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**On The Legal Sanction Against Marriage Registration Violation in
Southeast Asia Countries: A Jasser Auda’s Maqasid Al-Shariah
Perspective**

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Abstract. The legal sanction on marriage registration violations was intended to create equity within households and fulfill every citizen’s constitutional rights. However, the law enforcement efforts encountered some problems, especially in three Southeast Asia countries: Indonesia, Malaysia, and Brunei Darussalam. This article investigated the diversity of regulations on marriage registration violations in the countries and analyzed how Jasser Auda’s *maqasid al-shariah* perspective viewed the type of legal sanctions there. This study found that there were regulations on marriage registration violations in each country. However, while Malaysia and Brunei Darussalam imposed both financial penalty and imprisonment, Indonesia only charged fines for the culprits. In Jasser Auda’s perspective, the regulations in the countries, except Indonesia, were in line with *maqasid al-shariah* because firstly, they aimed at maintaining harmony in marriage and contained the aspect of serving the depth and breadth of public interest (*maslahah*) in terms of necessities (*daruriyat*). Secondly, the regulations had traversed basic conceptual approach and systems analysis.

Keywords: Indonesia, Malaysia, Brunei Darussalam, Maqasid al-shariah, Jasser Auda

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Abstrak. Sanksi pelanggaran pencatatan perkawinan pada mulanya berorientasi pada kemaslahatan bersama dalam berumah tangga dan juga terpenuhinya hak-hak konstitusional semua pihak. Namun penerapan sanksi pelanggaran pencatatan perkawinan dalam pelaksanaannya masih menjadi masalah, terutama di tiga negara; Indonesia, Malaysia dan Brunei Darussalam. Artikel ini mencoba membuka wawasan dengan mengajukan dua fokus kajian: *Pertama*, bagaimana model regulasi sanksi pelanggaran pencatatan perkawinan di negara Indonesia, Malaysia, serta Brunei Darussalam? *Kedua*, bagaimana bentuk sanksi dari pelanggaran pencatatan perkawinan di Indonesia, Malaysia, serta Brunei Darussalam dalam perspektif *maqasyid al-syari'ah* Jasser Auda? Artikel ini menemukan bahwa, *Pertama*, model regulasi yang diterapkan oleh Indonesia, Malaysia dan Brunei adalah sama-sama telah membuat regulasi penerapan sanksi pelanggaran pencatatan perkawinan dinegaranya masing-masing, namun jika di Malaysia dan Brunei menerapkan sanksi denda dan pidana, di Indonesia hanya sanksi denda saja. *Kedua*, dalam perspektif Jasser Auda bahwa penerapan sanksi pelanggaran pencatatan perkawinan pada tiga negara yang bertujuan mewujudkan ketertiban perkawinan yang sejalan dengan Maqasyid al-Syari'ah, karena mengandung aspek masalah yang besar (daruriyat) sekaligus semua kategori yang terkandung didalamnya melalui konsep dasar pendekatan dan analisis sistem. Meski dalam konteks Indonesia, masih belum terpenuhi.

Keywords: *Indonesia, Malaysia, Brunei, Maqasyid al-syari'ah, JasserAuda*

Introduction

Marriage is a sacred agreement made between a man and a woman in order to create *sakinah* (tranquility), *mawaddah* (love), and *rahmah* (mercy) relationships. Apart from being a religious observance and a Sunnah of God's messenger, marriage also aims to avoid adultery.

The benefits of a marriage do not only reach a family but also a community. Thus, marriage has a very strategic position in the life of the nation and society. The government, therefore, has an essential role in regulating marriage to create a safe, serene, and peaceful society.¹

¹ Muhammad Choriri, Sanctions for Violation of Marriage Registration in Maqashid Syariah Perspective Jasser Auda (Comparative Study of Regulatory Models in Indonesia, Malaysia, and Brunei), Thesis, unpublished.

The regulation ratified and implemented in Indonesia is the Marriage Law (No. 1 of 1974). It is stated in Article 2 Section 2 of the Law, "every marriage is registered according to the applicable laws."² Meanwhile, the Government Ordinance No. 9 of 1975 Chapter II affirms, "marriage is considered to have legal force if it is implemented according to religious rules and has been registered by the Registrar of Marriage (PPN)."³ So, if a marriage is not following the regulation, it will be considered illegal or unofficial.⁴

In reality, the marriage registrations in Indonesia encountered many obstacles, including the violation of marriage registration by the bridegroom, bride, and marriage registrar.⁵ For instance, a *siri* (unregistered or hush-hush) marriage in Kampung Arab, Cisarua, Bogor, Indonesia, occurred for around forty years.

On the other hand, there are various legal responses concerning marriage registration violations in several Muslim-majority countries.⁶ Saudi Arabia, for instance, does not have any regulation regarding the issue. Some countries, including Indonesia, isolate it. While several other countries like Malaysia and Brunei Darussalam have detailed sanctions, like financial penalty and imprisonment.

In Malaysia, since the enactment of the Islamic Family Law in 1984, there had been at least twenty-one regulations on marriage registration

² The position of Islamic law in the first principle of Pancasila, 'Belief in the Almighty God', is a very strong. This statement is confirmed in the 1945 Constitution Article 29 paragraph 1 "Country Based on God Almighty". Therefore, the existence of Islamic law is recognized by Pancasila and our constitution. See, Mardani, *Hukum Islam dalam Hukum Positif di Indonesia*, Depok: Rajawali Press, 2018, p. 5.

³ Islamic civil law in the New Order era was marked by the enactment of three very important laws and regulations, Law No. 1 of 1974 concerning Marriage, and Law No. 7 of 1989 concerning Religious Courts, and Presidential Instruction Number 1 of 1991 concerning Compilation of Islamic Laws. See, Amran Suadi dan Mardi Candra, *Politik Hukum Perspektif Hukum Perdata dan Pidana Islam Serta Ekonomi Syariah*, Jakarta: Kencana, 2016, p. 50.

⁴ At least, two main factors cause *siri* marriages as follows. First, because of the possibility that the perpetrator will commit polygamy. Second, because they do not have access to carry out marriages at the Office of Religious Affairs (KUA). About *siri* (unregistered or hush-hush) marriage. See: Irfan Islami, "Perkawinan di Bawah Tangan (Kawin Siri) dan Akibat Hukumnya," *ADIL: Jurnal Hukum* 8, No. 1 (2017).

⁵ Presidential Decree No. 1 of 1991 concerning the Dissemination of the Compilation of Islamic Law.

⁶ The position of Islamic law based on the First Precepts of the Pancasila "Belief in One Supreme God" is very strong. This is confirmed by the 1945 Constitution Article 29 Section 1 "Country Based on God Almighty". Therefore, the existence of Islamic law is recognized by Pancasila and our constitution. See, Mardani, *Hukum Islam dalam Hukum Positif di Indonesia*, Depok: Rajawali Press, 2018, p. 5.

violation, either in the form of imprisonment or fines. For example, in the Article 33 of the Act, it is stated, “a Malaysian citizen who gets marriage abroad, and does not register the marriage to the Marriage, Divorce, and Reconciliation Registrar of Muslims or their representatives abroad for six months from the date of marriage, it is subject to a fine of RM1,000, or imprisonment for a maximum of six months, or both”.⁷

Likewise, similar sanctions were applied by the state of Brunei Darussalam. It had passed the Islamic Family Law in 2000, and the act had been amended several times—most recently in 2012. In Article 8 Section 1 states that “the solemnization of marriage contract can only be administered by an official appointed by the Sultan, or the Lord (*yang di-Pertuan*) authorized to superintend the marriage contract.” Section 2 emphasizes, “there is no marriage contract solemnization unless it has obtained the permission from the Marriage Registrar from the area where the prospective bride and bridegroom reside”. In Section 3, it is reaffirmed, “a *wali* (Islamic legal guardian) can arrange the marriage contract in the presence of the Marriage Registrar (Marriage Officer), only after the bride approves it”. In addition, Article 37 mentions the legal sanctions for anyone who administers the marriage contract without having the legal authority from the Sultan with a maximum imprisonment of six months, or a fine of 2,000 Ringgit, or both.⁸

Unregistered marriages will have a negative consequence on a woman and her child. Even though the marriage will be considered legal from a religious perspective, they may lose some marital rights without legal certification or recognition from the state (*yashihhu syar'an wa la yashihhu qanunan*). Therefore, it is not surprising that the state provides sanctions for the intentional violation of marriage registration. On another side, both the registration and the legal sanction contain *maqasid shariah*.

Jasser Auda was born in Egypt but lived in the West. He is a contemporary Muslim thinker who has used the concept of *maqasid shariah* in analyzing Islamic law. He received two doctoral degrees from the

⁷ See, M. Atho Mudzhar dan Muhammad Maksum, *Fikih Responsif: Dinamika Integrasi Ilmu Hukum, Hukum Ekonomi dan Hukum Keluarga*, (Yogyakarta: Pustaka Pelajar, 2017), 207. See also, State of Perak Enactment 13 of 1984, Islamic Family Law Enactment of 1984 Part IV; Penalties and Miscellaneous Provisions Relating to Marriage Contract and Marriage Registration, Section 33. Compare it with Abdul Manan, *Pembaruan Hukum Islam di Indonesia*, Jakarta: Penerbit Kencana, 2017, 165.

⁸ *Ibid.*, p. 207.

University of Wales, the United Kingdom, and the University of Waterloo, Canada. Also, he serves as the President of the Maqasid Institute.⁹

By using systems philosophy, Jasser Auda's presentation of *maqasid shariah* is distinct from classical *maqasid* thinkers. Therefore, it is intriguing to involve his perspective in discussing the legal sanctions for marriage registration violations in Indonesia, Malaysia, and Brunei Darussalam.

Many prior studies had also discussed marriage registration, for examples Dyah Ochtorina Susanti and Siti Nur Shoimah's articles in a journal entitled "*Urgency of Marriage Registration (Utilities Perspective)*"¹⁰, Muhammad Nasir's "*Maqasid al-Shariah in Marriage Registration in Indonesia*",¹¹ Ahmad Khoiril Anam's "*The Application of Muslim Family Law in Southeast Asia: A Comparison*"¹², Ardian Kurniawan's "*Criminal Sanctions of Marriage Registration Violation and Its Relevance in the Development of Marriage Law in Indonesia*"¹³, and Liky Faizal's "*the Legal Consequences of Marriage Registration*"¹⁴.

Based on the background, this study aimed to find the common thread between Indonesia, Malaysia, and Brunei Darussalam, regarding the legal sanctions' mechanism of marriage registration violation. Moreover, the countries also shared identical geography and socio-cultural condition.¹⁵

Maqasid Shariah and Jasser Auda's Systems Theory

According to Allal al-Fasi *maqasid shariah* is "intentions, goals, and secrets regulated by Allah (*al-shar'i*) in every Sharia law".¹⁶ Abdullah bin Bayyah, defines *maqasid shariah* as "anything directed to the goal of *al-shar'i*

⁹ More about Jasser Auda's biography, see www.jasserauda.net. See also Susanti, Salamah Eka, *Pendekatan Sistem dalam Teori Hukum Islam (Membaca Pemikiran Jasser Auda)*, in *Jurnal as-Syariah: Jurnal Hukum Islam* 1, no.1 (2015).

¹⁰ Dyah Ochtorina Susanti dan Siti Nur Shoimah, "*Urgensi Pencatatan Perkawinan (Perspektif Utilities)*," *Rechtidee* 11, no. 2 (2016).

¹¹ Muhammad Nasir, *Maqasid Syariah dalam Pencatatan Perkawinan di Indonesia*, *Journal At-Tafkir*, (2017).

¹² Ahmad Khorul Anam, "Penerapan Hukum Islam di Asia Tenggara: Sebuah Perbandingan," *Jurnal Bimas Islam* 10, no. 1 (2017).

¹³ Ardian Kurniawan, *Sangsi Pidana Pelanggaran Pencatatan Perkawinan dan Relevansinya dalam Perkembangan Hukum Perkawinan di Indonesia*, Tesis, UIN Sultan Taha Jambi, 2020.

¹⁴ Liky Faizal, "Akibat Hukum Pencatatan Perkawinan," *Jurnal Asas* 8, no. 2 (2016).

¹⁵ M. Noor Harisudin, *Membumikan Islam Nusantara*, Surabaya: Pena Salsabila, 2020, p. 1.

¹⁶ Ala al-Fasi, *Maqasyidus Syariah wa Makarimuha*, Maktabah al-Wahdah al-Arabiyyah- ad-Dar al-Baidla, t.th., p. 7. Compare: HM. Ramzi Al-Amiri Manan, *Ad-Durar as-Saniyah ala Maqashid as-Syariah al-Islamiyah*, tp, t.th., p. 33.

(Allah) in enforcing a law." According to 'Abd al-Majid al-Najjar, *maqasid shariah* is the global establishment goal of Sharia to direct human as the Sharia objects, towards benevolence and public interest (*maslahah*). For al-Najjar, the highest goal of Sharia is to provide access for a human to achieve goodness and benefits as God's caliphs on earth. Meanwhile, Ahmad al-Raisuni, a *maqasid* expert from Tunisia, defines *maqasid shariah* as "the meaning, purpose, impact, and outcome associated with *al-kitab al-shar'i* (Sharia discourse) and *al-taklif al-shar'i* (Sharia enforcement)".¹⁷

Yusuf al-Qaradhawi defines *maqasid shariah* as "any objectives of the revelations (*nash*) either they are ordered, prohibited, or allowed for the *mukalaf* (an accountable person)". He confirms this definition by stating that *maqasid shariah* is the 'name' for the wisdom contained behind Sharia law.¹⁸ He also emphasizes that *maqasid shariah* is different from 'illah (operative cause behind a law) in the theory of *qiyas* (deductive analogy), as 'illah is clear, limited, and following the law.¹⁹ As the operative cause behind a law, 'illah is not the objective of the law. Travel, for example, is 'illah as an exemption not to fast during Ramadan. However, travel and illness are not the objectives of the law. The objectives (*maqasid*) of Sharia is the wisdom behind that law. It is permissible to do *jama`* (combining) and *qasr* (shortening) prayers and exempt fasting because it eliminates the *mashaqqah* (difficulty). The wisdom behind those regulations is known as *maqasid shariah*.²⁰

Additionally, Jasser Auda defines *maqasid* by introducing its plural form from the root word *maqsid*, which means *principle, intention, and final objective*. Thus, the meaning of *maqasid al-shariah* is the intention and objective of Islamic law.²¹

In contrast to the definition of *maqasid al-shariah* carried out by post-al-Shatibi *maqasidiyyun*, the prolonged discussion about the scope of *maqasid* has emerged in classical books. Al-Juwaini, al-Amidi, and even al-Ghazali had explained the scope of the *maqasid* in their books.

Classical scholars applied *maqasid al-shariah* to all Islamic law fields and did not separate the concept into specific parts. They designed stages of

¹⁷ Ar-Raisuni, *Nadlariyat al-Maqashid 'Ind al-Imam as-Syatibi*, Virginia: al-Ma'had al-Alami lil Fikr al-Islami, 1995, p. 145-146.

¹⁸ Yusuf al-Qaradhawi, *Dirasah Fi Fiqh Maqasyid as-Syariah Baina Maqashid al-Kulliyah wa Nushus al-Juz'iyah*, Kairoa: Dar al-Syuruq, 2012, p. 19-20.

¹⁹ Abd. Wahab Khalaf, *Ilmu Ushul Fiqh*, al-Haromain: 2004, p. 63; Abu Zahra, *Ushul al-Fiqh*, Dar al-Fikr al-Arabi: tth., p. 237.

²⁰ *Ibid.*, p. 21-22.

²¹ See, Jasser Auda, *Maqashid*, p. 4; Jasser Auda, *Fiqh al-Maqashid; Inathah al-Ahkam al-Syar'iyah bi Maqashidiha*, 2006.

the *maqasid* category, which consists of *al-daruriyyat* (inevitability/ primary), *al-hajiyat* (necessity/ secondary), and *al-tahsiniyyat* (supplement/ tertiary).²² From the first level, the concept of *al-kulliyatul khams* was born, which consists of *hifd ad-din* (protecting religion), *hifd an-nafs* (protecting the soul), *hifd al-aql* (protecting reason), *hifd an-nasl* (protecting lineage), and *hifd al-mal* (protecting wealth).

As-Shatibi in his *Al-Muwafaqat*²³ provided a review of the scope of *maqasid*, which was similar to the previous ulemas that covered the jurisdiction in the global context and lead to the protection of individuals. However, it must be admitted that the theory of *maqasid al-shariah* written by As-Shatibi was much more detailed and focused than the reviews of *maqasid* in the work of previous scholars.

The scope of *maqasid* initiated by classical scholars was becoming the object of criticism by Jasser Auda. According to him, it had four main weaknesses, especially regarding the traditional classification of necessities.

Firstly, the classical *maqasid*, regardless its claim of covering all issues in Islamic law, but in reality, it was not able to link its scopes to certain chapters in fiqh.

Secondly, the classical *maqasid al-shariah* was trapped in the paradigm of protection and preservation of the individual domain. Al-Shatibi formulated the core purpose of Sharia as the guarantee of benefits in the world and the hereafter. It proved that his concept of *maqasid* only revolved around individual issues.

Thirdly, the traditional *maqasid* classification did not cover universal issues and fundamental core values, such as justice and freedom.

Fourthly, the determination of classical *maqasid* was primarily formulated from fiqh literature which is the result of fiqh experts' thoughts, not formulated from the Quran and Sunnah as the primary sources.

Maqasidiyyun post-al-Shatibi responded to the weakness of this classical *maqasid al-shariah* theory by proposing several improvements, mainly on the extent of the legal scope and its protection targets. These

²² Al-Juwaini was the first to use this term: daruriyah, hajiyah dan tahsiniyah. Lihat, Al-Juwaini, *Al-Burhan*, Juz 2, t.tp: Dar al-Wafa, t.th, p. 595-613. See also Abdul Majid Shagir, *Al-Ma'rifah wa as-Sulthah fi at-Tajribah al-Islamiyah*, Kairo: Hajah al-Mishriyah al-Ammah, 2010, 331.

²³ As-Syatibi, *al-Muwafaqat fi Ushul as-Syariah*, Commentator Abdullah Darraz, Juz 3, Kairo: Dar al-Hadits, 2006, p. 134-141. The term Maqashid appeared later. At first, classical scholars used the term *maslahah*. See, Said Syaripuddin, "Maslahat as Considerations of Islamic Law in Viee Imam Malik," *Samarah, Jurnal Hukum Keluarga dan Hukum Islam* 4, no. 1 (2020).

improvements could be seen in Ibn' Ashur's works, 'Allal al-Fasl, Yusuf al-Qardawi, 'Abd al-Majid al-Najjar, Ahmad al-Raisuni, and other contemporary *maqasid* scholars.

Al-Raisuni, a contemporary *maqasid* expert, argued that understanding God's purpose in implementing the Sharia required a detailed understanding of the scope and objectives of that laws. According to him, there were three levels of Sharia's objectives. *Firstly*, *maqasid kulliyah 'ammah/ijmaliyyah/assasiyyah*, or the purpose of the Sharia was not limited to one side of the Sharia but became the basic goal of all Sharia established by Allah. *Secondly*, *maqasid juz'iyah*, which was the legal objectives of particular events, such as *adhan* (the Islamic call to prayer), *iqamah* (the second call to Islamic prayer), and so forth. *Thirdly*, *maqasid khassah*, or objectives that were found in each Sharia group such as *ibadah* (worship or observance), *muamalat* (mutual dealing), and others.

Furthermore, Al-Raisuni explained at length the *maqasid 'ammah*, which was rooted in *jalb al-masalih* (presenting benefit) and *daf al-mafasid* (eliminating damage) aspect, as well as providing examples of how to formulate *maqasid juz'iyah*. His book entitled *al-Jam' wa al-Tasnif li Maqasid al-Shar' al-Hanif, maqasid juziyyah of taharah* (ritual purification in Islam), *salat*, *zakat*, *hajj*, and other worships, was explained in detail.

With the coverage above, *maqasid al-shariah* can be present in every aspect of human life. The outermost coverage and generally the basis for all legal aspects can be reached with *maqasid 'ammah*. Objectives on specific aspects of the Sharia may be covered by *maqasid khassah*. In comparison, *maqasid juz'iyah* can reach the legal details of each affair.

Al-Raisuni stated that even in political matters (*al-siyasah al-syar'iyah*), the presence of *maqasid al-shariah* was very much needed. *Al-siyasah al-shar'iyah* was interpreted as every politics that upheld benevolence, benefit, and justice in society. The enforcement of these three aspects in the community was the realization of *maqasid al-shariah* as evidenced by the leading indicators: All enacted policies must be based on bringing benefit and rejecting corruption. With that, a Muslim politician who would enact policy should have one question in mind: what and how much was the realization of *maqasid al-shariah* contained in each of the formulated policies?

In this study, *maqasid al-shariah* was not a complementary method for formulating Islamic law. Instead, it was a basic method that could be used to bridge the purpose of Sharia to the spirit of Islamic law in responding to community development. The dynamics of Islamic law required to be active and open had opened the awareness of Islamic law experts to make *maqasid*

al-shariah a vital method to juxtapose sharia with Islamic law. It might create a symbiotic relationship: Sharia might give birth to a dynamic and inclusive law, while the dynamics of Islamic law continued to move within the control of sharia legality.

Although understanding *maqasid* had an essential value in carrying out *ijtihad* (independent reasoning), in reality, the laws implied in the Quran and Sunnah were indeed laborious to understand. Often the efforts of formulating the Sharia purpose encountered a dead end. This fact encouraged Islamic jurists to admit that indeed all of Allah's Sharia had reasons and objectives or *maqasid*, but not all of these reasons and objectives could be understood by human logic. In consequence, they designed a classification of Islamic law contained in the Sharia into two types: *ma'qul al-ma'na* or the law that could formulate *'ilal* (legal reasons), *asrar* (secret), *hikam* (wisdom) or *maqasid* (objectives) and *ghair ma'qul al-ma'na* or the law that *'Ilal, asrar, hikam, and maqasid* could not be formulated by logics.²⁴

In the view of the *maqasidiyyun*, *maqasid al-shariah* had an urgent position in conducting *ijtihad*. Some classical *maqasid* scholars guaranteed the understanding of *maqasid al-shariah* as the key to understanding God's law correctly. Imam al-Haramain al-Juwaini, for example, emphasized that Islamic law would never be understood without understanding *maqasid*. This view departed from the theory that none of God's actions are in vain. The futility in question was the absence of purpose and usefulness from the actions performed by Him. Eliminating futility means believing that in every teachings of Allah revealed there was a purpose or objectives, therefore understanding *maqasid* was the pathway to understand Islamic law.

²⁴ In responding to this fact, Islamic jurists are divided into three parts: First, those who refuse to adhere to *maqasid* in formulating the texts. For all of them, Allah's actions, including his statements in *al-shariah*, cannot be traced to the reasons and motivations behind them. Second, they argue with Allah's affirmation in QS. *al-Anbiya*: 23.

Next, those who make reason as the commander in understanding the texts. In contrast to the first group who rejected *maqasid*, this group made *maqasid* the leading standard in understanding the texts. They even reject the text if it contradicts the understanding of reason. Third, those who reject and accept *maqasid* to the extreme. They believe that Islamic law is always based on benefit. This belief does not mean limiting God's will with *maqasid* formulated by humans. On the contrary, he has made his *Shari'a* to provide benefit and prevent harm for his servants. Therefore, according to this group, if there is a conflict between the texts and *maqasid* formulated by reason, the texts must take precedence and leave the meaning of the texts to Allah.

Jasser Auda and the Systems Philosophy

Systems philosophy is defined as a pattern of thinking to examine everything through a broad context, the whole, the parts, components, subsystems, and examine the interrelationships between one another. In this system philosophy, each object of study is understood as part of a holistic, comprehensive, and dynamic system. For example, in understanding the universe, that nature is a very complex structure or system so that it cannot be studied only through a causality approach (causation), so a more functional systems philosophy is used in secured evidence and rational arguments.²⁵

The systems approach is a holistic perspective in which one element incorporated in it is related to a unified system. Within the system, there are several subsystems. There are many factors that can affect the analysis of a system on subsystems, and how the interactions between subsystems with one another. The system itself is a linkage and attachment between elements or units formed in an integrated structure in carrying out several functions in an integrated and inseparable way.²⁶ Thus, systems analysis in this approach uses subsystems, parts, units, or elements and examines the interaction mechanism of these parts.

Jasser Auda built on the following six category settings in designing systems philosophy:²⁷

Firstly, the *cognitive nature* of the system. This category distinguishes between the texts of the Quran and Hadith by one's understanding of the two texts. This category can distinguish between the forms of Sharia, fiqh, and fatwa. This distinction is significant because fiqh has always been equated with Sharia. For example, the assumption that *ijma'* (consensus) is the same as the verses of the Quran and Hadith texts, even though *ijma'* is not rooted in Islamic law. Also, *ijma'* is merely a consultation mechanism used only among the elite and tends to be exclusive.²⁸

Secondly, the aspect of *wholeness*. The modern human mind is partial. In Jasser Auda's view of systems theory, the causality relation (law of cause and effect) is a subsystem or part of an integrated, integrative whole system

²⁵ *Ibid.*, p. 65.

²⁶ *Ibid.*, p. 65.

²⁷ Jasser Auda, *Membumikan Hukum Islam Melalui Maqashid Syariah*, p. 86. See also: Jasser Auda, *Al-Ijtihad al-Maqashidi al-Syabkah al-Arabiyah li al-Abbas*, 2011.

²⁸ Nur Kholis, *Hukuman Mati Pongedat Narkoba Pendekatan Maqashid Syariah* Jasser Auda, Dissertation, UIN Sunan Ampel Surabaya, 2020, p. 77. See also, Nasrullah, "Maqasyid Syariah sebagai Pendekatan Sistem dalam Hukum Islam," *Jurnal Syariah dan Hukum* 2, no. 2 (2010).

and cannot be separated from one another.²⁹ This wholeness or systemic principle is very urgent in understanding *usul al-fiqh* (principles of Islamic jurisprudence) because this way, it can make a positive contribution to contemporary Islamic law reform. This way of reflection can produce a holistic and integrative understanding of Islamic law and expand the scope of *maqashid syariah* from the individual to the public scope.³⁰

Thirdly, openness. It is the interaction or linkage between the parts that exist in the system with the outside parts of the system. The realization of this openness depends on the ability of a system to achieve the goals set under various conditions.³¹ Openness, besides changing the point of view and perspective, also transforms one's philosophical thinking. Thus, the analysis and reasoning of Islamic law based on this openness will easily be trapped in a narrow, rigid, and textual understanding.

Fourthly, the hierarchy of interrelatedness in the system (interrelated hierarchy). A system is created from parts or subsystems that are arranged in a hierarchical relationship. The quality of the relationship between the parts will determine the success of achieving the goals. Likewise, Islamic law and the structural conditions of the surrounding community are essentially interrelated with one another. Every fiqh expert, when issuing a fatwa, certainly cannot be separated from their contexts. Therefore, the understanding of fiqh experts is also influenced by their surroundings.³² Through *maqashid sharia*, a *faqih* (Islamic jurist) who approaches Islamic law not only focus on the textual but also considers the contextual aspect. He will also be guided by the principles that become common threads with fellow Muslims around the world.

Fifthly, it contains various dimensions (multi-dimensionality). It means that each part or subsystem has a correlation and a close relationship with one another. Islamic law as a system also has various dimensions: rank and level. If the rank represents the various fields in a multidimensional manner used as a study object, then the level represents the multi-level aspects contained in each dimension. Therefore, there is no conflict between the proposition and the *maqasid* dimension on enacting Islamic law.³³

Sixthly, goal-oriented (*al-hadaf*) and purposefulness (*al-ghayah*). In systems theory, Jasser Auda mentioned two different things: goal-oriented and purposefulness. A system might establish *al-ghayah* if it could maintain its

²⁹ Jasser Auda, *Membumikan Hukum Islam melalyi Maqashid Syariah*, 87

³⁰ Nur Kholis, *Hukuman Mati Pengedar Narkoba...*, 78.

³¹ Jasser Auda, *Membumikan Hukum Islam Melalaui Maqashhid Syariah*, p. 88.

³² *Ibid.*, p. 89.

³³ *Ibid.*, p. 92.

purposefulness through various methods. Meanwhile, it would establish *al-hadaf*, only if it was stable, stagnant, and focused. Therefore, *maqasid shariah* was essentially positioned in the sense of purpose (*al-ghayah*).³⁴

Furthermore, Jasser Auda emphasized that *maqasid shariah* must be focused on the central texts in the Quran and Hadith, not just referencing fatwas or the understanding of scholars. On the other hand, *maqasid shariah* could therefore become a benchmark for the validity of the results of *ijtihad* produced by scholars.

Model of Legal Sanctions of Marriage Registration Violations in Indonesia, Malaysia, and Brunei Darussalam

Firstly, in Indonesia. There are some laws and ordinance, regarding the marriage registration violation, including The Law of Marriage (No. 1 of 1974), and the Government Ordinance of the Implementation of The Law of Marriage (No. 9 of 1975), especially the Article 45.

Secondly, in Malaysia. The federal country has specific laws of each federal state, specifically:

- a. The Federal Territories of Malaysia: Section 35, Laws of Malaysia. Act 303; The Islamic Family Law (Federal Territories) Act of 1984 contains the latest amendments-p.u. (a) 247/2002³⁵.
- b. State of Johor: Section 35, Enactment No. 17 of 2003, Islamic Family Law Enactment of 2003;
- c. State of Kedah: Section 35, Enactment No. 11, Islamic Family Law (Kedah Darul Aman) Year 2008 (contains the latest amendments - k.p.u. 31/2008);
- d. State of Kelantan: Section 35, Enactment 6 of 2002, Islamic Family Law Enactment of 2002;
- e. State of Melaka: Section 35, Enactment 12 of 2002 Islamic Family Law Enactment Year 2002;
- f. Negeri Sembilan: Section 35, Enactment 11 of 2003, Islamic Family Law Enactment of 2003;
- g. State of Pahang: Section 35, Enactment 3 of 2005, Islamic Family Law Enactment of 2005;
- h. State of Penang: Section 35, Enactment 3 of the Islamic Family Law Year 2004 (containing the Latest Amendment - pg.p.u. 12/2008);

³⁴ Khusniati Rofiah, *Teori Sistem sebagai Filosofi dan Metodologi Analisis Hukum Islam yang berorientasi Maqashid Syariah*, *Jurnal of Islamic Law* 15, no. 1 (2014).

³⁵ State of Perak Enactment 13 of 1984, Islamic Family Law Enactment of 1984 Part IV; Penalties and Miscellaneous Provisions Relating to Marriage Contract and Marriage Registration, Section 33.

- i. State of Perak: Section 35, Enactment 6 of 2004, Islamic Family Enactment of 2004; and others.

Thirdly, the regulations in Brunei Darussalam: Part IV, 33 & 38, Laws of Brunei, Chapter 217, Islamic Family Law, or AUUKI (Islamic Family Law), Chapter 217.

1. Law System

Indonesia adheres to the Law of Continental Europe (Civil Law System). This system requires Indonesia to proceed through several procedures in issuing its regulations and the formation of legislation, thus making Indonesia less responsive and dynamic in adapting to existing conditions.³⁶

The legal system adopted by Malaysia supports legal reform in the country for any reforms caused by the expansion of civilization, needs, and the current development. The common law legal system provides “leniency” for judges to decide the law regardless of whether the law exists within its legal system. The Anglo-Saxon law adopted by Malaysia put adjudication as the primary source of law. The decisions of the previous judges are then becoming the basis for the decisions of future judges. This practice is what makes the regulations in Malaysia able to adapt quickly to the existing socio-cultural dynamics.³⁷

Brunei Darussalam adheres to the same legal system as Malaysia, the Anglo-Saxon law (common law). Such a system has a dynamic character in dealing with the socio-cultural changes in society and its adaptations of regulations. At first glance, it can be seen that the historical changes that have occurred in Brunei's legislation, regardless of the leading cause, reflect that the country is more open to the aspiration's dynamics of its citizen.³⁸

³⁶ Diani Sadiawati et al., *Kajian Reformasi di Indonesia, Pokok Permasalahan dan Strategi Penanganannya*, Jakarta Selatan: Yayasan Studi Hukum dan Kebijakan Indonesia, 2019, p. 48-49.

³⁷ See, Enactment 17 of 2003, Islamic Family Law Enactment (State of Johor), 2003, Part IX, Penalties, Section 126.

³⁸ Laws of Brunei, Islamic Family Law Act, Chapter 217, no. 33.



In Indonesia, at the beginning of the formation of the Law of the Registration of Marriage, Divorce, and Reconciliation (No. 22 of 1946), the law contained detailed sanctions for marriage registration sanctions, although, at that time, the law was only applied for the islands of Java and Madura. In 1954, Law No. 22 of 1946 was replaced with the Law of Marriage Registration, Divorce, and Reconciliation (No. 32 of 1954), which was applicable in all regions in Indonesia. Furthermore, the regulation of sanctions is set as a Government Ordinance, not as a Law.³⁹

Malaysia is referred to the first country in Southeast Asia in terms of family law reform, especially through the Mohammad Marriage Ordinance No. 5 of 1880. Thus, long before Malaysia's independence, this Marriage and Divorce Law had been introduced and implemented in several Strait's countries, such as Malacca, Singapore, and Pulau Pinang (Penang) for the first time. After Malaysia's independence, legal reform was carried out as a development of the existing law, then each state also had its family law regulations.

In Brunei Darussalam, this country began to ratify Islamic law called The Muhammadan Laws Enactment 1912, between Brunei and the United Kingdom in 1912. The regulation regulated various issues concerning family law, criminal law, as well as jurisprudence. A year later, The Muhammadan Laws Enactment was also proclaimed, following The Muhammadan Marriage

³⁹ Maria Farida Indrati, *Ilmu Perundang-undangan; Jenis, Fungsi dan Materi Muatan*, Yogyakarta: Kanisius, 2007, p. 97.

and Divorce Enactment 1913, which regulated marriage and divorce through a judge's decision. During approximately 42 to 43 years of enacted, the two regulations were amended through The Brunei Religious Councils, Kathis Courts, and State Customs Enactment 1955, which was effectively enacted in 1956. After that, Brunei's legislation underwent several amendments in 1957, 1960, 1961, and 1967, until the ratification of the Revision Laws of Brunei 1984, in which this regulation was amended again, and entitled as the Deed of the Religious Council and the Kadi Court, Chapter 77, until now.⁴⁰



bride and bridegroom. In terms of duration, the imprisonment will last for maximum of six months of the sanctions. Additionally, the fines will be RM.1000 (approximately Rp.3,390,000). This punishment is strengthened by the negligence of the alternative model, like Indonesia. Instead, Malaysia uses 'alternative' and 'cumulative' sanctions.

In Brunei Darussalam, the law will punish marriage registrars, bride, and bridegroom who violate the regulations with imprisonment of three to six months and a fine of DB\$.1,000 up to DB\$.20,000 (approximately Rp.10,400,000 up to Rp.20,800,000). In terms of the sanction types, regulations in Brunei Darussalam and Malaysia are similar. They both apply two models at once; 'alternative' and 'cumulative' sanction. They will also increase the punishment for the second or more repetitive violations.

⁴⁰. Dedi Supriyadi, *Fiqh Munakahat Perbandingan: Dari Tekstualitas sampai Legislasi* (Bandung: Pustaka Setia, 2011), 202.



Analyzing the regulations above, it seemed that Malaysia had a very serious legal standing in establishing the ideals of a family that upholds constitutional rights. In the current context, from the authors' analysis, the regulation would be relevant in the implementation phase, based on several reasons:

Firstly, both imprisonment and fines apply to the bride and bridegroom. Meanwhile, in terms of the duration of the sanctions, the imprisonment will be six months. Also, the amount of fines is RM.1000 (approximately Rp.3,390,000). The law is strengthened by the 'alternative' and 'cumulative' sanction which will punish the repetitive violators even more.

Secondly, Malaysia is the first country in Southeast Asia to reform Family Law through the Mohammad Marriage Ordinance No. 5 of 1880. Long before Malaysia's independence, the Marriage and Divorce Law was introduced and applied in several Straits Settlements, such as Malacca, Singapore, and Pulau Pinang (Penang) for the first time. After Malaysia's independence, legal reform was carried out as a development of the existing law, then each state also has its family law regulations.

Thirdly, the Malaysian legal system supports the legal reform in the country following the development and the needs of society. The common law legal system provides "leniency" to judges and supported them with the capability of deciding the law on their own regardless of whether there are rules in the legislation. Malaysia's Anglo-Saxon legal system makes adjudication the primary source of law. The decisions of the previous judges are then becoming the basis for the decisions of future judges. This practice is

what makes the regulations in Malaysia able to adapt quickly to their current socio-cultural dynamics.

Brunei Darussalam applies penalties to marriage registrars who provide service for polygamous men without obtaining permission and registration from the court. The penalty is imprisonment maximum of three months or a fine maximum of DB\$1,000 regardless of the registrars firstly commits the offense. However, if the violation is repeated, then the punishment can be increased: the imprisonment will be maximum of six months or a fine of DB\$2,000.

On the other hand, for the bride and bridegroom who deliberately violate the marriage registration law, they are threatened with a maximum fine of DB\$1,000 or maximum imprisonment of three months.⁴¹ However, in AUUKI Chapter 125, the punishment will be increased if they do not file a report. They can be punished to a maximum fine of DB\$2,000 or imprisonment for a maximum of six months.

Considering the sanctions for violating the marriage registration above, it can be concluded that Brunei Darussalam imposes sanctions on the marriage registrars more severe than on the bride and bridegroom. This practice is possible because marriage registrars are trusted as role models within society. Thus, the violation by the officer will be more severe.

Legal Sanctions of Marriage Registration Violation in Indonesia, Malaysia and Brunei Darussalam from Jasser Auda's Perspective of Maqasid al Syariah

Legal sanctions of marriage registration violations are essential, primarily to protect the community by providing a validity of a relationship. But, on the other hand, a marriage that goes through a legal process will have better protection and guarantee and further provide the constitutional rights for the father, mother, and child.

On the other hand, the consequence of unregistered marriage will make a relationship unable to obtain a legal basis. The unofficial marriage will negative impacts, like no legal protection, for all involved individuals: men (husbands), women (wives), and their children. Furthermore, marriage in any circumstances will potentially encounter many problems, including divorce litigation, guardianship problems, annulment, and asset forfeiture. It even discloses the emergence of sensitive issues from the perspective of ethnicity, cultural differences, and gender equality. Therefore, to prevent these disastrous problems and other negative consequences (*mafsadah*), sanctions

⁴¹ Laws of Brunei, Islamic Family Law, Chapter 217, no. 125.

are applied against marriage registration violations regulated by Muslim-majority countries, including Indonesia, Malaysia, and Brunei Darussalam, to bring positive reform the public interest (*masalah*).

The implementation of sanctions for violating the marriage registration leads to *maqasid al-shariah*, which according to classical scholars, belongs to *the dlaruriyah* (necessity) level, which consists of protecting religion (*hifdz din*), protecting life (*hifdz an-nafs*), protecting reason (*hifdz al-aql*), protecting lineage (*hifdz an-nasl*), and protecting wealth (*hifdz al-mal*). However, it seems that those aspects are partial, and they cannot become an optimal strategy to protect citizens' rights like other human rights conceptions.

Jasser Auda viewed the importance of shifting the paradigm from the traditional *maqasid* theory, which is focused on personal protection, towards the new *maqasid* of developing and empowering human rights. The goal is to make Islamic law following the principles of '*amar ma'ruf nahi munkar*. The paradigm shift from the old *maqasid* expressed by al-Syathibi to the new *maqasid* paradigm offered by Jasser Auda is due to considerations related to the development of understanding of legal governance standards in various nation-states.

1. Indonesia

Indonesia is a country that has regulated sanctions of marriage registration violations. This regulation is listed at the Government Ordinance level, which imposes sanctions for such violations on marriage registrars and the bride and groom of administrative sanctions and fines. It is also contained in the regulation of the Minister of Religion, which provides administrative sanctions policies for officers who commit violations. Thus, this is a new step in Islamic family law, while there are indications that many Islamic religious figures, based on classical ulemas *ijtihad*, still argue that marriage is a form of worship or observance only, which does not need to be dragged into criminal laws.⁴²

Although there had been a development of Indonesian Islamic family law, it did not fully prove that regulations in Indonesia had been ideally included in the philosophy of the system initiated by Auda. The limited practice could be seen when Indonesian regulations were analyzed with a feature of systems philosophy or cognitive nature. It found that Indonesian regulations dismissed the tendency from *bayani* (text) towards *burhani*

⁴² <https://www.hukumonline.com/berita/baca/lt4b7415136a2ee/ancaman-pidana-bagi-pelaku-nikah-siri>.

(context) reasoning.⁴³ *Wholeness*, which means the existence of the regulation as sanctions, indicated that Indonesia had not succeeded in applying the holistic principle through the thematic interpretation method and was still limited to marriage verses.⁴⁴ Then on *openness*, sanctions for violators applied by Indonesia were not fully “open”, although there had been a material charge in the form of fines for the bride and bridegroom, but the material charge of fines was only IDR7,500, which was already irrelevant today, when compared to the constitutional right of the family.⁴⁵ *Interrelated hierarchy* and sanctions of regulations in Indonesia were not fully able to explain why there should be legal standings on marriage. This finding was the evidence of the existence of mutual benefits among every individual within marriage. On another side, regulations in Indonesia had not been able to traverse beyond the scope of religious rank to social rank or human rights, and from partial level to universal level. It was also challenging to move from local *urf* (custom) to international *urf*. The final category, the *purposefulness*, Indonesia showed limited efforts to achieve a *sakinah*, *mawaddah*, and *rahmah* marriage.

Thus, implicitly, Jasser Auda argued that marriage was not only a form of worship, but it can simultaneously be a series of *muamalah*, which would have implications for sanctions (*jinayah*). In this case, he indirectly demanded the formulation of regulations directed towards more relevant punishment to global developments.

Regarding the relevance of the sanctions in Indonesia with global developments, from Jasser Auda's view, Indonesia was still not enthusiastic and serious, not fully open, in looking at the interests of the constitutional rights of each individual in the family together with the sanctions against those who violate the law.

2. Malaysia

Malaysia is the second-largest Muslim-majority country after Indonesia in Southeast Asia. However, in terms of sanctions for violations of marriage registration, Malaysia was more persistent than Indonesia. Malaysia,

⁴³ This tendency is based on the reason why the law of imprisonment for violators was abolished in the 1974 Marriage Law as well as in PP No. 9 of 1975, and only a fine sanction was left for the bride and bridegroom.

⁴⁴ Jasser Auda, *Membumikan Hukum Islam Melalui Maqasid al-Syari'ah...*, 12-13.

⁴⁵ PP No. 9 of 1975 concerning the implementation of Law No. 1 of 1974 on marriage. Director of Islamic Religious Affairs and Sharia Development, Directorate General of Islamic Community Guidance, Ministry of Religion of the Republic of Indonesia, Association of Legislations, 185.

which adhered to the common law system or the Anglo-Saxon law, was easier to establish a law or regulation through a judge's decision than Indonesia, which adhered to the civil law system or the Law of Continental Europe. It made Malaysia very responsive to Islamic family law reforms, including sanctions for violating marriage registration.

By looking at the historical side of Islamic law reform, the material content of the sanctions, as well as from the sanctions threat model that applied in 'alternative' and 'cumulative' style, it showed that Malaysia had so far been able to implement *maqasid shariah* from Jasser Auda's perspective entirely. The six features proposed by Auda, specifically embodying *cognitive nature*, *wholeness*, *openness*, *interrelated hierarchy*, *multi-dimensionality*, and *purposefulness*, had existed and were initiated by Malaysia two centuries ago, through the Mohammad Marriage Ordinance No. V Year 1880, the first family law reform in Southeast Asia.

Malaysia's ability to apply *maqasid shariah* from a systems philosophy perspective on family law reform could be explained as follows: *cognitive nature*, which meant that Malaysia's regulations can ward off the tendency of the *bayani* reasoning (text) towards the *burhani* reasoning (context). It could also be seen from the ability of Malaysian judges to make decisions on the legal determination. Next, *wholeness*, which meant with the regulation of sanctions, Malaysia had succeeded in applying the holistic principle. Instead of using the thematic interpretation method, Malaysia was using a judge policy as a determinant of a law. Then on *openness*, the sanctions applied to violators by Malaysia were fully "open", by looking at the strict sanctions given by the country. Next, *interrelated hierarchy*, Malaysia had successfully explained why there must be regulations on marriages registration violations. This practice was evidence of the interrelationships and impacts among families, which were oriented towards mutual benefits. Next, *multi-dimensionality*, regulations in Malaysia could go beyond the scope from religious rank to social rank or human rights and from partial level to universal level. There was also an adjustment from local *urf* to international *urf*. Thus, individual constitutional rights in the family could always be maintained. Lastly, *purposefulness*, looking at the existing regulations, Malaysia had shown an effort to achieve the goal of a *sakinah*, *mawaddah*, and *rahmah* marriage.

3. Brunei Darussalam

The country predicated as the third largest Muslim majority country in Southeast Asia has more progressive regulations of marriage registration violations than Indonesia and Malaysia. Even Brunei applied tiered and

multiple sanctions. If a marriage registrar violated the rules, he would get more sanctions than a bride and bridegroom who breached it. Moreover, at the same time, the punishment would be increased if the officers repeatedly violated the law, and so forth.⁴⁶

Although Brunei was relatively new in enacting Islamic law, through The Muhammadan Laws Enactment, 1912, Brunei was very persistent in updating Islamic law. The country had done amendments five times. Its output, the Religious Councils and Kadi Courts Act, Chapter 77, still applies to date.

The form of Islamic family law reform in Brunei Darussalam had fully proven that regulations in the country had been ideally included in the philosophical features of the Jasser Auda's system. It could be seen when Brunei's regulations were analyzed with the systems philosophy, specifically *cognitive nature*, which was perfectly able to ward off the tendency of the *bayani* reasoning (text) towards the *burhani* reasoning (context). Next, regarding the *wholeness*, Brunei had succeeded in applying the holistic principle through the thematic interpretation method, and it was limited to marriage verses, but it makes all the verses in *nash* to be considered in deciding problems in Islamic law. Then on *openness*, the sanctions applied to violators in Brunei were 'open' for any possibility. It meant that every possible decision could be taken, and the punishment might be varied in terms of its tier and level.

Brunei did not hesitate to apply such sanctions. In terms of the interrelated hierarchy, the country could explain the purpose of regulations on marriage. It was nothing but the interrelationships and beneficial impacts for families. In the *multi-dimensionality* aspect, Brunei regulations could go beyond the scope from religious rank to social rank or human rights and from partial level to universal level. There was also an adjustment from local *urf* to international *urf*, or the ownership of an identity for each person. At the end of the feature, there was *purposefulness*, in which Brunei had shown how innovative Islamic family law in the country was convincing towards the goal of a *sakinah*, *mawaddah*, and *rahmah* marriage.

Conclusion

Indonesia had a different legal system from Malaysia and Brunei Darussalam, including regulations on marriage registration violations.

⁴⁶ Laws of Brunei, Islamic Family Law, Chapter 217, no. 125. See more: <https://www.e-syariah.gov.bn/portals/syariah/branches/>

Malaysia and Brunei Darussalam had applied strict regulation on the violations, while Indonesia still hesitated to give tough penalties to perpetrators of *siri* (unregistered or hush-hush) marriages. In this context, the existing regulations in Indonesia were not entirely following Jasser Auda's *maqasid syariah* perspective. Malaysia and Brunei Darussalam inarguably had done better of meeting the criteria of Jasser Auda's *maqasid syariah*.

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