

SAPAYUANG MARRIAGE IN MINANGKABAU FROM THE PRESPECTIVES OF MASHLAHAH, 'URF, AND HUMAN RIGHTS

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Abstract

This research aimed to analyze the punishment of *Sapayuang* marriage according to *Mashlahah* perspective, 'urf, and Human Rights correlated with the custom philosophy, Adat Basandi Syarak, Syarak Basandi kitabullah (Custom based on Islam, Islam based on Al-Qur'an) which is life foundation of Minangkabau people, the offender of *sapayuang* marriage accepts severe punishment. This research utilized the empirical juridical method wherein qualitative research was used as the research approach. Primary data was derived from the interview and field findings. Then, these data were analyzed using the relevant theories correlated with this issue such as classic books, books, journals, articles, law dictionaries, encyclopedia, and the previous correlated research to obtain a conclusion. There are several findings of this research, 1) the witness of *sapayuang* marriage is classified into *mashlahah dharuriyah* because maintaining the self-respect and prestige is included in *mashlahah dharuriyah*. If it is viewed from the perspective whether *mashlahah* changed or not, the prohibition of *sapayuang* marriage is categorized into *mashlahah muta'iqiyirah*. If it is reviewed from the *mashlahah* side, it is characterized into *mashlahah mursalah*, because there is no nash which bann it. However, there is no nash which supports it. As a result, it cannot be classified into *mashlahah mulghah*, 2) If it is reviewed from the 'urf object perspectives, the prohibition and punishment of *sapayuang* marriage are included in 'urf amali, which means the society habits related to actions. Then, if it is seen from the scope, this prohibition is included in 'urf khashah which means the habit which is particularly obeyed by the people in certain region. If it is reviewed from the validity of 'urf related to the punishment of *sapayuang* marriage, it is 'urf shahih, and 3) according to the Western human rights perspective, the punishment *dibuang dari nagari* (expelled) and excommunicated is included in Human Right violation. It is different from the concept of Eastern human rights which emphasizes human rights as part of Islamic teaching implementation.

Keywords : Human Right; Mashlahah; Minangkabau; Spayuang Marriage; 'Urf

Abstrak

Penelitian ini bertujuan untuk menganalisis sanksi nikah *sapayuang* dalam perspektif Mashlahah, 'urf dan Hak Asasi Manusia dihubungkan dengan Filosofi Adat Basandi Syarak, Syarak Basandi kitabullah yang merupakan pegangan hidup bagi orang Minangkabau, bagi pelanggar larangan nikah *sapayuang* diberikan sanksi yang sangat berat. Penelitian ini menggunakan metode kualitatif dengan pendekatan yuridis empiris. Data primer berasal dari hasil wawancara dan temuan-temuan di lapangan, selanjutnya dianalisis dengan teori-teori yang relevan dengan persoalan yang diteliti. Hasil penelitian menunjukkan bahwa sanksi nikah *sapayuang* tergolong *mashlahah dharuriyah* karena memelihara kehormatan diri dan gengsi termasuk *mashlahah dharuriyah*. Ditinjau dari segi berubah atau tidaknya *mashlahah* larangan perkawinan *sapayuang* ini tergolong kepada *mashlahah muta'iqiyirah* apabila ditinjau dari segi *mashlahah* tergolong *mashlahah mursalah*, karena tidak ada nash yang secara jelas menolaknya. Disisi lain, tidak ada nash yang mendukungnya. Sehingga, tidak dapat digolongkan pada *mashlahah mulghah*. Ditinjau dari segi objek 'urf, larangan dan sanksi nikah

sapayuang termasuk 'urf amali, yaitu kebiasaan masyarakat yang berkaitan dengan perbuatan. Dari segi cakupannya larangan ini termasuk 'urf khashah yaitu kebiasaan yang berlaku khusus di masyarakat dan daerah tertentu. Dilihat dari segi keabsahan 'urf terkait sanksi nikah *sapayuang* merupakan 'urf shahih. Dalam perspektif HAM barat, Sanksi dibuang dari nagari (diusir) dan pengucilan merupakan pelanggaran HAM, dan hal ini berbeda dengan konsep HAM timur yang menitik beratkan HAM sebagai bagian dari pelaksanaan ajaran Islam.

Kata Kunci : Hak Asasi Manusia; Mashlahah; Minangkabau; Nikah *Sapayuang*; 'Urf

Introduction

In Islam, marriage holds religious value. The Compilation of Islamic Law in Article 2 asserts marriage as "a very strong contract to obey the command of Allah and fulfill it as an act of worship". There are pillars and conditions in marriage. Marriage must also be free from prohibitions. Among the prohibitions are the existence of mahram individuals who are forbidden to be married. In addition to being regulated in Islamic law and State¹ Law, regulations regarding marriage prohibitions are also governed by customary law. One of the indigenous communities that still adhere to marriage prohibition rules is the Minangkabau indigenous community.

Nagari Sariak Alahan Tigo, which is part of the Minangkabau region, still maintains the structure, system, and customary law of Minangkabau intact. There are five tribes inhabiting Nagari Sariak Alahan Tigo: the Malay tribe, the Panai tribe, the Kutia Anyia tribe, the Chaniago tribe, and the Tanjung tribe. The prohibition of *sapayuang sa rumah gadang* marriage has been a common practice among the Minangkabau community since ancient times, designed by Datuak Perpatih Nan Sabatang and Datuak Katumanggungan based on customary deliberations, scholars, and other customary leaders. Then an oath was made on the Qur'an.² In conducting marriages in Nagari Sariak Alahan Tigo, they must adhere to the religious and customary rules in accordance with the expression "*adat basandi syarak, syarak basandi kitabullah*" declared at Puncak Pato Bukik Mararapalam, Luhak Nan Tuo,³ echoing another expression "*syarak basentak naiak, adat basentak turun*".

The prohibition of *sapayuang* marriage arises from the belief that individuals from the *sapayuang sa rumah gadang* community are considered relatives or *badunsanak*. In Minangkabau custom, marriage is exogamous. The prevailing customary system is highly distinctive, characterized by a matrilineal kinship system (through the female line). The strength of these customs aligns with the Minang proverb *tak lapuak dek hujan dan lakang dek paneh* (customs that do not decay from rain nor erode from heat).⁴

Sapayuang marriage, based on *pasumpahan sati urang terdabulu diateh Al-Quran*, are believed to bring harm according to ancestral beliefs. The five Datuak of the tribes in Sariak Alahan Tigo agree on four consequences for couples in *sapayuang sarumah gadang* marriages, expressed in the proverb *ka ateh indak ba pucuk ka bawah indak ba urek di tangah dilariak kumbang*, meaning a life of poverty, continuous family disputes, disabled or even insane children.⁵

To redeem violations committed by those involved in *sapayuang* marriage for breaking customary rules in Nagari Sariak Alahan Tigo, it is stated in the expression *salah ditimbang utang dibayia mancacab darah kaki ampek* (wrongfully assessed, debts paid, slaughtering four-legged

¹ Nabil Muhammad Taufik as-Samaluthi, *Pengaruh Agama Terhadap Struktur Keluarga* (Surabaya: PT Bina Ilmu, 1987), h.92.

² Wawancara Datuak Sampono Bumi selaku Datuak Suku Kutia Anyia Kamis 19 Mei 2022

³ Marjohan, *Adat Basandi Syarak Syarak Basandi Kitabullah Pergulatan Historis Regulasi Dan Implementasi* (Yogyakarta: Suara Muhammadiyah, 2009), h.1.

⁴ Hamka, *Merantau Ke Deli*, ed. Djajamurni (Jakarta, 1962), h.68.

⁵ Wawancara Datuak Sampono Bumi selaku Datuak Suku Kutia Anyia Kamis 19 Mei 2022

animals).⁶ Because *sapayuang* marriage is considered a major customary violation that could tarnish the honor of the tribe. Not only the couple faces consequences, but also their families, *mamak*, and *datuak suku* are considered incapable of educating their descendants and become the subject of gossip by the surrounding community.⁷

The sanctions imposed by custom against couples in *sapayuang* marriages in the eyes of the general public are deemed appropriate as they alleviate the harms caused by *sapayuang* marriages, in accordance with the principles of Fiqh, which state

درء المفسد مقدم على جلب المصالح⁸

“Avoiding harm takes precedence over acquiring benefits.”

The welfare mentioned indeed becomes an *‘urf* among the community in Nagari Sariaik Alahan Tigo. When viewed from its scope, it falls under specific *‘urf*.⁹ This is to ensure order and tranquility within the community. Syech Abdul Wahab Khalaf explains that *‘urf* is a continuous habit that can serve as *hujjah* based on the consensus and welfare of the people. As long as it does not contradict the Sharia, it must be preserved.¹⁰ The sanctions imposed by customary communities on those who engage in *sapayuang* marriage are generally inconsistent with human rights.

On the other hand, the Universal Declaration of Human Rights (UDHR) in Article 16 declares the freedom to marry for men and women who have reached adulthood without any restrictions based on race, nationality, or religion. Both men and women who marry have equal rights and are bound within marriage.¹¹ Couples intending to marry are given full freedom to form a family,¹² and the state is obliged to protect and ensure their security. Furthermore, Law Number 39 of 1999 concerning Human Rights in Article 10 explains the right of every person to continue their descendants through a legitimate marriage. Then a marriage is considered legitimate if it takes place with the free will of the prospective husband and wife concerned. The prohibition of *sapayuang* marriage actually restricts the freedom of individuals to form a family and imposes sanctions, as outlined above, on anyone who engages in *sapayuang* marriage even though such marriages do not violate statutory regulations.

Research Methods

This study employs a juridical-empirical approach with the object of examination focusing on the behavior of the community in Nagari Sariaik Alahan Tigo from the concept within the *emic* category. The *emic* analysis model elucidates the thoughts and behaviors of cultural group members according to their own definitions.¹³ The behavior of the community examined is the behavior that arises from interacting with existing normative systems. Additionally, this research is conducted

⁶ Wawancara Marsuis Datuak Rajo Batuah selaku Datuak Suku Panai Selasa 17 Mei 2022

⁷ Wawancara Marsuis Datuak Rajo Batuah selaku Datuak Suku Panai Selasa 17 Mei 2022

⁸ Al-Suyuthi. *Al-Asybah wa al Nazhoir li al Suyuthi*, (Bairut: Dar al Kitab al Alamiyah, 1990). Jus I. h. 87

⁹ Nola Pitriyah dan Buyan Wahid, “Perkawinan Eksogami: Larangan Perkawinan Satu Datuak,” *Jurnal al-Abwal* Vol. 8. No (2015).

¹⁰ Abdul Wahab Khalaf, *Ilmu Ushul Fikih* (Jakarta: PT Asdimahasatya, 2005), h.104.

¹¹ Lajnah Pentashihan Mushaf Al-Qur’an Badan Litbang Dan Diklat Kementerian Agama RI, *Tafsir Tematik: Hukum, Keadilan Dan Hak Asasi Manusi* (Jakarta: Lajnah Pentashihan Mushaf Al-Qur’an Badan Litbang Dan Diklat Kementerian Agama RI, 2010), h.284.

¹² Mashood A. Baderin, *Hukum Hak Asasi Manusia Dan Hukum Islam* (Jakarta: Penerbit Komisi Nasional Hak Asasi Manusia, 2010), h.136.

¹³ Alan Barnard and Jonathon Spencer, *The Routledge Encyclopedia of Sosial and Cultural Anthropology* (London-New York: Routledge, 2010), h.220.

on secondary data such as legislation, scholarly journals, and law books related to cooperation agreement law.¹⁴

The study adopts a qualitative approach. All data obtained are gathered through observation and interviews.¹⁵ The primary data sources in this study are the traditional elders of the ethnic groups in Nagari Sariak Alahan Tigo and the customary leaders in the Customary Institution of Nagari Sariak Alahan Tigo, as well as the Ulama Council of Solok Regency. Meanwhile, the secondary data sources in the study consist of literature studies obtained from journals, books, and documentation related to the issues addressed in this research. The data collection techniques employed are interviews and literature reviews. The data analysis technique utilized is qualitative descriptive analysis with the following steps: reviewing data, classifying data, analyzing data, and drawing conclusions.

Results and Discussion

The Sanction of *Sapayuang* Marriage from the Perspective of *Mashlahah*

The fundamental source of Minangkabau customs is the belief *alam takambang jadi guru*. Proverbs, petitions, as well as poetry, constitute the essence of customary teachings, such as consensus, which serves as a starting point to achieve prosperity and happiness within society.¹⁶ The adjustment of customary practices after the agreement in the Marapalam Hill Charter is that any existing customary provisions that do not conform to Islamic teachings will be removed. As a consequence of the Marapalam Hill Charter agreement, the concept of *Alam Takambang Jadi Guru* has been replaced by *kitabullah*.

The philosophy of *Adat Basandi Syarak, Syarak Basandi Kitabullah* is firmly held by the Minangkabau people, meaning that the laws to be applied must be in accordance with both the syarak (Islamic law) and adat (customary law). Based on this principle, with the integration of sharia and tradition, emerges the saying *indak lakang dek paneh, indak lapuak dek hujan* (not worn out by heat, not decayed by rain), signifying that customary practices have been purified or aligned with the teachings of Islam that we have inherited today, known as the *adat nan subana adat*.¹⁷

Certainly, the integration of custom and Sharia will bring about changes and adaptations in law. The changes occurring within society and its environment always lead to the development of the implementation of the law itself. These changes are closely related to the environment, place, circumstances, and customs. As expressed by Ibn Qayyim al-Jauziah:

تغير الفتوى بحسب تغير الأزمنة والأمكنة والأحوال والنيات والعوائد

“*Fatwas can change by considering changes in time, place, circumstances, intentions, and customs.*”¹⁸

Sapayuang marriage is strongly discouraged rather than prohibited in Minangkabau culture, and those who violate this will face consequences from the community, as the customary saying goes:

*Bagalanggan dimato rang banyak,
Bagalanggan matohari*

¹⁴ Mukti Fajar, Yulianto Achmad, *Dualisme Penelitian Hukum Normatif & Empiris*, (Yogyakarta, Pustaka Pelajar, 2010) h. 34 & 51.

¹⁵ Jonaedi Efendi dan Johnny Ibrahim, *Metode Penelitian Hukum Normatif Dan Empiris* (Depok: Prenadamedia Group, 2016), h.149.

¹⁶ Idrus Hakim Dt. Rajo Penghulu, *Rangkaian Mustika Adat Basandi Syarak Di Minangkabau* (Bandung: PT Remaja Rosdakarya, 1994), h.5.

¹⁷ Musyair Zainuddin, *ABS, SBK Filosofi Warga Minangkabau*, (Yogyakarta: Penerbit Ombak, 2019), h.30-32.

¹⁸ Syamsuddin Abi Abdillah Muhammad Ibn Abu bakar Ibn Qayyim Al-Jauziah, *I'lamul Muwaqi'in 'an Rabbil 'Alamin* (Bairut: Daar al-Fikr, 1977), h.14.

Dicaliak mato rang banyak

The meaning of the customary saying is that *sapayuang* marriage is not viewed favorably by the community, and such marriages are not encouraged to occur, which can be reflected in social interactions within the society.¹⁹

The reason for the prohibition of intra-lineage marriage in the Customary Law of *Nan Duo Puluh* is because such marriages can narrow social interactions by marrying individuals with the same lineage, potentially leading to internal conflicts within the tribe. Additionally, it can cause psychological disturbance to children due to racist experiences from other tribal members.²⁰

The community of Nagari Sariak Alahan Tigo adheres to a matrilineal system, believing that those from the maternal lineage share the same sense of connection and responsibility towards their maternal relatives (*sapayuang*). Thus, preserving this system is seen as a virtue and a form of justice for the community.

This reasoning undoubtedly differs from the grounds for prohibiting marriage as outlined in the Divine Word in Surah An-Nisa, verse 23.

حُرِّمَتْ عَلَيْكُمْ أُمَّهَاتُكُمْ وَبَنَاتُكُمْ وَأَخَوَاتُكُمْ وَعَمَّاتُكُمْ وَخَالَاتُكُمْ وَبَنَاتُ الْأَخِ وَبَنَاتُ الْأُخْتِ وَأُمَّهَاتُكُمُ اللَّاتِي أَرْضَعْنَكُمْ وَأَخَوَاتُكُمْ مِنَ الرَّضَاعَةِ وَأُمَّهَاتُ نِسَائِكُمْ وَرَبَائِبُكُمُ اللَّاتِي فِي حُجُورِكُمْ مِنْ نِسَائِكُمُ اللَّاتِي دَخَلْتُمْ بِهِنَّ فَإِنْ لَمْ تَكُونُوا دَخَلْتُمْ بِهِنَّ فَلَا جُنَاحَ عَلَيْكُمْ وَحَلَائِلُ الَّذِينَ مِنْ أَصْلَابِكُمْ وَأَنْ تَجْمَعُوا بَيْنَ الْأُخْتَيْنِ إِلَّا مَا قَدْ سَلَفَ إِنَّ اللَّهَ كَانَ غَفُورًا رَحِيمًا

“(Also) forbidden to you for marriage are your mothers, your daughters, your sisters, your paternal and maternal aunts, your brother’s daughters, your sister’s daughters, your foster-mothers, your foster-sisters, your mothers-in-law, your stepdaughters under your guardianship if you have consummated marriage with their mothers—but if you have not, then you can marry them—nor the wives of your own sons, nor two sisters together at the same time—except what was done previously. Surely Allah is All-Forgiving, Most Merciful.”

Based on the verse, it is known that marriage is prohibited in Islam if there is a blood relationship (*nasab*), thus mother, women in the direct line of ascent; daughter, women in the direct line of descent; sister, whether full or half; paternal aunt, sister of one's father or mother; niece. Additionally, marriage is also prohibited if there is a lactation kinship, namely foster mother and upwards; daughter of the foster mother; foster sister; foster aunt; niece of the foster and downwards. Lastly, marriage is prohibited due to affinity (*mushabarah*), which includes mother-in-law; stepdaughter; son-in-law; stepmother.

The concept of the prohibition of marriage mentioned above is based on *mashlahab mu'tabarab*, which is a benefit supported by *nash*. This *mashlahab* is also explicitly supported by *ijma'* and *qiyas* through *illat* recognized legal reasons. Meanwhile, the reasons for the prohibition of *sapayuang* marriage in Nagari Sariak Alahan Tigo, as explained above, belong to *mashlahab mursalah*. This is because there is no *nash* that explicitly rejects it, and on the other hand, there is no *nash* that supports it. In essence, *mashlahab* aims to bring benefit and reject harm. Imam al-Ghazali stated that

المصلحة فهي عبارة في الأصل عن جلب منفعة أو دفع مضره²¹

“*Mashlahab essentially denotes the pursuit of benefit or advantage, or the avoidance of harm or difficulty.*”

The belief that sustains this culture is the conviction that *sapayuang* marriage will result in offspring who are weak, as it is considered akin to marrying one's own siblings. This belief is reinforced by medical science, which explains the impacts of such incestuous marriages, including²² mental disorders, serious physical disabilities such as bowed legs, congenital heart defects, cleft lips, and even down syndrome, as well as other recessive autosomal disorders

¹⁹ Wawancara H. Zulkifli M.M, Kepala Kantor Kementerian Agama Kabupaten Solok Tanggal 1 Juni 2022

²⁰ Datoek Toeah, *Tambo Alam Minangkabau* (Bukittinggi: Pustaka Indonesia, n.d.), h.247.

²¹ Abu Hâmid Muhammad al-Gazâlî, *Al-Mustasfa Min 'Ilm Al-Ushûl*, (Bairut: Mu'assasat al-Risâlah, 1997), h.328.

²² Yuyuk Yusdiawati, “Penyakit Bawaan: Kajian Resiko Kesehatan Pada Perkawinan Sepupu,” *Jurnal Antropologi: Isu-Isu Sosial Budaya* 19 (2017): h.89-99.

resulting from the union of two abnormal genes, severe intellectual disabilities, cancer, slow growth rates, weakened immune systems making them susceptible to diseases, liver diseases, and infant mortality.

Some jurists argue that desires could weaken among close relatives, thus they disapprove of marriages with *bintul'amma* (paternal cousin), *bintul'khalah* (maternal cousin), *bintul'ammah* (paternal aunt's daughter), *bintul'khalah* (maternal aunt's daughter).²³ Considering the significant consequences, *sapayuang* marriages are best avoided, as dictated by the established customs and traditions.

Those who engage in *sapayuang* marriages essentially condemn themselves, akin to someone recalling their hometown but being unable to return together, where one must return first. This is what is referred to as condemning oneself.²⁴ Yusuf al-Qardhawi²⁵ cites Imam al-Qarafi's opinion, who includes the preservation of one's dignity and honor as a *mashlahah dharuriyah*. According to Yusuf al-Qardhawi, this addition is based on the hadith of the Prophet:

فَإِنَّ اللَّهَ حَرَّمَ عَلَيْكُمْ دِمَاءَكُمْ وَأَمْوَالَكُمْ وَأَعْرَاضَكُمْ كَحُرْمَةِ

“Verily, your blood, your honor, and your wealth are inviolable for (one another) (narrated by Bukhari)” (Asqalany, 1407: 190).

The absence of specific provisions in sharia regarding *sapayuang* marriages does not imply that the benefits emerging within that period are judged to be contradictory to the goals of legal stipulations. Ibnu Qayyim al-Jaziyah stated that:

الشريعة مبناهَا وأساسها على الحكم ومصالح العباد²⁶

“Sharia is built upon the foundation of wisdom and the welfare of humanity, both in the present and the future.”

Therefore, the concept of *mashlahah* cannot be separated from the *maqasid syariah*, which always faces challenges from the development of culture. This can shift the standards of welfare in a particular place, time, or era. To achieve a perfect Islam, we must view Islamic law not only as a vertical relationship but also more broadly as Islam as a world view, a societal model, a cultural model, and a civilization model.²⁷ If Islam does not see the integration between culture and religion, then Islam will be locked in a cycle of legal stagnation. However, culture will continue to transform without compromising on rules that lack clear textual evidence (*nash*). Imam Asy-Syathibi expressed about sharia and its function for humans as stated in his book *al-Muwafaqat*:

هذه الشريعة المعصومة ليست تكاليفها موضوعة حيثما اتفق لمجرد إدخال الناس تحت سلطة الدين، بل وضعت

لتحقيق مقاصد الشارع في قيام مصالحهم في الدين والدنيا معا

“Verily, the imposition of preserved sharia is not created to confine humans within the bounds of religion. Rather, sharia is established with the aim of realizing the welfare of humanity itself in this world and the Hereafter.”

To avoid being trapped in the stagnation of jurisprudence, Sahal Mahfudh suggests liberating ourselves from the alienation of *fiqh*, among other things caused by overly formalistic views. The foundation of life is increasingly tending towards theology, where theology here is not just about monotheism, but a worldview that serves as the foundation for all activities of Muslims. However, the formalistic assumptions about *fiqh* can actually be sidelined by the essence of *fiqh* itself.²⁸ Sahal Mahfudh aims to direct the development of *fiqh*, which has traditionally focused solely on hereafter issues, towards addressing worldly matters as well, to facilitate worship practices.

The punishment imposed on offenders in Sariak Alahan Tigo, when viewed in terms of its scope, encompasses both *mashlahah khashah* and *mashlahah kulliyah*. This punishment is categorized

²³ Sayyid Sabiq, *Fiqih Sunnah Jilid III* (Bairut: Dar al-Kutubi al-Arabi, 1987), h.81.

²⁴ Wawancara H. Zulkifli M.M, Kepala Kantor Kementerian Agama Kabupaten Solok Tanggal 1 Juni 2022

²⁵ Yusuf al-Qaradhawi, *Madkhal Lidarasah Al-Syar'iyah Al-Islamiyah* (Cairo: Makhtabah Wahbah, 2001), h.55.

²⁶ Ibnu Qayyim Al-Jauziyyah, *Ilam Al Muwafaqi' in 'an Rabb Al 'Alamin*, Jilid 3, (Cairo: Mathabi' al Islam, 1980), h.3.

²⁷ Masykuri Abdillah, *Islam Dan Humanism* (Yogyakarta: IAIN Walisongo Semarang, 2007), h.127.

²⁸ Sahal Mahfudh, *Nuansa Fiqh Sosial* (Yogyakarta: LKIS, 1994), h.41.

under *mashlahab kulliyat* because it preserves a much broader order, namely the ecosystem of the nagari and the tribe. The nagari will be protected from expulsion, discrimination, defamation, and all factors leading to division within the community. Imam Qarrafi's concept places dignity and honor as part of *dharuriyah* in the hierarchy of *mashlahab*. Anything that could undermine dignity, tarnish reputation, or cause humiliation should be avoided if there are other solutions available. Matters that could damage dignity are indeed prohibited by religion through the prohibition of sowing discord, gossiping, derogatory remarks, using derogatory nicknames, and other actions that touch upon one's honor and dignity.²⁹

The Sanction of *Sapayuang* Marriage According to the Perspective of 'Urf

Islamic law pays careful attention to the circumstances and conditions in the establishment of legal rulings. If Islam were to eliminate the existence of customs or traditions, it would appear rigid. Customs and traditions play a significant role in achieving the welfare of humanity Ibnu Qayyim al-Jauziyyah, in his phenomenal work *Plamul Muwaqi'in*, also shares this view. He states: وقد اتفقت كلمة فقهاء المذاهب على أن الأحكام التي تتبدل بتبدل الزمان وأخلاق الناس هي الأحكام الاجتهادية من قياسية ومصلاحية، أي: التي قررها الاجتهاد بناء على القياس أو على دواعي المصلحة، وهي المقصودة بالقاعدة الأتفة الذكر: "لا ينكر تغير الأحكام بتغير الأزمان". أما الأحكام الأساسية التي جاءت الشريعة لتأسيسها وتوطيدها بنصوصها الأصلية الأمرة النهائية كحرمة المحرمات المطلقة، فهذه لا تتبدل بتبدل الأزمان بل هي الأصول التي جاءت بها الشريعة لإصلاح الأزمان والأجيال

*"The consensus among all schools of thought's scholars is that the Shariah law that can change with the changing times and human behavior is the ijthabadi (jurisprudential) law based on analogy and mashlahat. This is what is meant by the principle "Laws change according to the changes in time and place." As for the fundamental laws upon which the Shariah is based, with its foundation through original texts (nash) indicating commands and prohibitions such as the prohibition of approaching what is absolutely prohibited, these cannot change solely with the passage of time but stand as the foundation by which time and generations can be evaluated."*³⁰

Ibnu Qayyim's opinion elucidates that Islam does not stand on one cultural model alone but varies significantly depending on where that culture applies. The terms culture and tradition in Islam are known as 'urf, as Abdul Wahab Khalaf³¹ mentions that 'urf is something known by many people and practiced by them, whether in speech or action, or something left behind.

Sapayuang Marriage is indeed uncommon and considered taboo (customary law). Such marriages have significant drawbacks. The prohibition and sanctions of such marriages fall under the category of customary law, which is an implementative form of the legal hierarchy in Minangkabau. The hierarchy of Minangkabau customary structure consists of four levels. Firstly, there is the *Adat nan sabana adat*, which refers to something that already exists and is accepted by the Prophet Muhammad SAW based on the words of God in His holy book.³² This custom cannot be changed even though it may be influenced by place, circumstance, and time because it is a divine (*Sunnatullah*) guideline for human behavior. Secondly, there is the *Adat nan di adatkan*, which is based on the compilation of Datuak Perpatih nan Sabatang and Datuak Katumanggungan. This custom is composed based on *ada yang sebenar adat* supported by the agreement of the customary leaders at that time and is structured based on eight fundamental customs in line with the influence of Islam, which was already present.³³ Thirdly, there is the *Adat nan taradat*, which is the result of the concretization of values that grow and develop within society. This custom must not contradict the *adat yang sebana adat* and *adat nan taradat*; instead, it should strengthen the customs above it.

²⁹ Ahmad al-Mursi Husain Jauhar, *Maqashid Syariah Terj. Khikmawati* (Jakarta: Amzah, 2010), h.141.

³⁰ Samsuddin Abi Abdillah Muhammad Ibn Abu bakar Ibn Qayyim Al-Jauziah, *Plamul Muwaqi'in 'an Rabbil 'Alamin*, (Bairut: Daar al-Fikr, 1977), h.49.

³¹ Abdul Wahab Khalaf, *Ilmu Ushul Fiqih*, cet.I, (Semarang: Toha Putra Group, 1994), h.89.

³² Ibrahim Dt Sanggoeno Diradjo, *Tambo Alam Minangkabau*, (Bukittinggi: Kristal Multimedia, 2009), h.142.

³³ Musyair Zainuddin, *ABS, SBK Filosofi Warga Minangkabau*, h.25.

Lastly, there is the *Adat istiadat*, which is something that has been accustomed in a nagari as a follow-up to *adat nan di adatkan* and has been ingrained and accepted as a habit.³⁴

Diagram ABS, SBK

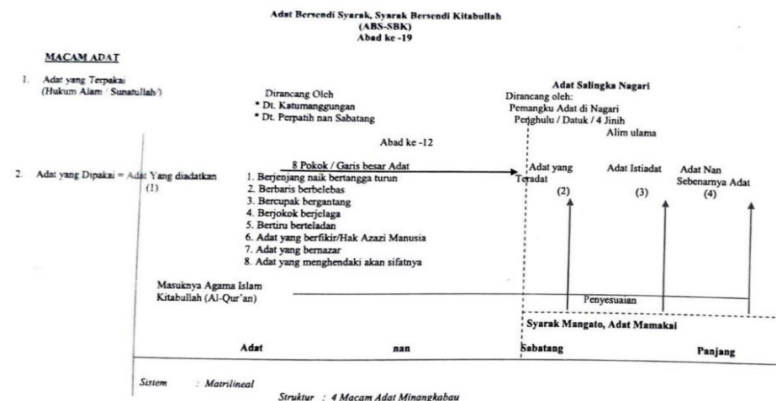


Figure 1. Diagram of the Relationship between ABS, SBK, the 8 Pillars of Minangkabau Tradition and the Hierarchical Structure of Minangkabau Tradition³⁵

In essence, the distinction between the terms "forbidden" and "prohibited" must be made. The word "forbidden" does not necessarily imply prohibition. In this case, the prohibition is more of a recommendation because the action is permissible but uncommon. Similar to jurisprudence in Islamic law, not everything permissible is necessarily beneficial, such as consuming worms, which, while halal, is not commonly consumed due to its repulsiveness.³⁶

When considering the object of *'urf*, the prohibition and sanction of *sapayuang* marriage fall under *'urf amali*, which pertains to the customs of society related to actions. And in terms of its scope, this prohibition falls under *'urf khashab*, which refers to the customs prevailing in a specific society and region. In this study, *sapayuang* marriage is practiced in the Nagari Sariak Alahan Tigo and is explicitly still practiced until now.

Viewed in terms of the validity of *'urf* related to the sanction of *sapayuang* marriage, it constitutes *'urf shabih* because it is a prevailing custom in society and does not contradict the scripture (*nash*). It does not eliminate benefits and does not bring harm. The implementation of this sanction is aimed at ensuring orderliness in community life.

The sanction for those who engage in *sapayuang* marriage in the Nagari Sariak Alahan Tigo, Hiliran Gumanti District, Solok Regency, has met the requirements of *'urf*. According to Amir Syarifuddin,³⁷ these requirements include: *Firstly*, *'urf* contains benefits and is acceptable to sound reasoning.³⁸ This sanction is intended to prevent the community from violating customs that lead to social effects. *Secondly*, *'urf* applies universally and evenly, especially in the Nagari Sariak Alahan Tigo. The people in that community are aware of the prohibition on *sapayuang* marriage and the consequences of violating it. *Thirdly*, *'urf* that serves as awareness in the establishment of existing laws (applies) at that time, not *'urf* that comes later. The prohibition and sanction of *sapayuang* marriage in the Nagari Sariak Alahan Tigo have existed and been used since ancient times, not a new decree. *Fourthly*, *'urf* does not contradict or neglect existing sharia evidence or principles of Islamic law. The prohibition and sanction of *sapayuang* marriage continue to this day in the Nagari, and it is not burdensome in its implementation. Although there are sanctions against violators such as expulsion and ostracism from the community, these measures are taken to prevent greater harm

³⁴ Datuak Bandaro Sati Lubuak, *Kertas Kerja Adat Minangkabau* (Padang Panjang, 1980), h.56.

³⁵ Musyair Zainuddin, *ABS, SBK Filosofi Warga Minangkabau*, h.33.

³⁶ Wawancara H. Zulkifli M.M, Kepala Kantor Kementerian Agama Kabupaten Solok Tanggal 1 Juni 2022

³⁷ Syarifudin Amir, *Ushul Fiqh Jilid 2*, (Jakarta: Kencana Prenada Media Group, 2009), h.270.

³⁸ John Makdisi, "Legal Logic and Equity in Islamic Law," *American Journal of Comparative Law* Vol 33 No (1985): h.63-92.

if *sapayuang* marriage is allowed. The system built by custom and already established will collapse and create confusion in the cultural system of the community. This can be observed within the principles of fiqh.

إذا تعارضت مفسدتان روعي اعظمهما ضررا بارتكاب اخفهما

"When two harms conflict, the greater harm should be avoided by accepting the lesser harm."

The traditional system aligns with the Minangkabau proverb "*sawah diagiah bapamatang, ladang dibari bamintalak, nan babeso tapuang jo sadah, nan bapikie minyak jo aia*". This proverb implies that customs regulate the community's way of life, both in individual behavior and social interaction, based on noble moral values. It suggests that every individual is expected to empathize with the feelings of others. This notion is further reinforced by the expression "*bak adat bapiek kulik, sakik dek awak sakik dek urang, sanang dek awak sangak dek urang, nan elok dek awak katuju dek urang*"³⁹

The Sanction of *Sapayuang* Marriage According to the Perspective of Human Rights

The existence of customary law cannot be separated from the presence of indigenous communities that uphold it. Indigenous legal communities have their own legal systems, including rules regarding sanctions imposed on individuals who violate customary norms. However, most of the customary rules in Indonesia, especially those related to customary criminal law, often exist in unwritten and orally transmitted forms (unwritten law).⁴⁰

From the perspective of the terms "custom" and "customary law," which are still evolving discussions to this day, it is stated that not all customs are customary law. According to Van Vollenhoven,⁴¹ the distinction between custom and customary law is seen in terms of sanctions, and this opinion has received responses from legal experts, especially regarding sanctions as a differentiating criterion between custom and customary law. This criterion is very appropriate as the basis for understanding true custom and customary law.

Customary law is law that does not derive from regulations made by the former Dutch East Indies government or other power instruments that have emerged spontaneously and apply to native people and Eastern foreigners.⁴² Furthermore, Soekanto stated that customary law is a complex of customs that are mostly not codified and have coercive sanctions or legal consequences.⁴³

The existence of customary sanctions, such as eviction and discriminatory treatment, when viewed from the perspective of human rights, may indeed seem to violate them. Human rights are inherent rights of individuals by nature and fundamental rights, as gifts from God that must be respected, safeguarded, and protected.⁴⁴ The essence of human rights is an effort to maintain the safety and existence of humans by creating a balance between individual interests and the public interest. Efforts to respect, protect, and appreciate human rights are the collective obligations and responsibilities of every individual.

³⁹ Idrus Hakimi, *Pegangan Penghulu, Bundo Kanduang, Dan Pidato Aula Pasambahan Adat Di Minangkabau* (Bandung: CV Remadja Karya, 1984), h.13.

⁴⁰ Patricia Pasapan, "Delik Adat Dalam Sistem Hukum Pidana Di Indonesia," h.3. Lihat juga Rini Apriyani, "Keberadaan Sanksi Adat Dalam Penerapan Hukum Pidana Adat," *Jurnal Hukum PRIORIS* 6 No 1 (2018): h. 230.

⁴¹ Van Vollenhoven adalah orang Belanda yang ditugaskan di Hindia Belanda, yang memiliki ketertarikan pada hukum yang berlaku di Indonesia. Buku yang pernah ditulis tentang hukum adat, salah satunya adalah *Het Adat-Recht van Nederlandsch Indie (Hukum Adat Hindia Belanda)*. Dia juga yang memetakan bahwa hukum adat di Indonesia dapat dikelompokkan dalam 19 lingkaran hukum. Karena hal-hal tersebut di atas Van Vollenhoven sering disebut sebagai Bapak Hukum Adat Indonesia.

⁴² Eka Susylawati, "Eksistensi Hukum Adat Dalam Sistem Hukum Di Indonesia," *Al-Ikham: Jurnal Hukum dan Pranata Sosial* 4.1 (2009): h.129. Lihat juga Hilman Hadikusuma, *Pengantar Ilmu Hukum Adat* (Bandung: Mandar Maju, 1992), h.13.

⁴³ Yulia, *Hukum Adat* (Lhoksumawe: Unimal Press, 2016) , h.2.

⁴⁴ Susani Triwahyuningsih, "Perlindungan Dan Penegakan Hak Asasi Manusia (HAM) Di Indonesia," *Jurnal Hukum Legal Standing* 2 No. 2 (2018): h.113. Lihat juga A.Bazar Harapan, *Hak Asasi Manusia Dan Hukumnya* (Jakarta: CV. Yani's, 2006), h.33-34.

The Universal Declaration of Human Rights (UDHR) articulates five categories of human rights: personal rights (guaranteeing personal needs), legal rights (providing legal protection), civil and political rights, subsistence rights (ensuring access to resources to support life), and economic rights.⁴⁵ Although the UDHR does not have legally binding positive law consequences, it exerts a strong influence, both directly and indirectly, on laws governing human rights universally among its member states. It can also be used as a measure for assessing the implementation of sanctions for violations of customary law.

Sanctions such as *dibuang dari nagari* (expelled) and ostracism constitute violations of human rights, as outlined in several articles of the UDHR. These include Article 3, which asserts the right of every individual to life, liberty, and personal security. Article 5 establishes a prohibition against torture, cruel, inhuman, or degrading treatment. Article 9 affirms that no one shall be subjected to arbitrary arrest, detention, or exile. Article 12 guarantees the right of individuals to privacy, family, home, and correspondence, and prohibits violations of honor and reputation. Article 16(3) recognizes the family as the natural and fundamental unit of society, granting protection to the family from society and the state. Article 19 affirms the right of every individual to hold and express opinions without interference, and to seek, receive, and impart information or ideas through any media and regardless of frontiers.

The perspective of the UDHR clearly places humans as the measure and center of human rights, such that freedom is measured by individual will without regard to boundaries, and justice is measured against the individual's own standards, with the value of human rights "grounded" in individual happiness.

Western human rights are highly anthropocentric, meaning they revolve around humans, and view human rights as the right to act freely as individuals for their own comfort and happiness as long as it does not harm others.⁴⁶ The concept of human rights as described above originates from the theory of natural rights. Natural rights theory originates from natural law theory, which dates back to ancient times with Stoic philosophy (achieving freedom of will according to natural law). From this perspective, the sanctions applied in Sariak Alahan Tigo would be considered violations of human rights because they restrict freedom of action, choice, assembly, and association.

However, in the context of Eastern human rights, the belief remains that sharia is sacred, universal, and must still be the foundation of life.⁴⁷ The fundamental principle of Eastern human rights thought are deeply rooted in a teocentric worldview, placing sharia above all else and using divine texts (*nash*) as the basis for thought and action. Allah states in Surah An-Nisa, verse 59:

يَا أَيُّهَا الَّذِينَ آمَنُوا أَطِيعُوا اللَّهَ وَأَطِيعُوا الرَّسُولَ وَأُولِي الْأَمْرِ مِنْكُمْ فَإِن تَنَازَعْتُمْ فِي شَيْءٍ فَرُدُّوهُ إِلَى اللَّهِ وَالرَّسُولِ إِن كُنتُمْ تُؤْمِنُونَ بِاللَّهِ وَالْيَوْمِ الْآخِرِ ذَلِكَ خَيْرٌ وَأَحْسَنُ تَأْوِيلًا

"O believers! Obey Allah and obey the Messenger and those in authority among you. Should you disagree on anything, then refer it to Allah and His Messenger, if you 'truly' believe in Allah and the Last Day. This is the best and fairest resolution."

Maududi argues that the charters, declarations, and resolutions of the UN cannot be compared to the rights granted and guaranteed by Allah SWT. This is because these UN documents are not applicable to all humanity. On the other hand, human rights in Islam are integral to its teachings.⁴⁸ According to A.K. Brohi, the Islamic approach to human rights contrasts with the Western approach. Islam places the respect for human rights and basic freedoms at the core

⁴⁵ Fardhan Wijaya Kosasi, "Deklarasi Universal Human Right Dan Pemenuhan Hak Asasi Bagi Narapidana," h.799.

⁴⁶ Hedly Bull, *Human Right and World Politic, Moral Claims in World Affairs*, Croom Helm. London, n.d h.79.

⁴⁷ Supriyanto Abdi, "Mengurai Kompleksitas Hubungan Islam, HAM Dan Barat," *UNISIA* No.44 (2002): h.75.

⁴⁸ Robby Habiba Abror, "Paradoks Universalitas HAM Barat Di Muka Cermin Islam Perspektif Filsafat Hukum Dan HAM," *IJTIHAD, Jurnal Wacana Hukum Islam dan Kemanusiaan* 12 No.2 (2012): h.277. Lihat juga Abul A'la Maududi, *Hak Asasi Manusia Dalam Islam* Terj. Achmad Nashir Budiman (Bandung: Pustaka, 1985), h.18.

of religious consciousness ingrained in the hearts, minds, and souls of its followers.⁴⁹ Regarding the issue of sanctions mentioned above, if viewed from the perspective of Islamic human rights, they do not violate human rights because the basis of human rights is centered on the five fundamental principles outlined in *al-dharuriyat al-khamsah*, and the freedom granted to humans is limited by sharia provisions and other higher interests.

In Indonesia's human rights regulation, the tradition of *sapayuang* marriage does not face prohibition from religion and the state but is prohibited by customary law. Juridically, it can be said to contravene Article 28B (1) of the 1945 Constitution of the Republic of Indonesia, which asserts the right to form a family and continue descendants through lawful marriage. Furthermore, Law No. 39 of 1999 on Human Rights Article 10 establishes the individual's right to form a family and continue descendants. The free will of the prospective husband and wife serves as the basis for a valid marriage. This means that every individual has the right to marry anyone according to their wishes with the aim of forming a family and continuing descendants. The tradition in Nagari Sariak Alahan Tigo seems to impede the free will to choose a partner.

Reviewed within Indonesian legislation, a valid marriage, as stipulated in Article 2 of Law No. 1 of 1974 concerning Marriage, is one conducted according to the laws of each religion and belief. The general explanation of the law states that for indigenous Indonesians who are Muslims, religious law disciplined within customary law applies, and customary law applies. Thus, there is legal validity to the tradition of prohibiting *sapayuang* marriage in Nagari Sariak Alahan Tigo, and it does not fall within the framework of violating human rights instruments.

Article 8 paragraph (f) of Law No. 1 of 1974 stipulates that one of the prohibitions of marriage is those who are prohibited from marrying by their religion or other applicable regulations. This provision also serves as the basis for justifying the tradition of prohibiting *sapayuang* marriage due to the existence of customary law regulations that prohibit this type of marriage.

Referring to the historical legal doctrine of von Savigny, Article 18B of the 1945 Constitution of the Republic of Indonesia is a form of recognition and respect by the state for special administrative units regulated by law. The state acknowledges and respects the units of customary law communities and their traditional rights as long as they are still alive and in line with the development of society and the principles of the Unitary State of the Republic of Indonesia, as regulated by law.⁵⁰ The logical consequence of recognizing the rights of customary law communities is the legitimacy to enforce the rules or provisions applicable in customary law communities.

The issue of sanctions imposed by customary law for violators of customary rules constitutes a violation of customary delicts. These sanctions are protected by Law No. 39 of 1999 concerning Human Rights Article 6, which states: "In the interests of upholding human rights, the differences and needs of indigenous peoples must be taken into consideration and protected by the law, the public and the Government."

Indeed, there may be some domino effects of customary law violations sanctions. On the other hand, the state must defend and protect human rights from expulsion, discriminatory treatment, and others. However, the state also highly protects living law within society. The solution that the state must take is to formulate limitations on the freedom of customary law in imposing sanctions on violators of customary law to ensure orderliness in living, both as a state society and a customary society.

Conclusion

⁴⁹ Nur Asiah, "Hak Asasi Manusia Dalam Perspektif Islam," *Jurnal Syari'ah dan Hukum Diktum* 15 No.1 (2017): h.58.

⁵⁰ Hasanudin Raharusun, "Eksistensi Hukum Adat Dalam Masyarakat Adat" (2022): diakses 5 Januari 2022, <https://law.uad.ac.id/eksistensi-hukum-adat-dalam-masyarakat-adat/>. diakses 5 Januari 2022

The sanction for *sapayuang* marriage in Nagari Sariak Alahan Tigo, when viewed in terms of *mashlahah*, falls under *mashlahah mursalah*. This is because there is no explicit *nash* rejecting it. On the other hand, there is no supportive *nash* either, so it cannot be classified as *mashlahah mulghabah*. The sanction of *sapayuang* marriage, in terms of its substantive strength, falls under *mashlahah dharuriyah* because it preserves one's honor and dignity as a fundamental benefit. Viewed in terms of whether the *mashlahah* changes or not, the prohibition of *sapayuang* marriage falls under *mashlahah mutaqqaiyyirah*, which is a contingent benefit that can change according to time and place, in line with the traditional saying *syarak babua mati, adat babua sentak, sakali aia gadang lalu, sakali tapian barubah*. This punishment is classified as *mashlahah khashah* because it will maintain a much larger order, namely the ecosystem of the nagari and the tribe. Nagari will be far from expulsion, discrimination, humiliation, and all things that cause division within the nagari.

In the examination of the object of *'urf*, the prohibition and sanction of *sapayuang* marriage fall under *'urf amali*, which is the customary practice of society related to actions. This prohibition is included in *'urf khashah*, which is a specific practice in certain communities and regions. In terms of the validity of *'urf* related to the *sapayuang* marriage sanction, it is considered *'urf shabih* because it is a prevailing practice in the community and does not contradict the *nash*, does not eliminate benefits, and does not cause harm. Its implementation is aimed at ensuring order in community life.

From the perspective of Western human rights, the sanction of *dibuang dari nagari* (expelled) and isolation from the village constitutes a violation of human rights. This violation is enshrined in the Universal Declaration of Human Rights in Articles 3, 5, 9, 12, 16, and 19 because the human rights perspective is viewed from an individual standpoint (anthropocentric). In contrast, the concept of Eastern human rights emphasizes human rights as part of the implementation of Islamic teachings. Therefore, in Eastern human rights perspective, *sapayuang* marriage does not violate human rights because the Eastern human rights study measures the concepts of *mashlahah* and *mudharat* in actions and incorporates traditions into the context of human rights. The axis of Islamic human rights is teocentric. Consistent with this, human rights in Indonesia are described in Law Number 39 of 1999 concerning Human Rights, and traditional customs and sanctions are protected by law, society, and the government. This is also explained in Article 18B of the 1945 Constitution, stating that the State recognizes and respects special administrative units regulated by law. Therefore, the tradition in Nagari Sariak Alahan Tigo cannot be considered a violation of human rights.

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