

## STUDY OF QAWA'ID ANALYSIS OF FIQHIYAH CONCEPTS: DOMINATION OF THE WIFE'S ROLE IN THE FAMILY AS A FORM OF CONTEMPORARY FAMILY LAW

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### ABSTRAK

Pasal 31 Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan menyatakan “suami adalah kepala keluarga dan istri adalah ibu rumah tangga”. Namun, akhir-akhir ini telah menjadi topik diskusi terkait dengan isu pembaharuan hukum perkawinan. Penelitian ini bertujuan untuk menganalisis kaidah fikih yang berkaitan dengan dominasi peran istri dalam keluarga sebagai bentuk hukum keluarga kontemporer. Penelitian ini menggunakan metode penelitian hukum empiris, Penelitian Hukum Empiris adalah metode yang menggunakan fakta-fakta empiris dari perilaku manusia, dapat berupa perilaku verbal yang dapat diamati secara langsung, penelitian empiris dapat digunakan untuk mengamati hasil-hasil perilaku manusia yang berupa peninggalan-peninggalan fisik dan arsip (Mukti dan Yuliato: 2010). Penelitian hukum empiris memperoleh data dari sumber data primer, seperti hasil penelitian lapangan, dan menganalisa bagaimana bekerjanya hukum di dalam masyarakat. Hasil penelitian ini menunjukkan bahwa mayoritas perempuan yang dominan dalam menjalankan peran dalam rumah tangga dipengaruhi oleh beberapa faktor, salah satunya adalah pendidikan dan lingkungan sekitar. Artinya, kita tidak boleh memahami konteks bahwa “suami adalah kepala keluarga dan istri adalah ibu rumah tangga” tanpa memahami pasal-pasal sebelum dan sesudahnya secara utuh. Pasal 31 ayat (1) UU Perkawinan menjelaskan bahwa hak dan kedudukan istri adalah seimbang dengan hak dan kedudukan suami dalam kehidupan rumah tangga dan pergaulan hidup bersama dalam masyarakat. Sebelum lahirnya UU Perkawinan, berdasarkan Pasal 108 KUH Perdata (Burgerlijk Wetboek), seorang istri tidak dapat melakukan perbuatan hukum (menghibahkan, menggadaikan, memindahtangankan, memperoleh sesuatu) tanpa bantuan suami dengan suatu akta atau izin tertulis.

**Kata Kunci:** Qawaidh Fiqih, Urf, Keluarga, Kontemporer

### ABSTRACT

*Article 31 of Law number 1 of 1974 concerning marriage states "the husband is the head of the family and the wife is the housewife". However, lately it has become a topic of discussion associated with the issue of renewing the marriage law. This study aims to analyze the fiqh rules relating to the dominance of the wife's role in the family as a form of contemporary family law. This research uses empirical legal research methods, Empirical Legal Research is a method that uses empirical facts of human behavior; can be in the form of verbal behavior that can be observed directly, empirical research can be used to observe the results of human behavior in the form of physical relics and archives (Mukti and Yuliato: 2010). Empirical legal research obtains data from primary data sources, such as the results of field*

*research, and analyzes how the law works in society. The results of this study indicate that the majority of women who are dominant in carrying out roles in the household are influenced by several factors, one of which is education and the surrounding environment. This means that we should not understand the context that `the husband is the head of the family and the wife is the housewife` without understanding the articles before and after as a whole. Article 31 (1) of the Marriage Law explains that the rights and position of the wife are equal to the rights and position of the husband in household life and social life together in society. Before the birth of the Marriage Law, based on Article 108 of the Civil Code (Burgerlijk Wetboek), a wife could not perform legal acts (granting, mortgaging, transferring, obtaining anything) without the help of her husband in a deed or written permission.*

**Keywords:** *fiqh rules, 'urf, family, contemporary*

## **INTRODUCTION**

In the context of contemporary family law, the role of wives in the family is an important subject that requires in-depth understanding from a fiqhiyyah perspective. In this journal, an analysis of fiqhiyyah concepts that regulate the dominance of the wife's role in the family as a form of contemporary family law will be conducted. The importance of understanding the qawa'id fiqhiyyah underlying the wife's role in the family is to maintain balance and justice in family relationships. Concepts such as rights and obligations, responsibilities, and fair treatment of wives are the main focus of this research. Through an in-depth analysis of the qawa'id fiqhiyyah relating to the role of wives in the family, it is hoped that it can provide a comprehensive understanding of how contemporary family law regulates and views the dominance of the role of wives in a broader context. Thus, this journal aims to contribute to the understanding of contemporary family law through the perspective of qawa'id fiqhiyyah relating to the dominance of the wife's role in the family. This research is expected to provide deep insights and be relevant in the context of the development of modern society today.

## **DISCUSSION**

### **1.1 What is the concept of family head according to Islam and the Marriage Law**

#### **Male leadership in the Qur'an**

In essence, the husband is the head of the family according to Islam and the law, and the wife is the mother of the household. According to Islamic law, marriage is a sacred, majestic, and firm bond between a man and a woman who are determined to live together as husband and wife. The discussion of the husband being the head of the family according to

Islam is found in Q.S. An-Nisa verse 34 which means it reads "The men are leaders of the women, because Allah has preferred some of them over some of the men or some of the others, and because they (men) have spent some of their property." The husband is the head of the family according to Islam.

This verse is an important reference from an Islamic perspective on husband-wife relationships. According to many scholars of tafsir, it talks about the role of the husband as the leader of the family, that the husband is the leader of the wife, but the interpretation of the verse continues to change from time to time.

As according to al-Qurtubi (2010), the verse explains that men are the leaders of women, meaning that those who are obliged to provide for and protect women. The task of leadership falls on the shoulders of men, such as the task of adjudicating as a judge, the task of going to war, which is only given to men, not to women.

Indonesian commentators also give the same meaning as classical commentators in interpreting the meaning of QS. an-Nisa' 34. According to Hasbi Ash-Shiddieqy (1995: 815) the verse shows the husband as the leader of the wife in the household. Meanwhile, according to Hamka (1987:46-47) the verse *الرِّجَالُ قَوَّامُونَ عَلَى النِّسَاءِ* implies the leadership of men over women, not equal or vice versa. Quraish Shihab (2016:425) also interprets the verse with male leadership over women.

The husband's leadership in the family and the demand for total obedience from the wife are also legitimized by several Hadith reports. The narration that explains the obligation to respect and honor the husband, as the Hadith from Abu Hurairah, the Prophet said, "If I could order someone to bow down to humans, I would order the wife to bow down to her husband" (HR. Tirmidzi). There is also a narration that explains about the husband's pleasure being the key to opening the door to heaven for the wife, that the Prophet Muhammad PBUH said: "A wife who dies, while her husband is pleased with her, then she will enter heaven" (HR. Ibn Majah). Wives who are reluctant to serve their husbands will receive the wrath of angels, as the Hadith of Abu Hurairah narrates that the Prophet said, "When a husband invites his wife to have intercourse, then she refuses, so that overnight the husband harbors anger towards his wife, then the wife will be cursed by angels until morning" (HR. Bukhari Muslim).

The various interpretations of the classical tafsir indicate that the husband is responsible for managing the household and must obey him. The leadership mandate is based on the fact that men are favored over women.

Men have physical and mental advantages, so they are entitled to maintenance in the family, while in social life they are entitled to public duties such as defense (in the form of

war), executing the law (in the form of judges), and community leaders. Husein Muhammad (2001:177) says that most classical mufassirs, such as al Thabari, al-Razi, Ibn Kathir to Muhammad Ali al-Shabuni and others, the views they put forward are all the same, namely the superiority of men over women.

The classical interpretation of QS. an-Nisa' 34 began to receive criticism, especially after Islamic thought intersected with Western thought. In addition, with the wider area of the spread of Islam, it is found that the classical interpretation is not in accordance with the growing social construction so that reinterpretation is needed in accordance with the current context. Classical interpretation as a result of the optics of a society that is thick with patriarchal culture is certainly not suitable for people who have a different socioculture. This then led to an attempt to reinterpret QS. al-Nisa' verse 34 so as not to lose context. The reinterpretation effort departs from the belief that Islam with its spirit of justice recognizes the differences between men and women (distinction), but these differences are not intended for discrimination, but rather to support the creation of harmonious and complementary relationships. Unraveling this problem, contemporary thinkers try to reinterpret, in order to present a more equitable interpretation and in accordance with the developing sociocultural context.

Nasaruddin Umar, based on Muhammad Abduh's opinion, does not absolutize male leadership over women because QS. al-Nisa' '34 does not state the superiority of men over women. In the verse, Allah does not state, for example, *bima fadhollallahu 'alaihinna* or "*bi tafdhilihim 'alaihinna*" which means because Allah gives men an advantage over women. Instead the language used is "*bima fadhalallahu ba'dhahum 'ala ba'dh*" which means because Allah gave some of them an advantage over others. If it is related to the wording that follows, namely *wa bima an faqu min amwalihim*, men who are *qawwam* for women are men (husbands) who spend their wealth on their wives.

The meaning of the word *al-rijal* in QS. an-Nisa' verse 34 is rightly interpreted as a word related to gender functions and relations. With this understanding, the meaning of the verse is more dynamic and flexible in following socio-cultural developments. This could be someone who is biologically classified as a woman, but in terms of gender, they may act like a man.

#### **b. The concept of head of household in marriage law**

The text of the norm of Article 31 (3) of the Marriage Law must not be understood partially, but must be understood as a whole. This means that we cannot understand that there is a context of assuming "the husband is the head of the family, the wife is the housewife" without clearly understanding the previous and subsequent articles. Article 31 of the Marriage

Law is part of Chapter VI on the Rights and Obligations of Husband and Wife which consists of Articles 30 to 34. By understanding comprehensively, it will give birth to a complete understanding of the intentions intended by the Marriage Law in regulating the rights and obligations of husband and wife.

Both the concept of positive law, religion and our socio-culture that places the husband as the head of the family, contains balanced justice. This means that the position is given to the husband, accompanied by duties and obligations that must be carried out and must even be able to be accounted for by the husband when the other party (wife) is harmed. However, the husband's position as head of the family does not *mutatis mutandis* make the wife subordinate to the husband. The husband as head of the family and the wife as a housewife are the distribution of functions in the household, not pointing to the structure of husband-wife relations.

Article 30 of the Marriage Law as an article that begins the rights and obligations of husband and wife, that husband and wife bear a noble obligation to uphold the household which is the basic structure of society. Any obligation placed on husband and wife is essentially the performance of a noble duty. If a marriage is understood as an act of worship, then the worship that lasts the longest is the worship of upholding the marriage bond. Therefore, if the intention is sincere, then the fulfillment of the obligation is worth worship before Allah SWT. Thus, both of them are placed in a noble position because they carry out noble obligations.

Article 31 (1) of the Marriage Law explains that the rights and position of the wife are equal to the rights and position of the husband in domestic life and in the community. The article emphasizes the principle of equality in rights and position between husband and wife. This article erodes the assumption that there is a difference in position that the wife is inferior to the husband. In other words, the superior husband has greater rights and position, while the inferior wife becomes the object of regulation, hence her rights and position are limited.

The balance of rights and positions does not only occur within the scope of the household, but also in relationships in society. As a consequence of the equal rights and position of husband and wife, Article 31 (2) of the Marriage Law states that each of the husband and wife has the right to take legal actions. Article 32 (1) is a very encouraging development regarding the equality of husband and wife in law.

Before the birth of the Marriage Law, based on Article 108 of the Civil Code (*Burgerlijk Wetboek*), a wife cannot perform legal acts (grant, mortgage, transfer, acquire anything) without the assistance of her husband in a deed or written permission. Article 110 BW explains that a wife cannot appear in court without the assistance of her husband.

These two articles are sufficient to establish that a woman, even if she is an adult, is incapable of acting legally without the presence of her husband. Based on Supreme Court Circular Letter No. 3/1963 on the Idea of Considering the *Burgerlijk Wetboek* Not as a Law, Articles 108 and 110 BW are not applicable. The husband is the head of the family and the wife is the housewife, not intended as a structural division that places the wife inferior to the husband, but rather in the nature of the division of noble household duties. There is no need for excessive concern that the husband's position as head of the family will open up opportunities for male arbitrariness over women.

The implementation of the functions of head of the family and housewife is carried out with mutual respect and assistance to each other. Therefore, husband and wife are obliged to love each other, respect, honor, be faithful and provide physical and mental assistance to one another."

The role as head of the family for the husband and housewife for the wife, balanced with the inherent duty that the husband is obliged to protect the wife and provide all the needs of household life according to his ability.

The Compilation of Islamic Law (KHI) details the husband's duties as head of the family, namely:

- 1) The husband is the supervisor of his wife and household, but important household matters are decided by the husband and wife together.
- 2) The husband is obliged to protect his wife and provide all the necessities of household life according to his ability.
- 3) The husband is obliged to provide religious education to his wife and opportunities to study sciences that are useful and beneficial for religion, homeland and nation.
- 4) The husband bears according to his ability, namely;
  - a. maintenance, *kiswah*, and residence for the wife;
  - b. household expenses, maintenance and medical expenses for wife and children;  
and
  - c. education expenses for the child.

The family as an element that forms society, the Marriage Law mandates that husband and wife must have a fixed place of residence, which is determined jointly by husband and wife. However, the responsibility to provide a place of residence is the duty of the husband (head of the family). The place of residence that must be sought by the husband is one that can protect the wife and children from interference from other parties, so that they feel safe and secure. The residence also has a function as a place to store property, a place to organize and

organize household tools. The husband is also obliged to equip the residence with household fittings and other supporting facilities according to his ability.

The family is the smallest element that makes up society and the nation, so we all even the state has an interest in realizing a good family order, which can support the progress of the nation and state in the future. To realize this, the Family Resilience Bill was discussed, but until now it has not been passed into law.

The Family Resilience Bill formulates the husband's duties as follows:

- a. As the head of the family, responsible for maintaining the integrity and welfare of the family, providing the necessities of family life in accordance with his/her ability, and responsible for the legality of the family population.
- b. The husband is obliged to protect the family from discrimination, cruelty, crime, abuse, exploitation, sexual perversion and neglect.
- c. Husbands protect themselves and their families from gambling, pornography, promiscuity and free sex, as well as the abuse of narcotics, alcohol, psychotropic substances and other addictive substances.
- d. Conducting deliberations with all family members in dealing with family problems.

The position of the husband as head of the family by the Marriage Law has implications for the husband's obligations towards his wife and family. This position is expected to be balanced with the obligations that must be fulfilled. Even in the right of inheritance of men over women, among the reasons is that men (husbands) bear the burden of the obligation to provide for their wives and families and other relatives that the law and social ethics of society are obliged to fulfill.

This understanding is in line with the opinion of Quraish Shihab (2013: 137) when explaining the meaning of the husband as leader over his wife in QS. an-Nisa' verse 34, that the advantages that exist in men are the existence of physical and psychological traits that are more supportive of successful household leadership than wives. The advantages that exist in women are more supportive of the duties and functions of educating and raising children.

## **1.2 The Concept of 'Urf Leading to the Domination of the Wife's Role in the Family as a Form of Contemporary Family Law**

### ***Definition of 'Urf***

The word urf comes from the word arafa, ya'rifu (عرف يعرف) Often daran with al-ma'ruf with the meaning: "something that is known". When it says فلان أولى فلان عرفا (*So-and-so is more than others in terms of his urf*), it means that so-and-so is better known than others. This

meaning of "known" is closer to the meaning of "recognized by The word 'urf is also found in the Qur'an with the meaning of "*ma'ruf*" (معروف) which means virtue (doing good), as in Surah al-A'raf (7): 199:

خُذِ الْعَفْوَ وَأْمُرْ بِالْعُرْفِ

*Forgive him and enjoin him to do what is right.*

Some Arabic scholars have equated the words 'adat' and 'urf; they are mutaradif (synonyms). If the two words are used together in a sentence, such as: "The law is based on 'adat and 'urf, it does not mean that the words 'adat and 'urf are different in meaning even though the conjunction "and" is used as a word that distinguishes between two words.

The word 'urf is defined not in terms of the number of times an action is repeatedly performed, but in terms of the fact that the action is well known and recognized by many people. These two different perspectives (from the point of view of repeatedly, and from the point of view of being known) led to the creation of the two names. In this case, there is actually no principled difference because the two words have the same meaning, namely: an act that has been repeatedly performed becomes known and recognized by many people; conversely, because the act is known and recognized by many people, it is performed repeatedly. Thus, although the two words can be distinguished, the difference is not meaningful.

### **Women as head of the family**

The distribution of the husband's role as head of the family and the wife's role as a housewife has been running and is in line with socio-cultural ethics, religious norms and laws that live in the community. This picture occurs in households that run normally, where there is a husband, wife and children, who live in harmony in a harmonious household frame.

This means that the concept outlined by Article 31 (3) of the Marriage Law is implemented in family life normally, the husband carries out the function as head of the family with the consequences of fulfilling household needs that are outwardly such as food, clothing and shelter, as well as inwardly such as providing security and education to the family. The wife as a housewife carries out the function and is responsible for the domestic area, organizing household affairs, and taking care of educating children.

The question is, what about families where, for some reason, the husband does not fulfill his function as head of the family. There are many reasons why a family does not run like a normal family, where the husband carries out the duties of the head of the family and the wife carries out the duties of a housewife. Some reasons that occur so that the wife must carry out the function as head of the family: (1) The husband dies so that the wife takes over the husband's duties; (2) The husband just leaves the wife without any news for a long time, (3)



The husband has an accident or illness which results in not being able to carry out his duties as a husband, (4) The victim of a divorce while the children join the wife without a sense of responsibility from the former husband: (5) The husband is lazy, does not want to work, so to meet the needs of the wife takes over meeting the needs of the family: (6) Unhealthy polygamous husbands who neglect their wives and families.

According to a research report conducted by the Smeru organization in collaboration with the Empowerment of Women Headed Households (Pekka) (2014:13), the percentage of women-headed families is far greater than the official government data on women-headed households. Out of 88,731 families, 15,268 or 17.32% stated that their families were headed by women. This figure is higher than the percentage of female-headed households issued by BPS in 2011, which was 14.3%.<sup>42</sup> The percentage is still possible to increase because there are as many as 5.76% of families that state that the head of the family is male, but actually (defacto) headed by a woman. It is estimated that the number of female-headed households continues to increase by an average of 0.1% per year. family law in the future that requires a legal solution.

Factors affecting women's dominance in family roles.

- 1) Changes in social attitudes: Modern societies are witnessing a gradual transition towards gender equality and women's empowerment. This shift in thinking is leading to a reassessment of traditional gender roles in the family, allowing women to be more active in decision-making processes and overall family dynamics.
- 2) Economic Trends: Women's influence in the family unit naturally increases as more women enter the workforce and contribute significantly to household income. For women, economic independence often means greater autonomy and decision-making rights in various aspects of family life.
- 3) Educational Opportunities: Increased access to education for women plays an important role in improving their skills and broadening their horizons beyond traditional domestic work. Education enables women to pursue careers, make informed decisions, and play an active role in shaping the future of their families.
- 4) Cultural Change: The cultural shift towards more egalitarian values has also impacted the division of roles in modern families. As society embraces diversity and inclusion, we increasingly recognize the importance of shared responsibility and mutual respect between partners, resulting in a more balanced division of roles in the household.
- 5) Manifestations of women's dominance in family roles Decision-making: Women are increasingly involved in important family decision-making processes, from financial

matters to decisions about children's education and health. Women's input has a significant impact on budget direction and priorities.

- 6) Nursing Practice: Traditionally, the role of caregiver has been associated with women. However, the caregiver role has expanded to include a broader definition that includes emotional support, nurturing, and managing general well-being within the context of the family. Women often take the lead in coordinating these aspects of family life.
- 7) Work-Life Balance: Many women today are able to balance their career and family responsibilities by demonstrating the ability to multitask and manage competing priorities effectively. This balancing act highlights their resilience and adaptability in the face of modern challenges.

Although wives *de facto* take on the husband's duties and functions, they do not necessarily declare themselves as the head of the family, because there are barriers to social and religious norms and even positive law. Article 31 (3) of the Marriage Law explicitly states that the husband is the head of the family while the wife is the housewife. The Marriage Law does not provide space for the wife to become the head of the family, so what happens is a contradictory situation of the head of the family in law and everyday reality. The Population Administration Law has responded to this problem by loosening the column for the head of the family, which does not have to be filled in by the husband's name. Based on Law Number 23 of 2006, which was amended by Law Number 24 of 2013 concerning Population Administration, it is possible for the wife to become the head of the family on the Family Card.

The renewal of the Marriage Law needs to consider situations that are outside the general custom so that *de facto* wives who are the head of the family can also be accommodated as the head of the family legally. In addition, the tendency for the pattern of husband and wife relations to become more egalitarian allows husband and wife to dialogue about the distribution of functions. It could be that in a family, the wife has more potential to be the backbone of the family, so it is agreed that the wife carries out the husband's role and vice versa. These are all challenges.

From the above problems, the scholars of *ushul fiqh* have formulated *fiqh* rules relating to 'urf, among others: *أدلة مُحَكَّمَةٌ* Meaning: Custom can become law.

One of the methods of *ijtihad* is 'urf (legal decisions based on local customs/traditions/customs).

This legal decision is based on local customs ('urf) which must not contradict the basic principles of *sharia* law and may only be used in the field of *muaamalah* (other than matters of *mahdhah* / worship).

If the custom can bring benefits that do not cause harm, then at least it is permissible (ibahah). Again, as long as the custom is not related to worship or is included in the religion. It is a part of the worship system, and as long as there is no qath'iy text that prohibits it, it is permissible or not prohibited.

## CONCLUSION

The development of the contemporary family reflects significant transformations in the role of women, emphasizing their growing influence and contribution in the family. Various areas of family life. As societal norms continue to evolve towards greater gender inclusivity and equality, women are poised to play a more important role in shaping the dynamics and functioning of the modern household.

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