</sup> A. Suryaman Mustari Pide, *Hukum Adat Dahulu, Kini Dan Akan Datang* (Jakarta: Prenadamedia Group, 2014), 103.

<sup>32</sup> Pide, 104.

<sup>33</sup> Pide, 105.

<sup>34</sup> Tolib Setiady, *Intisari Hukum Adat Indonesia Dalam Kajian Kepustakaan* (Bandung: Alfabeta, 2009), 345.

<sup>35</sup> Pide, *Hukum Adat Dahulu, Kini Dan Akan Datang*, 103.

<sup>36</sup> Ter Haar, *Beginselen En Stelsel Van Het Adatrecht* (Jakarta: Pradnya Paramita, 1997), 275.

<sup>37</sup> Ter Haar, *Adat Law in Indonesia* (Jakarta: Baratara, 1962), 5.

<sup>38</sup> Haar, 225.

human habit in social life. Human life begins with a family and they have arranged themselves and their members according to custom, it will be carried over in society and the state.<sup>39</sup>

Hadikusuma also expressed the opinion that customary law is not the product of rational, intellectual and liberal thoughts, such as the western way of thinking, but the creation of communal, magical and religious, or communal cosmic. This mindset is reflected in customary law, if someone commits a violation, so that people's lives become unbalanced, then not only people must be subject to the law but also their relatives.<sup>40</sup> Emile Durkheim argues that social reactions in the form of punishment or sanctions are very necessary to take care so that the traditions of traditional beliefs do not waver, so that the balance of society can be realized.<sup>41</sup> Supomo and Hazairin in Soemarman conclude that customary law is the law that regulates the behavior of Indonesian people in relation to one another. The relationship in question includes the overall customs, and habits and decency that live in society because it is embraced and maintained by the community.<sup>42</sup>

In simple terms, customary law is the values that live and develop in the community of an area as a rule of human behavior in social life. Although most customary law is unwritten, it has a strong binding power in society. There are separate sanctions from the community if they violate the rules of customary law. Therefore, what must be maintained is the balance of people's lives. If the balance is disturbed, then the community law officers must try to restore the balance. Society as a whole is always the focus of attention. This means that in customary law, human life is always seen in the form of a group, as a unified whole, so that later life becomes a happy family.

Several regions in Indonesia that apply customary law have customary sanctions in the form of customary law violations, namely: (a) compensation for immaterial in the form of coercion, such as being forced to marry a girl whom he intentionally had sex with, (b) paying customary money to those affected by customary sanctions, namely in the form of sacred objects as a substitute for spiritual losses, (c) cover for shame, apologies, (d) various corporal punishments to the death penalty, (e) exile from society and placing the person outside the legal system.<sup>43</sup> From several forms of customary sanctions for violations of customary law, it can be concluded that the main characteristic inherent in customary law lies in the sanctions or legal consequences.

Customary criminal law as a unified system with customary law, cannot be separated from the mindset of the Indonesian people which is very different from the mindset that dominates the western legal system (Continental Europe). Although the national legal protocol is leading to legal unification, customary law is a fact that still applies in customary law community units. Criminal law Even customary in some indigenous peoples in Indonesia, this

<sup>39</sup> Hilman Hadikusuma, *Antropologi Hukum Indonesia* (Bandung: Alumni, 1989), 7.

<sup>40</sup> Hilman Hadikusuma, *Pengantar Ilmu Hukum Adat Indonesia* (Bandar Lampung: CV. Mandar Maju, 1992), 11.

<sup>41</sup> Emile Durkheim, *Causal and Functional Analisis, Sosiological Theory* (New York: Milan Press, 2010), 502.

<sup>42</sup> Anto Soemarman, *Hukum Adat Perspektif Sekarang Dan Mendatang* (Jakarta: Adicita Karya Nusa, 2005), 21.

<sup>43</sup> Soepomo, *Bab-Bab Tentang Hukum Adat* (Jakarta: Pradnya Paramita, 1893), 20.

is still strong.<sup>44</sup> Customary law that lives in this society for people who still have a strong original culture will be felt.

Soekanto also stated that customary law is a complex of customs that are not written down, not codified and coercive, but have legal consequences.<sup>45</sup> Soekanto also added that customary law is a synonym for laws that are not written in legislative regulations (*statutory law*), laws that exist as conventions in state legal entities (Parliament, Provincial and so on), laws that exist as customary regulations that are maintained. in social life, both in the city and in the villages.<sup>46</sup> Since humans are born, then he starts his life, starting from a family, community, and then a state. Since humans have a family, they have arranged their lives and their family members according to their habits.

Judging from the development of human life, the occurrence of the law starts from the human person which continues to develop into habits and habits become the customs of a society. Gradually the community or community groups make the custom as a custom that should apply to all members of the community, so that it becomes "customary law". So customary law is an accepted custom and must be implemented in a society.<sup>47</sup> Slightly different from what was conveyed by Van Vollenhoven in Bushar, that customary law is defined as a customary regulation, actions (behavior) which are considered appropriate and binding on products by customary law communities and there is a general feeling that these regulations it must be maintained by customary leaders and other legal officers, so the customary regulations are legal.<sup>48</sup>

According to Soekanto, customary law is formed in two aspects, namely: (1) Sociological Aspects. In principle, humans cannot live alone and need other humans because humans are creatures social. Because human life requires other humans, every human will interact with other humans, and from these interactions give birth to experiences. From this experience will be obtained a value system that can be considered as a good thing and a bad thing. (2) Juridical Aspect. This aspect is seen from the level of sanctions, from this method a habit will be created, and the sanctions for deviations are somewhat stronger than the sanctions for usage. Habits that are repeated in society will give birth to standards of behavior or mores where the sanctions for deviations have become strong. In the development of standards of behavior or mores will give birth to a custom consisting of customs and customary law, and the sanctions are already very strong.<sup>49</sup>

### **Malay Customary Marriage Law**

The application of customary law in everyday life is often found in marriage ceremonies. Marriage is a very important event in the livelihood of our society, because marriage does not

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<sup>44</sup> Soepomo, 20.

<sup>45</sup> Soerjono Soekanto, *Dasar-Dasar Hukum Adat Dan Ilmu Hukum Adat* (Bandung: Alumni, 1981), 20.

<sup>46</sup> Soekanto, 20.

<sup>47</sup> Hadikusuma, *Pengantar Ilmu Hukum Adat Indonesia*, 1.

<sup>48</sup> Muhammad Bushar, *Asas-Asas Hukum Adat*, 12th ed. (Jakarta: Pradnya Paramita, 2003), 29.

<sup>49</sup> Soekanto, *Dasar-Dasar Hukum Adat Dan Ilmu Hukum Adat*, 6-7.

only concern the woman and the groom, but also the parents of both parties, their siblings, and even their respective families. In indigenous people's marriage is part of a sacred event so that in its implementation there must be the involvement of ancestral spirits to be asked for prayer. Customary law itself is a law that becomes a habit of the community which becomes daily behavior between one another and there are sanctions in it, usually in the form of morals.

According to customary law in Indonesia, traditional marriage can take the form and system as: 1) 'Perkawinan Jujuran', where the application is made by the man to the woman and after the marriage, the wife follows the place of domicile and residence of the husband, this is common in Bantul, Lampung, and Bali. 2) 'Perkawinan Semanda', where the applicant is carried out by the woman to the man and after the marriage the husband follows the domicile and residence of the wife, this can be found in the Minangkabau area, and South Sumatra. 3) 'Perkawinan Bebas', where the application is made by the third party. men and after marriage both husband and wife are free to determine their place of domicile and residence, according to their will, this can be found in Java, the latter is widely applicable in advanced (modern) family societies.<sup>50</sup>

Customary law in marriage in general does not only mean a civil engagement, but is also a "customary engagement" and at the same time is a kinship and family relationship. So, the occurrence of a marriage bond does not only have consequences for civil relations, such as the rights and obligations of husband and wife, joint property, children's position, rights and obligations of parents, but also concerns relations with customs, family inheritance, and kinship and neighbors and regarding traditional and religious ceremonies. Likewise, it concerns the obligation to obey religious orders and prohibitions, both in human relations with God (*ibadah*) and human relationships with humans (*muamalah*) in social life so that they are safe in this world and safe in the hereafter.

One of the customary laws that until now has never been lost is Malay customary law. Malay tradition is formed based on the creativity, work, and feelings of the Malay people who live together with the aim of being one with the natural surroundings. The creativity is a mental ability, so that it is able to produce a philosophy with a way of thinking, a feeling of inclusion that is able to embody all human principles and values to regulate human life. Malay customary values consist of the conceptions of the minds of the Malay people regarding things that they consider very noble. The value system is used as an orientation and reference in action. Therefore, the customary values possessed by the Malay community influence and become an alternative in their every action.

In everyday life, the Malay community is guided by the customary law that applies in the Malay tradition. One of these customary laws is marriage customs. Suwardi said that people with Malay customs consider marriage is very sacred to be practiced with Malay culture. Whatever the procedure that must be followed, it is sometimes considered sacred because it has

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<sup>50</sup> Fahmi, "Kontruksi Hukum Adat Pernikahan Masyarakat Melayu Palembang Berdasarkan Syariat Islam," 30.

become an obligation to carry it out, so that there are many taboos and prohibitions that must be known by both parties who are getting married, because the procedure is a blend of Malay cultural ancestors with Islam. Many goals are expected in Malay traditional marriages, including biological goals, social status goals, trust goals, blood relations (hereditary) perpetuation goals, and even political goals.<sup>51</sup>

The Malay community really respects and upholds their customs, so that when a child wants to get married, the Malay people try to give the best to their child in accordance with the Malay customs they adhere to. In the marriage procession, customs for the Malay community are very important. Marriage traditions are one of the *external* that must be held. That is, carrying out the traditional Malay marriage tradition is a must that must be carried out by the Malays as a cultured society, there are even some Malay people who try to carry out the tradition even though by borrowing money.

The implementation of the traditional Malay marriage procession also has quite long stages, therefore not all Malays carry out the marriage custom completely. Therefore, marriage in Malay customs seems complicated, due to the many stages that must be passed. The complexity actually arises because marriage in the Malay view must get the blessing of both parents and must receive official recognition from neighbours and the community. In Malay traditional marriages, a series of wedding ceremonies are carried out in detail and neatly arranged, all of which must be carried out by the prospective bride and groom and their families.<sup>52</sup>

Regardless of the situation, Malay people still use custom, because marriage customs are not an individual matter, but involve many people, so everything related to marriage customs has become a shared responsibility. The rules or norms in the tradition of marriage marriages or traditional Malay marriages are held, in order to cleanse the offspring from slander, because by doing marriage, it will avoid immorality.<sup>53</sup> In addition, the series of cultural activities and customary marriage practices are expressions of gratitude and the giving of prayers of hope to the bride and groom carried out by family elders and traditional leaders.

### **Malay Customary Marriage Law: 'Urf Perspective**

Humans as social beings (*zoon politicon*) definitely need a system that regulates social interaction to achieve benefit and social justice in order to avoid harm and damage. The system (*nizhām*) is sometimes formed intentionally or naturally by mutual agreement which periodically then becomes a habit, perception or general conception (*mudrik*) which has authority (*salaththah*) capable of judging (*judgeah*) and has sovereignty (*siyādah*) for the community. Therefore, in Islamic law based on this concept, the custom is called '*urf*, as a manifestation of the character of society.

<sup>51</sup> Suwardi, *Metodologi Penelitian Kebudayaan* (Yogyakarta: Gadjah Mada University Press, 2006).

<sup>52</sup> Suwira Putra, "Makna Upacara Tepuk Tepung Tawar Pada Pernikahan Adat Melayu Riau," *Jom Fisip* 1, no. 2 (2014).

<sup>53</sup> Afiq Budiawan, "Tinjauan Al-Urf Dalam Prosesi Perkawinan Adat Melayu Riau," *Jurnal An-Nahl* 8, no. 2 (2021): 115–25.

Some scholars distinguish between '*urf* and *adat*, such as Abu Sinnah and Muhammad Mustafa Syalaby. Both are of the opinion that the word *adat* means "repetition" or "practice" which has become a habit, and can be used, both for individual (*adah fardhiyah*) and group (*adah*). The notion of *adat* (*al-'adat*) and '*urf* has a significant role. Both words come from Arabic which was adopted into standard Indonesian. The word *adat* comes from the word '*ad* which has the derivation of the word *al-'adat* which means something that is repeated (habits). While '*urf* comes from the word '*araf* which has a derivation of the word *al-ma'ruf* which means something known.<sup>54</sup>

In another sense, '*urf* is everything that is already known to humans because it has become a habit or tradition, whether it is in words, actions or in relation to leaving certain actions, which is also called *adat*. In addition, the word '*urf* is defined as "a repetitive practice that is acceptable to someone with common sense". According to most of the scholars, *adat* and '*urf* do not have significant differences in terminology with different legal consequences. For example, in the book of *fiqh* there is the expression *haza thabit bi al-'Urf wa al'adat* (this provision is based on *al-'Urf* and *al-'adat*), so the meaning of both is the same. The mention of *al-adat* after the word *al-'Urf* serves as a reinforcement (*ta'kid*) only, not a separate sentence that contains a different meaning (*ta'sis*).<sup>55</sup>

'*Urf* etymologically means something that is considered good and accepted by the human mind and they do it in every activity. '*Urf* in *syar'i* terminology ' is everything that humans are accustomed to and they obey, in the form of actions that occur between them or words they usually say to show a certain meaning, where when they hear the word, their mind immediately turns to it, not to another. There are also those who say that '*Urf* is something that is embedded in the soul, and is accepted by common sense. Something embedded in the soul and accepted because it is often used and treated that arises from a love.<sup>56</sup>

'*Urf* (tradition) are forms of *mu'amalah* (related to interests) that have become customary and have been carried out consistently in the community. '*Urf* is also meant by what is well known among mankind and is always followed, both '*urf* of words ('*Urf Qauli*) and '*urf* of actions ('*Urf Amali'), or in relation to abandoning certain actions, so '*urf* is also called *adat*. '*Urf Qauli* is like an example of someone's pronunciation in *lafaz al-waladu* for *muzakkar* instead of *muannas*, and *lafaz lahm* not for fish meat, or the use of *lafaz dabbah* (creeping animals) for horses only.<sup>57</sup>*

There are several opinions of experts regarding the meaning and purpose of '*urf* itself. As quoted by Fauziah, there are several views from *ushul* scholars regarding '*urf*, first, Abdul Wahab Khallaf, said '*urf* as a human habit and they always get used to it either in the form of words, deeds or an agreement to leave something. Second, Abu Zahrah said that '*urf* are all

<sup>54</sup> Rijal Mumazziq Zionis, "Posisi Al-Urf Dalam Struktur Bangunan Hukum Islam," *Jurnal Filasifa* 2, no. 2 (2011): 131–35.

<sup>55</sup> Ahmad Fahmi Abu Sinnah, *Al-Urf Wa al-Adah Fi Ra'y al-Fuqaha* (Mesir: Mathba'ah al-Azhar, 1947), 7–13.

<sup>56</sup> Abdul Hayy Abdul 'Al, *Pengantar Ushul Fiqh* (Jakarta: Pustaka al-Kautsar, 2014), 325.

<sup>57</sup> 'Al, *Pengantar Ushul Fiqh*.

forms of human behavior and they always rely on him. *Third*, Mustafa Abdul Rahim said that every human act or word which all humans or the majority of humans submit to is '*urf*. *Fourth*, Al-Ghazali is of the view that '*urf* is something (both words and deeds) that has become a soul's stability in terms of its acceptability by a healthy mind and acceptable to a healthy and good character. *Fifth*, Al-Jurjani said '*urf* as something that has been fixed (constant) in the soul, recognized and accepted by the mind, '*urf* is proof and easy to understand. Likewise, the notion of *adat*, which is a habit that humans continue to do based on the laws of reason and humans continue to repeat it.<sup>58</sup>

The conception of Islam is very clear in dealing with local traditions, in principle, if the tradition does not conflict with the sharia, please continue, but if it is in conflict with sharia law, it must be stopped. Therefore, the position of '*urf* in the sense of local tradition is parallel to Islam itself. According to the term *syara'* expert, there is no difference between '*urf* and *adat* tradition. One example of custom in action (same as '*Urf Amali*'), such as the human habit of buying and selling by exchanging directly, without forming a word of contract. Likewise with the customs in speech (same as '*Urf Qauli*'), such as the human habit of pronouncing the word "meat" as "fish". Customs are formed from human habits according to their degrees in general and in particular.<sup>59</sup>

Thus, '*urf* practically contains benefits so that some thinkers call it the second character of a sacred society. Likewise, to find out '*urf* of the community, it can be seen from state regulations. '*Urf* occurs because there is a match in actions and words among humans in general. People's habits are repeatedly carried out by certain regional communities, and are continuously lived by them, whether it happens at certain times or throughout the ages.<sup>60</sup>

The application of Malay customary law in daily life related to *syara'* laws, one example is the marriage ceremony. So that the marriage ceremony is closely related to Islamic law. Marriage in Islam is *sunnatullah* and applies to every creature.<sup>61</sup>

Marriage is the only way that Allah has chosen for every Muslim to have children by forming a harmonious family. In other words, Allah SWT wants the continuity of human existence, and this will appear in humans in the form of love and attraction between men and women.<sup>62</sup> Therefore, marriage must be maintained by both parties in order to achieve this goal.

As Allah SWT says:

Meaning: *O mankind, fear your Lord who has created you from one self (Adam), and (Allah) created his partner (Eve) from his (self); and from them Allah brought forth many males and females. Fear Allah in whose name you ask one another, and (maintain) family relations. Indeed, Allah is always watching over you and watching over you. [Qs. An-Nisa' (4):1]*

<sup>58</sup> Fauziah, "Konsep 'Urf Dalam Pandangan Ulama Ushul Fiqh (Tela'Ah Historis)," *Jurnal Nurani* 14, no. 2 (2014): 17.

<sup>59</sup> Abdul Wahab Khallaf, *Ilmu Ushul Fikih* (Jakarta: Pustaka Amani, 2003), 117.

<sup>60</sup> Asmawi, *Perbandingan Ushul Fiqh* (Jakarta: Amzah, 2011), 161.

<sup>61</sup> Tihami and Sohari Sahrani, *Fiqih Munakahat* (Jakarta: Rajawali Press, 2010), 6.

<sup>62</sup> Rosidin, *Fiqih Munakahat* (Malang: UIN Maliki Press, 2013), 13.

In traditional Malay marriages, there are provisions and regulations for their implementation. The customary provisions of the marriage absolutely must be followed by the Malay customary community because of the moral sanction if someone does not follow the applicable customary law. In Islam, customs are called '*Urf*'. There are several opinions of experts regarding the meaning and purpose of '*urf*' itself. As quoted by Fauziah, that there are several views of *ushul* scholars regarding '*urf*', *first*, Abdul Wahab Khallaf, said '*urf*' as a human habit and they always get used to it either in the form of words, deeds or an agreement to leave something. *Second*, Abu Zahrah said that '*urf*' are all forms of human behavior and they always rely on him.<sup>63</sup>

*Third*, Mustafa Abdul Rahim said that every human act or word which all humans or the majority of humans submit to is '*urf*'. *Fourth*, Al-Ghazali is of the view that '*urf*' is something (both words and deeds) that has become a soul's stability in terms of its acceptability by a healthy mind and can be accepted by a healthy and good character. *Fifth*, Al-Jurjani said '*urf*' as something that has been fixed (constant) in the soul, recognized and accepted by the mind, '*urf*' is proof and easy to understand. Likewise, the notion of customs, which is a habit that is continuously carried out by humans based on the laws of reason and humans continue to repeat it.<sup>64</sup>

If viewed from its conformity with the texts and the principles of the Shari'a, '*urf*' is divided into two types, namely '*Urf al-Sahih*' and '*Urf al-Fasid*'. The explanation is as follows:<sup>65</sup>

1. '*Urf al-Sahih*', namely '*urf*' that applies in the community that does not conflict with Islamic principles (*nash al-Qur'an* and *Sunnah*) and does not justify anything that is unlawful or forbids what is lawful. With the existence of '*urf al-sahih*' This does not eliminate the benefit of humans and does not bring harm to them.<sup>66</sup> As in the case of prioritizing a down payment in an '*istishna'*, or during the engagement period the man gives a gift to the woman and this gift is not considered a dowry, performing prayers wearing a sarong, and buying and selling transactions without mentioning the contract clearly. The status of '*urf al-sahih*' must be maintained by the mujtahids and judges, both in terms of issuing new laws and in deciding cases. The reason is that what has been used to and carried out by many people is a necessity and a necessary benefit as long as it does not conflict with Islamic law.<sup>67</sup>
2. '*Urf al-Fasid*', namely '*urf*' which contradicts the *nash sharif* *al-Qur'an* or *Sunnah* and justifies something that is unlawful or forbids what is lawful. As in the case of the prohibition of sharia that is carried out by the community, for example, buying and selling contracts that contain usury, the mixing of a woman with a man (not a muhrim) on

<sup>63</sup> Fauziah, "Konsep 'Urf Dalam Pandangan Ulama Ushul Fiqh (Tela'Ah Historis)," 17.

<sup>64</sup> Fauziah, 17.

<sup>65</sup> Wahbah al-Zuhaili, *Ushul Al-Fiqh al-Islami* (Damaskus: Dar al-Fikr, 1986), 109–10.

<sup>66</sup> Haroen Nasrun, *Ushul Fiqh 1* (Jakarta: Logos Publishing House, 1996), 141.

<sup>67</sup> Mukhtar Yahya and Fatchur Rahman, *Dasar-Dasar Pembinaan Hukum Fiqh Islami*, 3rd ed. (Bandung: Al-Ma'arif, 1993), 110–11.

an occasion, men wear rings in the procession of fiancé and marriage. Of course, this is an act of *taqlid* on westerners. In addition, what is included in '*urf al-fasid*' is '*urf* arguments *syar'iyyah* or basic principles. Another example is someone who hands over a sum of money to a judge to win a case or for the smooth running of his affairs.<sup>68</sup> As for '*urf al-fasid*' does not have to be considered and practiced, because paying attention and maintaining it means opposing the *syara'* or canceling the *syara'* law. However, if you look at it from an emergency point of view or the level of need, it is permissible to do the act on the grounds of an emergency, not because many people are used to it.<sup>69</sup>

Islamic law and customs are an integral part of the practice of Malay community life, which in general cannot be separated, interrelated and side by side according to their respective functions. As is well known, there is an expression of the Malay community's rule (*pituah*) which says:<sup>70</sup>

"Adat bersendikan Syarak, Syarak bersendikan Kitabullah"  
"Adat ialah Syarak semata, Adat semata al-Qur'an dan Sunnah"  
"Adat sebenar Adat ialah Kitabullah dan Sunnah Nabi"  
"Syarak mengata Adat memakai, iya kata Syarak benar kata Adat"  
"Syarak tumbuh dari Kitabullah, berdiri Adat karena Syarak"

This method explains that in Malay customs there is Islamic law (sharia), this method also shows the close relationship between Islam and Malay customs.<sup>71</sup> Even though Islam is not the first religion to come and interact with local Malay culture, the influence of Islam is very strong and solid for the Malay community. Likewise with traditional Malay marriages, the influence of Islamic law in Malay customary marriages is due to the inclusion of Islamic teachings, causing changes in the lives of Malay people. The Malay community recognizes the principle of "*Adat sebenar adat merupakan prinsip yang bersumber pada agama Islam*", meaning that these customs rules cannot be changed, this custom is still standing because of *syara'*. This causes Malay customary law to be inseparable from Islamic values.<sup>72</sup>

In a study conducted by Ratno Lukito, many Western scholars are of the view that customary law and Islamic law existing in the Malay nation are considered a conflict, but Ratno is of the view that customary law and Islamic law are intermingled and have dialogue.<sup>73</sup> In Indonesia, the idea of combining customary law with Islamic law in history was also conveyed by Hasbi Ash-Shiddieqy with the concept of " Fikih Indonesia". However, this concept has not received a good response from Muslim scholars at that time. Then echoed again by Hazairin

<sup>68</sup> Nasrun, *Ushul Fiqh* 1, 141.

<sup>69</sup> Yahya and Rahman, *Dasar-Dasar Pembinaan Hukum Fiqh Islami*, 111.

<sup>70</sup> Tenas Effendi, *Tunjuk Ajar Melayu* (Yogyakarta: Balai Kajian dan Pengembangan Budaya Melayu, 2004), 32.

<sup>71</sup> Surtina, *Nilai Budaya Dan Nilai Agama Pada Upacara Pernikahan Adat Melayu Desa Benan Kecamatan Senayang Kabupaten Lingga Provinsi Kepulauan Riau* (Tanjungpinang: Jurusan Pendidikan Bahasa dan Sastra Indonesia Fakultas Keguruan dan Ilmu Pendidikan Universitas Maritim Raja Ali Haji, 2014), 5.

<sup>72</sup> Zefri, *Tari Melemang Bentan Penaga Di Pulau Bentan Kepulauan Riau*, 5.

<sup>73</sup> Lukito, *Pergumulan Antara Hukum Islam Dan Hukum Adat Di Indonesia*, 29-30.

with a concept that is not much different, namely combining the concept of Islamic law with local values that exist in Indonesia.<sup>74</sup>

In reviewing a law, scholars always put forward the rules of *ushul* and take references and sources of Islamic law. The implementation of marriage of the Malay community can be seen from the perspective of Islamic law, in this case through the way (method) '*urf*'. '*Urf*' is a discussion about a thing or situation that is repeated and always done so that it becomes a custom. '*Urf*' is one of the theories in establishing Islamic law. In the rules of *ushul fiqh*, '*urf*' reads as follows:<sup>75</sup>

العادة محكمات

*"Customs can be established as".*

Islamic law, which is expected to be able to harmonize customary law with religious law, so as to create harmony in life between Islamic law and social phenomena and realities.

The conception of Islam is very clear in dealing with local traditions, in principle, if the tradition does not conflict with the sharia, please continue, but if it conflicts with sharia, it must be stopped, because it can damage the purpose of the shari'a to be passed down (*maqashid syari'ah*). As for the traditional Malay marriage, for the Malay community, it is as a stylist and director in the social life of the community. Customary law for indigenous Malays is something that must be implemented. Even though it is an unwritten law, customary law is considered a way of life (philosophy of life) for the Malay indigenous people.

## Conclusion

The position of customary law in the Malay community is as a stylist and director in the social life of the community. In the Malay tradition itself, there is a kind of expression, "*Adat Bersendikan Syarak, Syarak Bersendikan Kitabullah*". This implies that directly or indirectly, Malay cultural traditions still adhere to Islamic teachings. This expression is clear that Malay customs will not violate Islamic law, because Malay custom itself is practiced based on Islamic law. If there is a customary practice that is contrary to Islamic law, it means that it is not a Malay custom.

It is clear that Malay customary law is in line with '*urf*' in Islamic law. For the Malay indigenous people, customary law contains benefits and is used as an unwritten rule that must be obeyed and needs to be developed so that it can actually be effective for the smooth running of government, development, and society as well as strengthen national resilience. Moreover, it can also be a solid building in maintaining Islamic law.

Malay customary marriage law may be applied as long as it is not considered '*Urf al-fasid*'. It means, the process of applying the Malay customary marriage law is in accordance with the

<sup>74</sup> Ratno Lukito, *Tradisi Hukum Indonesia* (Cianjur: IMR Press, 2013), 75–76.

<sup>75</sup> Dahlan Tamrin, *Kaidah-Kaidah Hukum Islam (Kulliyah al-Khamsah)* (Malang: UIN Maliki Press, 2010), 234.

rules of Islamic law. However, when applying Malay customary marriage law, it turns out that there are no good values or 'Urf al-sahih, then the Malay customary marriage law should not be used and applied, because it can damage the sacred values that exist in the Malay custom.

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